

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 21181/19**

**BETWEEN:**

**Igor TULEYA**

**Applicant**

**and**

**Poland**

**Respondent**

**and**

**Amnesty International  
International Commission of Jurists**

**Interveners**

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**WRITTEN SUBMISSIONS ON BEHALF OF THE  
INTERVENERS**

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## Introduction

1. These submissions are made by Amnesty International and the International Commission of Jurists (the 'Interveners') pursuant to the leave to intervene granted by the President of the Section in response to an application dated 23 November 2020 under Rule 44 § 3 of the Rules of Court.<sup>1</sup>
2. The present case is situated within the context of the "reform" of the judiciary in Poland, which involves a set of policy measures and legislative changes adopted by the parliament and implemented by the authorities between late 2015 and 2020. Drawing on the Court's own jurisprudence, EU law, the work of Special Procedures of the UN Human Rights Council and their own research into the situation within the judiciary in Poland, the Interveners focus on three main issues:
  - The scope of application of Article 8 and Article 13 in cases relating to disciplinary proceedings against judges, in light of international standards on disciplinary proceedings and measures and effective domestic remedies; of the Court's Convention jurisprudence; and of general principles on the rule of law and the role and independence of the judiciary.
  - The situation of the independence of the judiciary in Poland as the context in which to assess the application of Articles 8 and 13.
  - The scope of Article 10 as applied to judges, including those engaged in the administration of the judiciary.

### **I. The scope of application of Articles 8 and 13 in cases relating to disciplinary proceedings against judges**

#### **1. *Judicial independence and disciplinary proceedings against judges***

4. Disciplinary proceedings, similar to a variety of other procedures related to the appointment, promotion and dismissal of judges, raise questions related to various rights protected under the Convention, including the right to respect for private life under Article 8 ECHR and to an effective remedy under Article 13 of the Convention.

##### 1.2. Article 8 ECHR

5. Poland has an obligation to ensure that judges, like all individuals, enjoy the right to respect for private life, as protected by Article 8 of the Convention.
6. The obligation to respect the right to private life under Article 8 does not have an exhaustive definition under the Convention and has been further clarified by the jurisprudence of the Court. In particular, the Court has held that the right to respect for a person's private life can include the right to respect for one's honour and reputation.<sup>2</sup> Even if someone is criticized in the context of a public debate, a person's reputation forms part of their personal identity and psychological integrity and therefore also falls within the scope of their "private life".<sup>3</sup> Additionally, an issue under Article 8 may arise in so far as the measure has or may have a serious negative effect on the individual's private life,

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<sup>1</sup> Pursuant to the letter from the Deputy Registrar to Amnesty International dated on 7 December 2020, the interveners were granted an extension for submitting comments in the proceedings with a deadline of 15 January 2021.

<sup>2</sup> *Pfeifer v Austria*, Application no. 12556/03, para.35, Judgment of 15 November 2007; *Chauvy and Others v France*, para. 70

<sup>3</sup> *Pfeifer v Austria*; *Denisov v Ukraine*, ECtHR, Application no. 76639/11, Judgment of 25 September 2018. *Fernandez and Niemietz*

such as a material effect or impact on establishing professional relationships or the individual's social and professional reputation.<sup>4</sup>

7. In *Özpinar v Turkey* the Court established that investigation of the private and professional life of a judge represented an interference with the right to respect for private life.<sup>5</sup> Similarly, in *Erményi v Hungary*, the Court held that Article 8 extends to "activities of a professional or business nature because it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world".<sup>6</sup> Removal from a judicial position is thus covered by Article 8.<sup>7</sup>
8. When applicants claim breaches of their Article 8 rights in cases when they have not yet been dismissed from their professional position or otherwise sanctioned, the Court set the test in *Denisov v Ukraine* for the severity of the potential consequences for an individual's reputation as a comparison of their life before and after the measure in question. This involves an assessment of the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case.<sup>8</sup>
9. Disciplinary proceedings are a legitimate and important element of the judicial system that serve the purpose of guaranteeing the balance of power and accountability. However, due to their importance and far reaching consequences, disciplinary proceedings must be clearly established and provide appropriate procedural safeguards. As with other measures affecting the careers of judges, European and other international standards provide that, in order to secure judicial independence, such proceedings should be conducted by "an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."<sup>9</sup>
10. Lengthy disciplinary proceedings against a judge that are extensively covered by the media may have consequences for the professional reputation of a judge. Whilst such proceedings carry the risk of undermining the judge's credibility and authority, due to the nature of their work, they may further impact the public's trust in the wider judicial profession. As the Court reiterated in *Harabin v Slovakia*, what is at stake in disciplinary proceedings against a judge "is the confidence of the public in the functioning of the judiciary at the highest national level."<sup>10</sup> As the reputation of the country's justice system as a whole is at stake, this should be treated with an even greater concern. Both judicial independence and the reputation of judges have an individual, personal dimension, as well as an institutional aspect.
11. Furthermore, disciplinary proceedings against judges must comply with international fair trial standards and provide an affected judge with the opportunity to challenge any decision and sanction.<sup>11</sup>

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<sup>4</sup> *Denisov v Ukraine*, (Application no. 76639/11), Judgement of 25 September 2018 para. 115

<sup>5</sup> *Özpinar v Turkey*, Application no.20999/04, Judgment of 19 October 2010, para. 48

<sup>6</sup> *Erményi v Hungary*, Application no.22254/14, 22 November 2016, para.30

<sup>7</sup> *Erményi v Hungary*, para.31

<sup>8</sup> *Denisov v Ukraine*, para. 117

<sup>9</sup> E.g. European Charter on the statute for judges (Department of Legal Affairs of the Council of Europe, 8-10 July 1998, DAJ/DOC (98)23), General Principles para. 1.3; Universal Charter of the Judge (International Association of Judges, as revised 2017), Article 7-1; UN Special Rapporteur on the independence of judges and lawyers, *Report to the General Assembly*, UN Doc. A/75/172, 17 July 2020, paras. 23-32, and para. 90.

<sup>10</sup> *Harabin v Slovakia* (Application no. 58688/11) para. 133

<sup>11</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies para 69), and UN Basic Principles on the Independence of the Judiciary (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32

12. In its preliminary ruling in a case relating to the execution of European arrest warrants issued against a Polish citizen residing in Ireland, the Court of Justice of the European Union established that “[t]he requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of it being used as a system of political control of the content of judicial decisions”.<sup>12</sup>

### 1.2. Article 13 ECHR

13. Where there is an arguable case that an individual’s rights have been violated, they have the right to an effective remedy at the national level.<sup>13</sup> The right to an effective remedy will apply even if it is later determined that no violation of the substantive human right occurred. The objective of a remedy is to “enforce the substance of the [international human rights treaty] rights and freedoms in whatever form they might happen to be secured in the domestic legal order”.<sup>14</sup>

14. The right to a remedy must be effective, impartial and independent and be capable of reviewing and overturning the decision.<sup>15</sup> The UN *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.<sup>16</sup> The Principles, which were approved by all members of the UN General Assembly, recall that this obligation arises from the general obligation to respect, ensure respect for and implement international human rights law and international humanitarian law, enshrined in treaty law and customary international law.<sup>17</sup> Judicial bodies should in principle be empowered to provide an effective remedy in all such cases, and in any event any remedy-granting body must fulfil the requirements set out above if it is to qualify as effective - i.e. the power to bring about cessation of the violation and appropriate reparation, including, where relevant, restitution – and of impartiality and independence.<sup>18</sup> The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.<sup>19</sup>

15. This Court has applied Article 13 ECHR in cases of dismissals of judges contested either under Article 6 or 8 ECHR. In *Özpinar v Turkey*, it relied on Article 13 instead of 8 for the resolution of the case,<sup>20</sup> while in *Baka v Hungary*, the Court limited itself to the

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of 29 November 1985 and 40/146 of 13 December 1985, principles 17 and 20).

<sup>12</sup> Judgement of the Court (Grand Chamber) of 25 July 2018, Case C-216/18 PPU, para 67

<sup>13</sup> Article 8 UDHR; Article 2.3 ICCPR; Article 8.2 CPED; Article 13 ECHR; Article 25 ACHR; Article 25 *Protocol to the ACHPR on the Rights of Women in Africa*.

<sup>14</sup> *Al-Nashif v Bulgaria*, ECtHR, *op. cit.*, fn 481, para. 132. See also, *Omkarananada and the Divine Light Zentrum v Switzerland*, ECommHR, *op. cit.*, fn 474, para. 9.

<sup>15</sup> *Alzery v Sweden*, CCPR, *op. cit.*, fn. 364, para. 11.8. In the same case, the Committee did not find a violation of Article 13 ICCPR, therefore demonstrating the more extended guarantees provided to by the principle of *non-refoulement*. See also, *Zhakhongir Maksudov and Others v Kyrgyzstan*, CCPR, *op. cit.*, fn. 324, para. 12.7; *Agiza v Sweden*, CAT, *op. cit.*, fn. 332, para. 13.7; *Shamayev and Others v Georgia and Russia*, ECtHR, *op. cit.*, fn. 434, para. 460; *M.S.S. v Belgium and Greece*, ECtHR, *op. cit.*, fn. 324, para. 293; *C.G. and Others v Bulgaria*, ECtHR, *op. cit.*, fn. 510, para. 56 (Right to a remedy where right to respect for family life under Article 8 ECHR was in issue); *Čonka v Belgium*, ECtHR, *op. cit.*, fn. 570, paras.77-85 (right to a remedy in case of alleged collective expulsion under Article 4 Protocol 4 ECHR). For the Inter-American system, *inter alia*, *Ximenes-Lopes v Brazil*, IACtHR, Series C No. 149, Judgment of 4 July 2006, para. 175. A thorough analysis of the right to a remedy is to be found in, ICJ, *Practitioners’ Guide No. 2*, *op. cit.*, fn. 480.

<sup>16</sup> Articles 2 and 3 of the UN *Basic Principles and Guidelines on the right to a remedy and reparation*.

<sup>17</sup> Article 1 of the UN *Basic Principles and Guidelines on the right to a remedy and reparation*.

<sup>18</sup> See, ICJ, *Practitioners’ Guide No.2*, *op. cit.*, fn. 480, pp. 49-54; CAT, *General Comment No. 4*, *op. cit.*, para. 13.

<sup>19</sup> *Muminov v Russia*, ECtHR, *op. cit.*, fn. 343, para. 100; *Isakov v Russia*, ECtHR, *op. cit.*, fn. 324, para. 136; *Yuldashev v Russia*, ECtHR, *op. cit.*, fn. 324, paras. 110-111; *Garayev v Azerbaijan*, ECtHR, *op. cit.*, fn. 484, paras. 82 and 84.

<sup>20</sup> *Özpinar v Turkey*, Application no.20999/04, Judgment of 19 October 2010, para. 30 and 48.

assessment of Article 6 ECHR on the basis that this was *lex specialis* in relation to Article 13.<sup>21</sup>

### 1.3. Conclusions

**16. The Interveners submit that disciplinary proceedings against a judge affect their professional reputation and that the nature of their role implies that such proceedings affect the individual's private life as understood by Article 8.1 of the Convention. In particular, such proceedings affect professional relationships that the individuals have developed in their career and are likely to cast significant doubt on their professional reputation and standing, impugning their honour, probity and personal and professional merit, both amongst colleagues within the judiciary, and in society at large.**

**17. The Interveners further submit that, if the only avenue to challenge the lawfulness, necessity or proportionality of the dismissal of a judge, or any other significant disciplinary measure against them, under Article 8 ECHR, is through an authority that does not embody the relevant requirements of independence and impartiality under international standards on judicial independence, the basic requirements of Article 13 ECHR are not fulfilled.**

## **II. The situation of the independence of the judiciary in Poland as the context in which to assess the application of Articles 8 and 13**

18. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law, which is a necessary condition for the effective protection of human rights, and the establishment and operation of judicial independence and the rule of law are inherent in Convention obligations.<sup>22</sup> Judicial independence, as affirmed by the jurisprudence of the Court, encompasses both an institutional dimension and a personal dimension relating to the situation and conduct of an individual judge.<sup>23</sup> The former may be characterised as the independence of the judicial branch as a whole from interference by the other branches of government and the public. The latter aspect, of equal importance, refers to the independence of individual judges, including their independence within the judicial system.<sup>24</sup>

19. Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures that have undermined the independence of the judiciary.

20. In its review of the changes in Poland's judiciary in December 2017,<sup>25</sup> the Venice

<sup>21</sup> *Baka v Hungary*, para. 181.

<sup>22</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, and endorsed by General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985; UN Human Rights Council, *Resolution 35/12 on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, UN Doc. A/HRC/35/12, 10 July 2017; UN General Assembly, *Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, UN Doc. A/RES/67/1, 30 November 2012, para. 13; ICJ, *Declaration of Delhi*, 10 January 1959; *Stafford v UK*, ECtHR, Application no. 46295/99, Judgment of 28 May 2002, para. 78, which states that: "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court"; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), UN Docs. E/CNA/Sub2/1988/20/AddI and AddIICorrI, Articles 4 and 74; Bangalore Principles, Value 1.

<sup>23</sup> *Parlov-Tkalcic v Croatia*, ECtHR, Application no. 24810/06, Judgment of 22 December 2009, para. 86; *Agrokompleks v Ukraine*, ECtHR, Application no. 23465/03, Judgment of 6 October 2011, para. 137.

<sup>24</sup> UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, paras. 23 and 39, that states that: "judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges".

<sup>25</sup> The Venice Commission has examined the Act on Ordinary Courts, the Draft Act on the National Council of the Judiciary, and the Draft Act on the Supreme Court, as proposed by the President of the Republic at the time of review. See: Venice Commission, "Opinion", CDL-

Commission concluded that taken together these changes “enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law.”<sup>26</sup>

21. The rules governing the system of disciplinary proceedings in Poland were significantly changed in 2017 and they now assign significant powers to the Minister of Justice – who is also the Prosecutor General. The minister now appoints the Disciplinary Prosecutor for the judges of the common courts,<sup>27</sup> the two deputy prosecutors, and the judges adjudicating in the disciplinary court of first instance as well as the members of the office of the disciplinary representative of the Minister of Justice.<sup>28</sup>

### 2.1. The National Council of the Judiciary (NCJ)

22. The Executive and Legislative authorities have politicised the process of appointments to the National Council of the Judiciary (NCJ) with the amendment of the Law on the NCJ, which came into force in January 2018. The NCJ is currently comprised of 25 members: 15 judges and 10 non-judge-members. The law gave the Parliament the power to appoint the 15 judge-members of the NCJ,<sup>29</sup> despite the fact that the Polish Constitution expressly limits to six the number of members of the NCJ that are appointed by Parliament. On 5 March 2018, the Parliament appointed the new NCJ judge-members, eight of whom were the new presidents or vice-presidents of courts whose members had been appointed since August 2017 by the Minister of Justice.<sup>30</sup> In December 2017, the European Commission of the EU concluded that “[t]he new rules on appointment of judges-members of the National Council of the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards.”<sup>31</sup>

23. The amendment of the Law on the NCJ prematurely terminated the tenure of sitting NCJ members in March 2018. According to the new procedure provided for in the amendment, the mandate of the “old” members expired when the new members were appointed.<sup>32</sup> Such termination raised concerns over the breach of Article 187(3) of the Polish Constitution which affords a full four-year term of office to NCJ members,<sup>33</sup> as underlined in the opinions of the NCJ, of the Supreme Court and of the Ombudsman.<sup>34</sup>

24. As a consequence of the changes, the NCJ has lost its guarantees of structural independence from the legislative branch.

### 2.2. The Disciplinary Chamber of the Supreme Court

25. In December 2017, the Parliament adopted the amendment to the Law on the Supreme Court. The law established the new Disciplinary Chamber whose members were to be elected by the National Council of the Judiciary (NCJ) and whose “lay judges” were to be

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AD(2017)031, 11 December 2017, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)

<sup>26</sup> Venice Commission, “Opinion”, 11 December 2017, para. 129

<sup>27</sup> A new post created within the “reform” of the judiciary in 2018. See: Article 112.3 Law on Common Courts.

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>

<sup>28</sup> Amnesty International, *Poland: Free Courts, Free People, June 2019, EUR 37/0418/2019*

<sup>29</sup> Law on the National Council of Judiciary adopted on 8 December 2017, Article 9a.

<sup>30</sup> Wyborcza, “Krajowa Rada Złobrownictwa”. *Zobacz, kim są nowi sędziowie KRS*, 6 March 2018, available at <http://wyborcza.pl/7,75398,23108831,krakowa-rada-ziobrownictwa-zobacz-kim-sa-nowi-sedziowie.html?disableRedirects=true> (accessed 25 November 2019).

<sup>31</sup> European Commission, *Reasoned Proposal, op. cit.*, para. 142.

<sup>32</sup> Law on the National Council of Judiciary, Article 6.

<sup>33</sup> Opinion of Advocate General Tanchev, *op. cit.*, para. 61.

<sup>34</sup> European Commission, *Reasoned Proposal, op. cit.*, para. 140.

elected by members of the Senate.<sup>35</sup>

26. The Disciplinary Chamber is a court of second instance in disciplinary proceedings against judges. Disciplinary proceedings are initiated by the disciplinary prosecutor upon a motion of the NCJ (among other authorised bodies),<sup>36</sup> and heard by the first instance disciplinary courts and reviewed by the Disciplinary Chamber of the Supreme Court. They can result, among other sanctions, in the removal of a judge from office.<sup>37</sup> The judges interviewed by Amnesty International in 2018 feared that once the new Disciplinary Chamber was elected, a series of disciplinary proceedings would commence against judges who have ruled against the wishes of the government in politically sensitive cases. In February 2019, the President of Poland appointed the heads of the two new chambers of the Supreme Court: Disciplinary and Extraordinary.<sup>38</sup>
27. In April 2018, following his visit to Poland, the UN Special Rapporteur on the independence of judges and lawyers expressed deep concern about these and other changes, and called on the government to, among other things, review the vast *ratione materiae* jurisdiction of the Disciplinary Chamber in line with the recommendations of the European Commission, the Venice Commission and OSCE/ODIHR.<sup>39</sup>
28. On 3 April 2019, the European Commission (EC) launched an infringement procedure by sending a Letter of Formal Notice to Poland regarding the new disciplinary regime for judges.<sup>40</sup> The EC concluded that the disciplinary regime does not offer the necessary guarantees to protect the process from political control, and that the Disciplinary Chamber of the Supreme Court, which reviews decisions taken in disciplinary proceedings against judges, does not meet the requirements of an independent and impartial court. This is due to the fact that the Disciplinary Chamber is composed solely of new judges selected by the National Council for the Judiciary whose judges-members are appointed by the Parliament.<sup>41</sup> The EC reached the opinion that the lack of independence of the disciplinary proceedings undermines the judicial independence of Polish judges.<sup>42</sup>
29. On 19 November 2019, the Court of Justice of the European Union (CJEU) ruled that the new Disciplinary Chamber of the Polish Supreme Court, whose members were selected by the *new* NCJ, can only be competent to rule on cases relating to the retirement of Supreme Court judges if its independence and impartiality are guaranteed. As the decision was issued in response to preliminary questions submitted to the CJEU by Poland's Supreme Court,<sup>43</sup> the assessment of whether the Disciplinary Chamber of the Polish Supreme Court meets the requirements of judicial independence currently rests

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<sup>35</sup> See the text of the law in Polish: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU2018000005/T/D20180005L.pdf>; For details about European Commission's rule of law concerns over the amendment see: European Commission, "Rule of Law: European Commission acts to defend judicial independence in Poland", 20 December 2017, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367)

<sup>36</sup> The other bodies that can request the disciplinary prosecutor to start an investigation of a judge are the Minister of Justice, president of a regional or appeal court, the board of a regional or an appeal court and the Disciplinary Prosecutor for Common Courts.

<sup>37</sup> The Law on Common Court, Art. 109. § 1. <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>

<sup>38</sup> Rzeczpospolita, *Andrzej Duda powołał prezesów nowych izb Sądu Najwyższego*, 27 February 2019, available at [https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gjlfdtLWWjPA\\_RO6yO9qoshPAa15Qz8cGFS06p\\_VPBU](https://www.rp.pl/Sedziowie-i-sady/302269952-Andrzej-Duda-powolal-prezesow-nowych-izb-Sadu-Najwyzszego.html?fbclid=IwAR1jCoP9NUtqscf2gjlfdtLWWjPA_RO6yO9qoshPAa15Qz8cGFS06p_VPBU) (accessed on 25 November 2019).

<sup>39</sup> Special Rapporteur on the independence of judges and lawyers, *Report on his mission to Poland*, UN Doc. A/HRC/38/38/Add.1, 5 April 2018, paras. 72 and 84, <https://undocs.org/A/HRC/38/38/Add.1>.

<sup>40</sup> European Commission, "Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control", 3 April 2019, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1957](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957)

<sup>41</sup> European Commission, "Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control", 3 April 2019. See also: Amnesty International and International Commission of Jurists, "Third-party intervention to the European Court of Human Rights on the case of Waldemar Żurek", 27 October 2020, para. 22 <https://www.amnesty.org/en/documents/eur37/3302/2020/en/>

<sup>42</sup> European Commission, "Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control", 3 April 2019

<sup>43</sup> *A.K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, CJEU, Judgment in Joined Cases C-585/18, C-624/18 and C-625/18, 27 June 2019, paras. 154 and 166.

with the Supreme Court.<sup>44</sup>

30. The CJEU's ruling draws on the earlier advisory opinion of the same court's Advocate General, who stated that:

- the mission of judicial councils is to safeguard the independence of courts and judges, which means that they must be free from any influence from the legislative and executive authorities;
- in order to guarantee the continuity of functions, the mandates of the members of judicial councils should not be replaced at the same time or renewed following parliamentary elections;
- selection, appointment and/or promotion of judges are among the most widely recognised functions of judicial councils, and the procedures must be carried out by judicial councils that are independent of the legislative and executive authorities.<sup>45</sup>

31. On 8 April 2020, the CJEU granted the request of the European Commission (EC) for interim measures to suspend the application of the national law on the powers of the Disciplinary Chamber of the Supreme Court of Poland holding, *inter alia*, that the arguments of the EC concerning the lack of a guarantee as to the independence and impartiality of the Disciplinary Chamber are *prima facie* not unfounded.<sup>46</sup>

32. On 5 May 2020, acting First President of the Supreme Court Kamil Zaradkiewicz issued an order to enforce the decisions of the CJEU of 8 April 2020. The order suspends the referral of new disciplinary cases of judges to the Disciplinary Chamber of the Supreme Court until the CJEU issues a judgment in case C-791/19<sup>47</sup> or until the Constitutional Tribunal issues a judgment in case P 7/20.<sup>48</sup>

33. On 6 May 2020, the President of the Disciplinary Chamber of the Supreme Court decided that the Disciplinary Chamber would continue to operate.<sup>49</sup>

34. In its 2020 Rule of Law Report, Country Chapter on Poland, the EC concluded that the National Council for the Judiciary was composed mainly of politically appointed members.<sup>50</sup>

## 2.2. Conclusions

**35. The Interveners submit that following the reforms relating to the judiciary carried out in Poland between 2015 and 2020, the disciplinary proceedings against judges do not meet the requirements of impartiality and independence necessary to the provision of an effective remedy under article 13 ECHR. This is a consequence of the fact that the body in charge of such proceedings does not enjoy structural independence from the Legislative and Executive powers**

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<sup>44</sup> *Ibid.*, para. 172.2

<sup>45</sup> *A.K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, Opinion of Advocate General Tanchev, 27 June 2019, paras. 125, 127, 128.

<sup>46</sup> *Commission v Poland*, CJEU, Grand Chamber Order of the Court in Case C-791/19 R, 8 April 2020, para. 78. This should in no way prevent this Court from reaching a conclusion on this question in so far as necessary to resolve the present case.

<sup>47</sup> Action brought on 25 October 2019 — European Commission v Republic of Poland, (Case C-791/19); <http://curia.europa.eu/juris/document/document.jsf?text=&docid=221358&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=15764640>

<sup>48</sup> <https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=22772&cid=1>

<sup>49</sup> The President of the Disciplinary Chamber of the Supreme Court, "Statement concerning Regulation No. 55/2020 of the First President of the Supreme Court of 5 May 2020", 6 May 2020. [http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Komunikat%20-%20Zarz%C4%85dzenie%2055\\_2020%20-%20EN.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Komunikat%20-%20Zarz%C4%85dzenie%2055_2020%20-%20EN.pdf)

<sup>50</sup> European Commission, 2020 Rule of Law Report, Country Chapter: Poland, 30 September 2020, p. 4 [https://ec.europa.eu/info/sites/info/files/pl\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/info/files/pl_rol_country_chapter.pdf)

**because its appointing authority, the NJC, is not structurally independent in light of international standards on judicial independence.**

### **III. The scope of Article 10 as applied to judges, including those engaged in the administration of the judiciary**

#### 3.1. Freedom of expression of judges and the public interest

36. Poland has an obligation to ensure that judges, like all individuals are allowed to exercise their right to freedom of expression.<sup>51</sup> This right is recognised in international standards on the judiciary including the UN Basic Principles,<sup>52</sup> the Bangalore Principles,<sup>53</sup> the Singhvi Declaration,<sup>54</sup> the Burgh House Principles,<sup>55</sup> and the Code of Judicial Ethics for the International Criminal Court.<sup>56</sup>
37. This Court has held that the protection of freedom of expression under article 10 ECHR extends to judges,<sup>57</sup> including judges at senior levels. In *Baka v Hungary*, the Grand Chamber has ruled that “it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question [and the Court] has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties” .<sup>58</sup> However, at the same time, the Court has stressed that, “having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant’s calls for close scrutiny on the part of the Court”.<sup>59</sup>
38. With regard to the freedom of expression of judges on issues pertaining to the justice system, the Court has held that these questions “fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 .... Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter.”<sup>60</sup>

#### 3.2. Judges have a right and a duty to speak out in defence of the rule of law

39. Any assessment of the necessity and proportionality of restrictions on the right to freedom of expression of judges must be seen in light of the role of the judiciary under the principle

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<sup>51</sup> ECHR, article 10; ICCPR, article 19. See also, Human Rights Committee, General Comment no. 34, paras. 34-36 and 38.

<sup>52</sup> UN Basic Principles, principle 8, reads that “...members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”

<sup>53</sup> Bangalore Principles, value 4.6.

<sup>54</sup> Singhvi Declaration, principle 8.

<sup>55</sup> Burgh House Principles, principle 7.1.

<sup>56</sup> Code of Judicial Ethics of the International Criminal Court, ICC-BD/02-01-05, Article 9. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/41/48, 29 April 2019, and ICJ, *Judges’ and Prosecutors’ Freedom of Expression, Association and Peaceful Assembly*, February 2019, available at <https://www.icj.org/wp-content/uploads/2019/02/Universal-SRIJL-Judges-Advocacy-non-legal-submission-2019-ENG.pdf> .

<sup>57</sup> *Kudeshkina v Russia*, Application no. 29492, Judgement of 2 February, para. 85; *Albayak v Turkey*, Application no. 38406/97, Judgment of 31 January, paras. 39-42.

<sup>58</sup> *Baka v Hungary*, para. 164. See also, *Guz v Poland* (no. 965/12; *Vogt v Germany* [GC], Application no. 17851/91, Judgment of 26 September 1995, para. 53; *Poyraz v Turkey*, Application no. 15966/06, Judgment of 7 December 2010, para. 56; *Kudeshkina v Russia*, Application no. 29492/05, Judgment of 26 February 2009, para. 85; *Albayak v Turkey*, Application no. 38406/97, Judgment of 31 January 2008, paras. 39-42; *Harabin v Slovakia*, Application no. 58688/11, Judgment of 20 November 2012, para. 149; *Wille v Liechtenstein* [GC], Application no. 28396/95, Judgment of 28 October 1999, para. 42. See also, UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc. A/HRC/41/48, 29 April 2019, para. 86

<sup>59</sup> *Baka v Hungary*, para. 165.

<sup>60</sup> *Ibid.*

of separation of powers, and the judiciary's "mission to guarantee the very existence of the Rule of Law".<sup>61</sup> International standards recognize that each judge is "responsible for promoting and protecting judicial independence."<sup>62</sup>

40. As the Court has acknowledged, in certain contexts, judges may therefore have a responsibility as well as a right to exercise their freedom of association and expression. This arises in particular when the public debate concerns matters affecting the judiciary, such as issues related directly to the operation of the courts, the independence of the judiciary including salaries and benefits, fundamental aspects of the administration of justice or matters relating to the personal integrity of a judge.<sup>63</sup>
41. In *Baka v. Hungary*, the Grand Chamber added that in assessing the proportionality of an interference with freedom of expression of a judge, it "must take account of the circumstances and overall background against which the statements in question were made..., attaching particular importance to the office held by the applicant, his statements and the context in which they were made."<sup>64</sup>
42. As the maintenance of the impartiality and independence of the judiciary may on occasion demand a judge's exercise of their right to freedom of expression or association, the possibility to effectively exercise this right in the light of a correlating duty must be guaranteed. As this Court has recognised several times, if judges fear they will face sanctions for speaking in defence of judicial impartiality and independence, the threat of sanction would inevitably have a "chilling effect" that would stand in direct contradiction to the duties and responsibilities of judges to uphold the independence of the judiciary.<sup>65</sup> The UN Special Rapporteur on the independence of judges and lawyers has affirmed in his 2019 report to the UN Human Rights Council that "[i]n situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy."<sup>66</sup> In any assessment of whether an interference with a judge's freedom of expression is necessary in a democratic society and proportionate to a legitimate aim, therefore, the responsibility of the judge to uphold and defend judicial independence should be a significant consideration.

### 3.3. Conclusions

- 43. The interveners submit that the possible scope for limitations to the right of freedom of expression must, when applied to judges, be interpreted in light of the specific role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law. Any restriction on the right to freedom of expression must not impair the right and the duty of the judge to protect and enforce without fear or favour and resist any encroachment on their independence as judges. Provided that the dignity of judicial office is upheld and the essence and appearance of independence and impartiality of the judiciary are not undermined, the executive authorities must respect and protect the right and duty of judges to express themselves, particularly in matters concerning the administration of justice and the respect**

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<sup>61</sup> Magna Carta of Judges, para. 1.

<sup>62</sup> Magna Carta of Judges, para. 3. Universal Charter of the Judge, article 1.

<sup>63</sup> *Baka*, para. 165

<sup>64</sup> *Baka*, 167, 171.

<sup>65</sup> *Baka*, 167, 173; *Wille* para. 50 and *Kudeshkina* paras. 98-100.

<sup>66</sup> UN Special Rapporteur on the independence of judges and lawyers, *Annual Report to the UN Human Rights Council*, UN Doc.

A/HRC/41/48, 29 April 2019, para. 102.

**and protection of judicial independence and of the rule of law.**