

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 43572/18

BETWEEN:

Jan Grzęda

Applicant

and

Poland

Respondent

and

**Amnesty International
International Commission of Jurists**

Interveners

**WRITTEN SUBMISSIONS ON BEHALF OF THE
INTERVENERS**

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 27 September 2019 under Rule 44 § 3 of the Rules of Court.
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 2016 and 2018. Drawing on the Court's own jurisprudence, EU law, the work of UN Special Procedures 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 6.1 of the European Convention of Human Rights (the 'Convention') in cases relating to the role of self-governance mechanisms (such as the National Council of the Judiciary ('NCJ')) and their members in an independent judiciary;
 - the role of the NCJ to safeguard the independence of the judiciary in Poland;
 - the situation of the independence of the judiciary in Poland as the context in which to assess the application of Article 6.1.
3. It will be argued that in many European jurisdictions (and elsewhere), judicial councils play an important role in the self-governance, independence and impartiality of the judiciary. Respecting and upholding the independence of the judiciary requires, *inter alia*, that members of judicial councils should, in the discharge of these functions and during their term, enjoy independence from the executive and the legislative powers, as well as from outside pressures and other powerful interests.

I. The scope of application of Article 6.1 in cases relating to the role of self-governance mechanisms

Judicial independence and self-governance

4. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law, which is inherent in the Convention and a necessary condition for the effective protection of human rights.¹ Judicial independence, as affirmed by the jurisprudence of the Court, encompasses both an institutional, systemic dimension and a personal dimension relating to the situation and conduct of an individual judge.² 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, or as structural independence. The second aspect, of equal importance, refers to the independence of the individual judge, including his or her independence within the judicial system.³

¹ UN Basic Principles on the Independence of the Judiciary, adopted by the 7th 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.

² *Parlov-Tkalčić 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.

³ 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

5. Those responsible for judicial self-governance play an important role in upholding both aspects of judicial independence. To maintain the institutional independence of the judiciary, they must perform their role independently from the executive, the parliament and other outside pressures and interests.
6. In many European jurisdictions, members of judicial councils play a significant role in the self-governance of the judiciary. They typically, *inter alia*, hold powers relating to judicial appointments, evaluations, promotions and disciplinary proceedings.⁴ International standards explicitly recognise all of these functions as potentially having an impact on the independence and impartiality of individual judges and the independence and impartiality of the judiciary as a whole.⁵
7. The Magna Carta of Judges provides that “[t]o ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competencies for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers.”⁶ Specifically, as stated in the explanatory memorandum, “[j]udicial councils play an essential role in guaranteeing the independence and the autonomy of the judiciary. The underlying rationale for their creation is the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive branch. In addition to their primary function of safeguarding judicial independence, a growing number of judicial councils have been entrusted with far-reaching powers to promote the efficiency and quality of justice and rationalize the administration of justice, court management and budgeting”.⁷ The Universal Charter of the Judge affirms that “[i]n order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means. The Council for the Judiciary must be completely independent of other State powers. It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation.”⁸ The Committee of Ministers Recommendation 2010/12 defines “Councils for the judiciary [as] independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.”⁹ The Kyiv Recommendations on Judicial Independence assert that “Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence.”¹⁰
8. The UN Special Rapporteur on the independence of judges and lawyers affirms that “[j]udicial councils play an essential role in guaranteeing the independence and the autonomy of the judiciary. The underlying rationale for their creation is the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive and parliament. In addition to their primary function of safeguarding

influence, but also freedom from undue influence that might come from the actions or attitudes of other judges”.

⁴ ICJ, *Serbia’s Judges and Prosecutors: The Long Road to Independent Self-Governance, A Mission Report*, 2016.

⁵ See for instance, UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principles 11, 13, 14, 17-20; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles*, 21-22 January 2010, paragraphs 3.1-3.3, 4.1, 10.1(h), 12.1-12.7, 13.5, 14.1-14.2, 15.1-15.8, 17.1-17.4; UN Human Rights Council, *Resolution 35/12*, *op. cit.*, para. 3.

⁶ CCJE, *Magna Carta of Judges*, CCJE(2010)3 Final, 17 November 2010, para. 13.

⁷ *Ibid.*, para. 84.

⁸ International Association of Judges, *Universal Charter of the Judge, Adopted by the IAJ Central Council in Taiwan on November 17th 1999, Updated in Santiago de Chile on November 14th 2017*, Articles 2 and 3.

⁹ CMCE, *Judges: independence, efficiency and responsibilities*, Recommendation CM/REC(2010)12, 17 November 2010, para. 26.

¹⁰ OSCE Office for Democratic Institutions and Human Rights & Max Planck Minerva Research Group on Judicial Independence, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, 23-25 June 2010, Part I, para. 2.

judicial independence, a growing number of judicial councils have been entrusted with far-reaching powers to promote the efficiency and quality of justice and rationalize the administration of justice, court management and budgeting.”¹¹

9. Removal or the threat of removal of a judge from the membership in a judicial council during his or her term has the potential to affect his or her personal independence. It may also have a chilling effect, causing members of judicial councils to be less likely to discharge their management functions in a way that respects and protects the independence of individual members of their court. It is therefore essential for the protection of judicial independence that adequate safeguards be put in place to ensure fair proceedings in decisions affecting their career and security of tenure.
10. International standards on the independence of the judiciary enshrine the principle that the political powers – legislative and executive – should not be responsible for or otherwise interfere with the appointment, functioning, or removal of members of judicial councils.¹² Because of their central function in ensuring the independence of the judiciary, the Consultative Council of European Judges (‘CCJE’) has asserted that “[m]embers of the Council for the Judiciary (both judges and non-judges) should be granted guarantees for their independence and impartiality.”¹³ For that, it recommended that “members of the Council for the Judiciary should not all be replaced at the same time.”¹⁴ The CCJE has affirmed that “when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice,”¹⁵ while assuming the problem would not subsist in all-judge councils. It has clearly stressed that “the Council for the Judiciary should be “depoliticised”.”¹⁶
11. In a recent report outlining the role of judicial councils, the UN Special Rapporteur on the independence of judges and lawyers found that “[i]n order to insulate judicial councils from external interference, politicization and undue pressure, international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process. The interference of the judicial hierarchies in the process should also be avoided.”¹⁷ Echoing the CCJE, the Special Rapporteur found that “[o]ne of the responsibilities of judicial councils is to protect judges from external political influence. In order to guarantee the continuity of a council’s functions, its members should not be replaced at the same time or renewed following parliamentary elections. In particular, it would be inconsistent with the principle of the independence of the judiciary to allow for a complete renewal of the composition of a judicial council following parliamentary elections.”¹⁸
12. 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 elected by the *new* NCJ, can only be competent to rule on cases relating to the retirement of Supreme

¹¹ UN Special Rapporteur on the independence of judges and lawyers, *Annual Report, Judicial Councils*, UN Doc. A/HRC/38/38, 2 May 2018, para. 84.

¹² CCJE, *Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society*, 23 November 2007, para. 44.

¹³ *Ibid.*, para. 36.

¹⁴ *Ibid.*, para. 35.

¹⁵ *Ibid.*, para. 19.

¹⁶ *Ibid.*, para. 21.

¹⁷ UN Special Rapporteur on the independence of judges and lawyers, *op. cit.*, para. 76.

¹⁸ *Ibid.*, para. 83. He actually referred in that paragraph to “Poland, the Special Rapporteur expressed the view that the early termination of all the judicial members of the Council would lead to the creation of a new National Council of the Judiciary dominated by political appointees, in breach of existing standards on the independence of the judiciary and the separation of powers (see A/HRC/38/38/Add.1, para. 70)”.

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,¹⁹ the assessment of whether the Disciplinary Chamber of the Polish Supreme Court meets the requirements of judicial independence now rests with the Supreme Court.²⁰

13. 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 which are independent of the legislative and executive authorities.²¹

International standards on security of tenure of judges performing administrative functions

14. Almost every aspect of the judicial career, from judicial appointments, through the conditions governing promotion, transfer, suspension and cessation of judicial functions, is relevant to judicial independence.²² In its Recommendation CM/Rec (2010)12 on judges, the Committee of Ministers stated that "where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice".

15. The Interveners consider that independence of judicial councils, as the competent authority making recommendations on judicial appointments and playing a role in the disciplinary proceedings of judges, is directly linked to the security of tenure of judges. The UN Basic Principles on the Independence of the Judiciary state, in principle 12, that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. At a Council of Europe level, the Committee of Ministers Recommendation 2010/12 states that "security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists."²³ Security of tenure until a mandatory retirement age or the expiry of a fixed term

¹⁹ *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.

²⁰ *Ibid.*, para. 172.2

²¹ *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.

²² CCJE, *Opinion No 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges*, Recommendation No. R(94)12, 23 November 2001, para. 11.

²³ CMCE, *Judges: independence, efficiency and responsibilities*, *op. cit.*, Chapter VI, para. 49. See further international and regional standards: Universal Charter of the Judge, Article 8: "A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered"; International Bar Association's Minimum Standards of Judicial Independence, Article 1(b): "Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control" and Article 22; Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle B.3(c); Burgh House Principles on the Independence of the International Judiciary, principle 3.1; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, Principles A(4)(n)(2) and A(4)(p); Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, Principle IV; Latimer House Guidelines for the Commonwealth, *Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles*, 19 June 1998, Section II, para. 1; Magna Carta

of office is said to be “a fundamental tenet of judicial independence”.²⁴ Standards developed in other regions also affirm these principles; for example, the Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region states that a “judge’s tenure must not be altered to the disadvantage of the judge during his or her term of office.”²⁵

16. Consistent with these standards, the importance of security of tenure of judges, as an element of the right to a fair trial by an independent and impartial tribunal, has been affirmed by this Court²⁶ as well as by the UN Human Rights Committee,²⁷ and the UN Human Rights Council.²⁸
17. Appointment as a member of judicial councils differs from appointment as a judge in that it is for a short, fixed term of office to carry out a range of functions, many or all of which may be of a more administrative or quasi-judicial, rather than judicial, character. Nevertheless, a substantial degree of security of tenure for the designated term of office in a judicial council should be seen as necessary to guarantee the independence of the Council and, thereby, the independence of the judiciary. The requirements of security of tenure in Council membership are particularly heightened when a judicial council or its organs exercise a judicial or quasi-judicial role in the removal of judges from judicial office.
18. **The Intervenors therefore submit that the principle of independence of the judiciary necessarily implies a substantial degree of security of tenure in the members of a judicial council, for the duration of his or her term of office. In order to ensure such security of tenure and to maintain the independence both of individual members of judicial councils, and the overall capacity of the Council to uphold independence of individual judges and the independence of the judiciary, proceedings for the removal from the position of member of a judicial council during his or her term of membership should provide guarantees of independence and fairness of the proceedings. Where the Council or its organs exercise a judicial or quasi-judicial role in the removal of judges from office, the grounds and procedures for removal of membership of the Council should resemble those required for removal of a judge from judicial office.**

Special considerations in the application of Article 6.1 to dismissal of members of judicial councils

19. The Intervenors submit that these general principles should also be reflected in the application of Article 6.1, both as regards its scope of application and in the substance of

of Judges, Principles 4 and 19; European Charter on the Statute for Judges, Principle 3.4. Within the jurisprudence of the ECtHR, see, among others, *Campbell and Fell v. UK*, Application nos. 7819/77 and 7878/77, Judgment of 28 June 1984, para. 80; *Incal v. Turkey*, Application no. 22678/93, Judgment of 9 June 1998, para. 65. See also, Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, *Annual Report to the Human Rights Council*, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Venice Commission, *Report on the Independence of the Judicial System, Part I: the Independence of Judges*, CDL-AD(2010)004, para. 38.

²⁴ CCJE, *Opinion No 1 (2001)*, *op cit.*, para. 57.

²⁵ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (As Amended at Manila, 28 August 1997), Article 21.

²⁶ *Kleyn v. Netherlands*, ECtHR, Application no. 39343/98, Judgment of 6 May 2003, para. 190: “In order to establish whether a tribunal can be considered “independent” for purposes of Article 6 §1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressure and the question whether it presents an appearance of independence”.

²⁷ UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

²⁸ UN Human Rights Council, *Resolution 35/12*, *op. cit.*, operative para. 3: “Stresses that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement should be adequately secured by law, that the security of tenure of judges is an essential guarantee of the independence of the judiciary and that grounds for their removal must be explicit, with well-defined circumstances provided by law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions, and that procedures upon which the discipline, suspension or removal of a judge are based should comply with due process”.

the protection it affords. As has been reiterated by the Court's Grand Chamber in *Baka v. Hungary*, the existing "presumption of applicability of Article 6" encompasses cases of employment disputes concerning employees of the State, including judges.²⁹ Following *Eskelinen and Others v. Finland*, in order for protection under Article 6.1 to be excluded in such cases, two conditions must be met: the national law must expressly exclude access to a court for the post or category of staff; and the exclusion must be justified on objective grounds in the State's interest.³⁰ Under this doctrine, it is presumed that Article 6.1 applies to employment disputes involving public sector workers, in the absence of convincing reasons put forward by the State.³¹ Applying the *Eskelinen* test, this Court has, in a number of cases, found Article 6.1 to be applicable to questions regarding the judicial career and removal of judges from office,³² disputes on suspension³³ or dismissal³⁴ from judicial office, and removals from a senior administration position within the court³⁵ or as Court President,³⁶ even when the person retained their underlying judicial position.

20. The Court held in *Baka* that the need to respect the full term of a judge in charge of court administration tasks is "supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges."³⁷ The termination *ex lege* of this term could not remove the judge's right under Article 6.1 and was found to have "impaired the very essence of the applicant's right of access to a court."³⁸ Any law excluding access to a court "should be compatible with the rule of law."³⁹ Regard is to be given to "the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge".⁴⁰

21. In the submission of the Interveners, when assessing any justification advanced by the State for excluding judges' access to court in regard to their career and security of tenure, or membership of judicial governance bodies, consideration must be given to the strong public interest of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. The Interveners submit that it can never be in the legitimate interests of the State to deprive judges who are members of judicial councils, of access to court or of due process protection in disputes capable of affecting their institutional or individual independence, including in cases that concern their security of tenure or conditions of service relative to their discharge of judicial governance functions.

22. The Interveners further submit that in the assessment of the adequacy of procedural safeguards in accordance with Article 6.1, and in considering the

²⁹ *Baka v. Hungary*, ECtHR, Application no. 20261/12, Judgment of 23 June 2016, paras. 103-105.

³⁰ *Vilho Eskelinen and Others v. Finland*, ECtHR, Application no. 63235/00, Judgment of 19 April 2007, para. 62.

³¹ *Ibid.*, para. 62.

³² *Olujic v. Croatia*, ECtHR, Application no. 22330/05, Judgment of 5 February 2009; *G v. Finland*, ECtHR, Application no. 33173/05, Judgment of 27 January 2009; *Juricic v. Croatia*, ECtHR, Application no. 58222/09, Judgment of 26 July 2011; *Dzhidzheva-Trendafilova v. Bulgaria*, ECtHR, Application no. 12628/09, Decision of 9 October 2012; *Volkov v. Ukraine*, ECtHR, Application no. 21722/11, Judgment of 9 January 2013.

³³ *Paluda v. Slovakia*, ECtHR, Application no. 33392/12, Judgment of 23 May 2017, para. 34.

³⁴ See for example, *Volkov v. Ukraine*, *op. cit.*, paras. 91 and 96; *Kulikov and Others v. Ukraine*, ECtHR, Applications nos. 5114/09 and 17 others, Judgment of 19 January 2017, paras. 118 and 132; *Sturua v. Georgia*, ECtHR, Application no. 45729/05, Judgment of 28 March 2017, para. 27; and *Kamenos v. Cyprus*, ECtHR, Application no. 147/07, Judgment of 31 October 2017, para. 88.

³⁵ *Denisov v. Ukraine*, ECtHR, Application no. 76639/11, Judgment of 25 September 2018.

³⁶ *Baka*, *op. cit.*, paras. 34 and 107-11.

³⁷ *Ibid.*, para 108.

³⁸ *Ibid.*, para 121

³⁹ *Ibid.*, para. 117

⁴⁰ *Ibid.*, para. 121.

justification of any restrictions on aspects of Article 6.1 rights in cases concerning the career of judges, consideration should be given to the particular significance of these proceedings for judicial independence and the rule of law, a founding principle of the Convention system. Although the individual judge may be an immediate beneficiary of the full protection of his or her Article 6.1 rights, the protection ultimately benefits all persons entitled under Article 6.1 to the “independent and impartial tribunal” of which the individual judge is part.

II. The role of the NCJ in safeguarding the independence of the judiciary in Poland

23. While assessing the application of Article 6.1 in the present case, it is important to take account of the broader context of attacks on judicial independence in Poland to recognise the connection between the individual rights of the applicant and their structural consequences, in this case for the right to fair trial of others, and more fundamentally for the rule of law as a whole, i.e. “one of the fundamental principles of a democratic society [...] inherent in all the Articles of the Convention”.⁴¹
24. There is a consistent body of caselaw through which the Court has made a link between the two requirements of Article 6(1), namely: 1) a tribunal must be established by law; and 2) the judiciary must be independent and impartial. Such a link is important to secure society’s confidence in the courts.⁴² With regard to the requirement of independence, this Court has held in *Volkov v. Ukraine* that, “when at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality.”⁴³ Another indicator of independence is “the manner in which judges were appointed to that body, having regard to the authorities which delegated them and the role of the judicial community in that process”⁴⁴.
25. In the case of *European Commission v. Poland*, which involved the forced retirement of Supreme Court judges, the CJEU ruled that “guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.”⁴⁵
26. The NCJ of Poland is a professional governance body, expressly provided for in the Polish constitution and responsible for safeguarding the independence of the judiciary.⁴⁶ The NCJ assesses candidates for judicial offices; drafts the rules of judicial ethics; and can initiate disciplinary proceedings against judges.⁴⁷ Crucially, the NCJ elects the judicial members

⁴¹ *Káracsony and Others v. Hungary*, ECtHR, Application no. 37494/02, Judgment of 18 April 2006.

⁴² *Morice v. France*, ECtHR, Application no. 29369/10, Judgment of 23 April 2015, para. 78.

⁴³ *Denisov v. Ukraine*, *op. cit.*, para. 68.

⁴⁴ *Denisov v. Ukraine*, *op. cit.*, para. 68. Other factors include: “Third, it was relevant to establish whether the members of the disciplinary body worked on a full-time basis or continued to work and receive a salary outside; given that the latter case would inevitably involve their material, hierarchical and administrative dependence on their primary employers, this would endanger their independence and impartiality (ibid., para. 113). Fourth, attention had to be paid to the participation of representatives of the prosecution authorities in the composition of the disciplinary body for judges; the inclusion of the Prosecutor General *ex officio* and the other members delegated by the prosecution authorities raised concerns as to the impartiality of the disciplinary body of judges in view of the functional role of prosecutors in domestic judicial proceedings (ibid., para. 114). Fifth, where the members of the disciplinary body played a role in the preliminary inquiry in a disciplinary case and subsequently participated in the determination of the same case by the disciplinary body, such a duplication of functions could cast objective doubt on the impartiality of those members (ibid., para. 115)”.

⁴⁵ *European Commission v. Republic of Poland*, CJUE, Case C-192/18, Judgment of 5 November 2019, para. 111.

⁴⁶ Polish Constitution, Article 186(1).

⁴⁷ European Commission, *Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017) 835, 20 December 2017, para. 137; Dariusz Mazur, Themis, Association of Judges, *Judges under special supervision, namely ‘The Great Reform’ of the Polish justice system*, 5 April 2019, p. 9.

of two new Supreme Court chambers: Extraordinary and Disciplinary. The independence of the Disciplinary Chamber is already compromised by virtue of having also lay members appointed by Senate and its President being appointed by the President of Poland. The Disciplinary Chamber is a court of second instance in disciplinary proceedings against judges. The disciplinary proceedings initiated by the disciplinary prosecutor upon a motion of the NCJ (among other authorised bodies),⁴⁸ heard by the first instance disciplinary courts and reviewed by the Disciplinary Chamber of the Supreme Court, can result in the removal of a judge from office. The NCJ plays a substantial role in relation to the process for removing judges from office or their transfers between the respective divisions within a court.⁴⁹ Amnesty International interviewed judges in 2018 who feared that once the new Disciplinary Chamber was established, a series of disciplinary proceedings would commence against judges who have ruled against the government in politically sensitive cases.⁵⁰

27. The UN Special Rapporteur on the independence of judges and lawyers has affirmed that “while the National Council of the Judiciary is not a judicial authority per se and does not exercise judicial functions, its role of safeguarding judicial independence in Poland requires that it be independent and impartial from the executive and legislative branches.”⁵¹

The situation of the independence of the judiciary, including the NCJ, in Poland

28. 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.

29. With regard to the NCJ, which is comprised of 25 members - 15 judges and 10 non-judge members - the authorities politicised the process of appointments to the NCJ with the amendment of the Law on the NCJ, which came into force in January 2018. The law gave parliament the power to appoint the 15 judge-members who serve as members of the NCJ,⁵² despite the fact that the Polish Constitution expressly limits to six the number of members of the NCJ appointed by parliament. On 5 March 2018, parliament appointed the new NCJ judge members, eight of whom were the new presidents or vice-presidents of courts appointed since August 2017 by the Minister of Justice.⁵³ 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.”⁵⁴

30. The Advocate General of the CJEU has concluded that “the manner of appointment of the members of the NCJ itself discloses deficiencies which appear likely to compromise its independence from the legislative and executive authorities,” because a majority of 21 of 25 members are elected by the legislative authorities.⁵⁵

⁴⁸ 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.

⁴⁹ The power to review a complaint of a judge concerned about a substantive change of their post – including a transfer to a different division – sits with the National Council of the Judiciary. See Amnesty International, *Poland 2019: The State of the Judiciary*, November 2019, p. 11.

⁵⁰ Amnesty International, “*Reform*” of the judiciary in Poland poses risk to the right to fair trial, Briefing by Amnesty International ahead of the General Affairs Council Meeting, March 2018, p. 7.

⁵¹ 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, para. 68.

⁵² Law on the National Council of Judiciary adopted on 8 December 2017, Article 9a.

⁵³ Wyborcza, “*Krajowa Rada Ziobrownictwa*”. 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).

⁵⁴ European Commission, *Reasoned Proposal*, op. cit., para. 142.

⁵⁵ The other ten are lay members: six are elected by parliament, one is appointed by the President and three are sitting in the NCJ ex officio. See, Venice Commission, *Opinion on the Draft Law on the National Council of the Judiciary*, 11 December 2017, para 15; Opinion

31. The amendment of the Law on the NCJ also 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.⁵⁶ Such termination raised concerns over the breach of Article 187(3) of the Polish Constitution affording a full four-year term of office to NCJ members,⁵⁷ as underlined in the opinion of the NCJ, of the Supreme Court and of the Ombudsman.⁵⁸ The CJEU Advocate General concluded that “the immediate replacement of the currently sitting members of the NCJ in tandem with the new regime for appointment of the NCJ may be considered to further impair the NCJ’s independence from the legislative and executive authorities.”⁵⁹
32. On 17 September 2018, the General Assembly of the European Network of Councils for the Judiciary (ENCJ) suspended the membership of Poland’s NCJ.⁶⁰ The ENCJ concluded that, due to the 2017 “reforms”, the NCJ could no longer be considered independent of the executive and legislature because of parliament’s role in the process for the election of NCJ members. The ENCJ also noted that the amendment of the Law on the NCJ “is part of an overall reform to strengthen the position of the executive, infringing very seriously on the independence of the judiciary”.⁶¹
33. The “reform” of the judiciary also empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of Courts, to force Supreme Court judges to retire, and to employ disciplinary proceedings to target judges for their decision making or for their exercise of the right to freedom of expression. The “reform” enabled the government to interfere with the operation of the judicial system in breach of the principle of separation of judicial, executive and legislative powers.
34. In July 2017, the President of Poland signed an amendment to the Law on the System of Common Courts. The amendment entered into force in August 2017 and empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts. Within the first six months of the law entering into force, the Minister was empowered to replace the presidents or vice-presidents without providing any justification. Between September 2017 and February 2018, the Minister of Justice dismissed and subsequently appointed at least 130 presidents and vice-presidents of common courts.⁶² There are 377 courts in Poland⁶³ and the government has acknowledged that the Minister has replaced about 18% of presidents and vice-presidents of these courts.⁶⁴ The powers of the presidents of courts include transferring judges between divisions within a court, which, pursuant to the amendment of the Law on Common Courts of 2017, can be challenged only before the

of Advocate General Tanchev, *op. cit.*, para. 132.

⁵⁶ Law on the National Council of Judiciary, Article 6.

⁵⁷ Opinion of Advocate General Tanchev, *op. cit.*, para. 61.

⁵⁸ European Commission, *Reasoned Proposal*, *op. cit.*, para. 140.

⁵⁹ Opinion of Advocate General Tanchev, *op. cit.*, para. 135.

⁶⁰ European Network of Councils for the Judiciary (ENCJ), *ENCJ Suspends Polish National Judicial Council – KRS*, available at <https://www.encj.eu/node/495> (accessed on 25 November 2019).

⁶¹ ENCJ, *Position Paper of the Board of the ENCJ on the membership of the KRS of Poland*, 16 August 2018, p. 4.

⁶² The estimate is of 130-160 presidents and vice-presidents as reported by Helsinki Foundation of Human Rights in *Od Kadr Sie Zaczyna, Zmiana prezesów i wiceprezesów sądów powszechnych w okresie od sierpnia 2017 r. do lutego 2018 r.* 2018, p. 16, available at <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>. See also, Iustitia, *Ostatecznie 130 prezesów i wiceprezesów zostało odwołanych przez Ministra Sprawiedliwości w trybie spec ustawy z lipca 2017 roku*, 13 February 2018, available at <http://www.iustitia.pl/informacja-publiczna/2100-ostatecznie-130-prezesow-i-wiceprezesow-zostalo-odwolanych-przez-ministra-sprawiedliwosci> (accessed 25 November 2019). The changes in the posts of presidents and vice-presidents of common courts continued even after February 2018. According to information published by the association of judges Iustitia, by May 2018 the total number of replaced presidents and vice-presidents was of 195 (150 were removed by the Minister of Justice and 45 resigned). The list is available at <http://monitorkonstytucyjny.eu/archiwa/3982> (accessed on 25 November 2019).

⁶³ Sonar, *Wyborcza, PiS zapowiada "reformę reformy" sądownictwa. Władza idzie na ustępstwa wobec Komisji Europejskiej?*, available at <http://sonar.wyborcza.pl/sonar/7,156422,22492032,sonarwsadach-pis-poprawia-ustawy-ziobro-powoluje-prezesow.html> (accessed on 25 November 2019).

⁶⁴ Polish Government, *White Paper on the Reform of the Polish Judiciary, Executive summary*, March 2018, p. 5, available at https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf.

NCJ.⁶⁵ Amnesty International has documented cases in which the NCJ has dismissed judges' complaints that claim that their transfers were punitive and/or effectively amounted to demotions, without any or adequate justification.⁶⁶

35. The amendment of the Law on the Supreme Court also included provisions that permitted the reopening of closed disciplinary proceedings against judges.⁶⁷ The law established a new Disciplinary Chamber⁶⁸ whose members were to be elected by the "new" NCJ and whose "lay judges" were to be elected by members of the Senate.⁶⁹ In February 2019, the President of Poland appointed the heads of the two new chambers of the Supreme Court: Disciplinary and Extraordinary.⁷⁰

36. Various laws adopted and implemented in Poland between 2015 and 2018 have severely undermined the independence of the judiciary. Amendments to the laws governing all arms of the judiciary – the Constitutional Tribunal, NCJ, common courts and the Supreme Court – have rendered courts, judges and judicial institutions vulnerable to political influence.

37. The UN Special Rapporteur on the independence of judges and lawyers visited Poland in 2017 and concluded that the early termination of all members of the NCJ "decided by the legislative branch constitutes an additional interference with the independence of the Council and a breach of the principles of separation of powers and security of tenure. Coupled with the early termination of all the judicial members of the Council, the implementation of the new Act will lead to the creation of a 'new' NCJ dominated by political appointees, in contravention of existing standards on the independence of the judiciary and the separation of powers."⁷¹

38. The Interveners submit that the application of Article 6.1 and its attendant safeguards to the present case is manifestly justified because the functioning of the NCJ – without pressure or influence from the executive and legislative branches or other outside forces – is essential to the overall independence of the judiciary in Poland. The NCJ plays an essential role in defending and promoting judicial independence, which is the cornerstone of the rule of law and the protection of human rights in Poland. One of the safeguards protecting the independence of the NCJ is constitutionally protected tenure of their members. Forcible termination of the tenure of NCJ members in March 2018 both breached individual rights and undermined the NCJ's ability to safeguard the independence of the judiciary. If judges who are members of the NCJ are at risk of arbitrary removal from the NCJ, its overall functioning as said defender of judicial independence will be impaired to the detriment of individual judges, the judiciary as an equal branch of government, and to the public, which has a right to an independent and impartial judicial system.

⁶⁵ USTAWA z dnia 27 lipca 2001 r., available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>.

⁶⁶ Article 22a.5 and 6; Amnesty International, *Poland 2019: The State of the Judiciary*, November 2019. See also, Wyborcza, *Decyzja KRS o umorzeniu sprawy odwołania złożonego przez sędziego Żurka bez uzasadnienia*, 18 October 2018, available at <https://krakow.wyborcza.pl/krakow/7,44425,24061190,decyzja-krs-o-umorzeniu-sprawy-odwolania-zlozonego-przez-sedziego.html> (accessed on 25 November 2019).

⁶⁷ Article 124.1. The amendment of the Law on the Supreme Court entered into force in April 2018.

⁶⁸ The Chamber has two divisions: one serves as the first and the other as the second instance for disciplinary proceedings against judges, prosecutors, attorneys and notaries (see Article 3 (Article 27) of the Law on the Supreme Court, available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D20180005L.pdf>).

⁶⁹ Under Article 61 para. 2 of the Law on the Supreme Court, the Senators will elect the lay members of the Supreme Court.

⁷⁰ 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=IwAR1jCoP9NUtqscf2gilfdtLWWjPA_RO6yO9qoshPAa15Qz8cGFS06p_VPBU (accessed on 25 November 2019).

⁷¹ Special Rapporteur on the independence of judges and lawyers, *Report on his mission to Poland*, *op. cit.*, para. 68.