

# HR HELSINKI FOUNDATION for HUMAN RIGHTS

## The Supreme Court in Poland (September 2018)

### 1. National Council of Judiciary – procedure of appointments of new Supreme Court judges

#### **Background information**

According to Law on Supreme Court adopted in December 2017, two new chambers will be established in the Supreme Court (SC)<sup>1</sup>. Hence, the new judges of the Supreme Court have to be appointed in order to fill in the seats in the new chambers.

#### **President's announcement of vacancies in the Supreme Court**

The procedure of appointing new judges (mainly to those two new chambers, but also to previously existing – Civil Chamber and Criminal Chamber) was initiated by President of Poland in June 2018. The President issued official announcement of vacancies in the Supreme Court<sup>2</sup>. It was issued in May 2018, however it was published in Official Journal a month later. The main legal concern dealt with lack of signature by the Prime Minister. According to the Polish Constitution, all official decisions of the President require such Prime Minister's countersign in order to be valid. Such a requirement is not applicable when decision concerns the presidential "prerogatives" (e.g. proclaiming elections to the Sejm and to the Senate, summoning the first sitting of a newly elected Sejm and Senate, signing or refusing to sign a bill)<sup>3</sup>. The announcement of vacancies in the Supreme Court does not fall under the category of the presidential prerogatives listed in the Constitution, however it was argued by President's lawyers that announcement of vacancies in the Supreme Court is a part of the prerogative to appoint judges by the President. It is highly probable that the process of appointing the new judges of the Supreme Court will be deemed invalid because of the lack of the Prime Minister's countersign<sup>4</sup>.

#### **The procedure of appointing the new judges of the Supreme Court**

According to the announcement there are 44 vacancies in the Supreme Court. Within month since the announcement was published, the candidates could apply for positions in the Supreme Court. During this period, the law concerning procedure of appointments was amended (please see the point below). Altogether approx. 200 candidates applied for the positions of the Supreme Court's judges<sup>5</sup>. Initially the spokesperson of the new National Council of Judiciary (NCJ) informed that the first meeting of NCJ will be held in September 2018. However, in August 2018 it was announced that NCJ will meet on 20 August 2018 and the candidates will be heard by working groups composed of the members of NCJ. After one week, the working groups completed hearings of the candidates and prepared list of recommended candidates.

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<sup>1</sup> The new chambers are: Disciplinary Chamber and Public Affairs and Extraordinary Control Chamber.

<sup>2</sup> *Obwieszczenie Prezydenta Rzeczypospolitej Polskiej z dnia 24 maja 2018 r. nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym* – <http://www.monitorpolski.gov.pl/MP/2018/633>.

<sup>3</sup> Prerogatives are enlisted in Article 144 para. 3 of the Constitution.

<sup>4</sup> M. Florczak-Wątor, T. Zalaśiński, *Opinia prawna w sprawie zgodności z Konstytucją obwieszczenia Prezydenta Rzeczypospolitej Polskiej z dnia 24 maja 2018 r. nr 127.1.2018 o wolnych stanowiskach sędziego w Sądzie Najwyższym, wydanego bez kontrasygnaty Prezesa Rady Ministrów* - [https://www.iustitia.pl/images/2018\\_09\\_03\\_Opinia\\_prawna.pdf](https://www.iustitia.pl/images/2018_09_03_Opinia_prawna.pdf).

<sup>5</sup> List of candidates - <http://krs.pl/pl/aktualnosci/d.2018,8/5454.lista-kandydatow-do-sadu-najwyzszego-ktorych-zgloszenia-wplynely-do-krajowej-rady-sadownictwa>.

6 out of 12 selected candidates to the Disciplinary Chamber are prosecutors, who are currently subordinated to the Prosecutor General (Minister of Justice)<sup>6</sup>. Due to the accelerated pace of the procedure, already after the NCJ announced its decisions, it came out that some of the appointed candidates did not meet statutory criteria for the position of a judge of the Supreme Court or had been sentenced in disciplinary proceedings<sup>7</sup>. Now, the President will make final decision whether appoint the recommended candidates for the position of judges of the Supreme Court.

### ***International reactions***

On 16 August 2018, the Board of the European Network of Councils of Judiciary informed the Polish NCJ that it would convene an Extraordinary General Assembly on 17 September 2018 in order to decide on the membership of the Polish NCJ in the ENCJ. The Board has proposed to suspend the membership of the Polish NCJ as it no longer meets the requirements of ENCJ that it is independent of the Executive and Legislature so as to ensure the independence of the Polish Judiciary

## **2. Amendments to the Law on Supreme Court**

On 11 July 2018, a group of MPs submitted a draft of amendments to Law on the Supreme Court<sup>8</sup>. It aimed at speeding up the procedure of selecting judges of the Supreme Court initiated in June 2018. It seems that the main changes were a reaction to the statements of judges and lawyers, who appealed to the lawyers' community to massively present their candidatures in this process in order to block it. Potentially, it would have led to a situation when the Supreme Court would not be packed with new judges appointed by the National Council of the Judiciary which is under political influence of the governing majority.

The first reading of the draft law took place on 19 July 2018, and the next day the bill was adopted by Sejm (the first chamber of the Parliament). Senate approved the draft law on 25 July 2018 and the President signed it on 26 July 2018. The amendments concerning the procedure of appointments to the Supreme Court entered into force the next day (27 July 2018).

New law provides that any appeal against a negative decision of the National Council of Judiciary (e.g. refusal to appoint for the position of the Supreme Court judge) will be in practice ineffective<sup>9</sup>. If the Supreme Administrative Court finds that decision of the National Council of the Judiciary is unlawful, still this ruling will not have any legal impact, because the positive decision concerning appointing another candidate for the position of the Supreme Court judge will become final<sup>10</sup>. For instance, if there are 5 candidates for one sit in the Supreme Court and one receives recommendation for NCJ to be nominated for this position, the other 4 candidates are entitled to appeal against that decision, but the Supreme Administrative Court is not entitled to quash the decision concerning the candidate that was nominated for the position by the NCJ.

The amendments led to a situation when there is no effective legal remedy and judicial control over decisions made by the National Council of the Judiciary. Thus it violates the European Convention on Human Rights and the Constitution. Such a legislation allows for accelerated appointments to the Supreme Court without any external control. It can lead to situation when e.g. the candidates do not meet the statutory criteria, but there is not effective review of NCJ decisions. Moreover, the new law simplified the procedure of appointing the Supreme Court judge. For example, the lack of relevant

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<sup>6</sup> <https://www.prawo.pl/prawnicy-sady/sa-pierwsi-kandydaci-do-izby-dyscyplinarnej,295035.html>

<sup>7</sup> One of the most extreme example of the NCJ appointment procedure was a candidacy of K. Zaradkiewicz – director of Administrative Law Department in the Ministry of Justice. On 27 August 2018 his candidacy was rejected by NCJ, and the next day – when Minister of Justice personally argued in favour of his candidacy – he received the required majority of votes of NCJ.

<sup>8</sup> Draft no. 2731.

<sup>9</sup> The appeals will be heard by the Supreme Administrative Court within 14 days.

<sup>10</sup> However, it is formally possible for a candidate to appeal against „positive” decision of NCJ on appointing him/her for position of SC judge.

documents concerning the candidate does not have to suspend the selecting procedure. These changes aimed at accelerating the whole procedure of appointing new judges to the Supreme Court.

New law also allows to appoint the new First President of the Supreme Court sooner than it would have happened according to the previous regulation. According to the Constitution the the First President term of office lasts 6 years and expires in April 2020. However due to lowering the retirement age of the Supreme Court judges in December 2017, the government argues that Małgorzata Gersdorf's term of office expired in July 2018 and new First President shall be selected.

### 3. Supreme Court – preliminary reference to CJEU

In August 2018, the Supreme Court decided to refer a set of questions to the European Court of Justice within the preliminary reference procedure<sup>11</sup>. The questions concern the issue of compatibility of the amendments to the Act on Supreme Court (lowering the retirement age of the Supreme Court judges) with the EU law, in particular with principle of independence of justice. Additionally, the Supreme Court decided to suspend the applicability of those provisions. Supreme Court's decision was criticized by the politicians. The President, the Minister of Justice, the deputy Prosecutor General argued that decision of the Supreme Court is unlawful and shall not be enforced. Moreover, the deputy Prime Minister stated in August 2018 that Government will probably ignore the CJEU ruling on justice reform<sup>12</sup>. Helsinki Foundation for Human Rights found these statements as unacceptable in a democratic state ruled by separation of powers<sup>13</sup>.

Most probably the CJEU will hear the case concerning the Supreme Court after the President appoints new Supreme Court judges. Meanwhile the President will also decide whether he allows the SC judges, who reached 65 years old, to stay in the office. Such a situation will definitely undermine the feasibility of the CJEU judgement.

In July 2018 the European Commission introduced an infringement procedure relating to law amending judiciary system in Poland and sent a Letter of Formal Notice to the Polish government<sup>14</sup>. In mid-August 2018 the Commission announced that “the response of the Polish authorities does not alleviate the Commission's legal concerns” and Commission decided to move to the next stage of the infringement procedure<sup>15</sup>.

*The brief has been prepared by HFHR's lawyer Barbara Grabowska-Moroz.*

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<sup>11</sup> Press release of the Supreme Court – no. 1 - [http://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=233-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty\\_o\\_sprawach](http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=233-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach); no. 2 - [http://www.sn.pl/aktualnosci/SitePages/Komunikaty\\_o\\_sprawach.aspx?ItemSID=232-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty\\_o\\_sprawach](http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=232-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach);

<sup>12</sup> <https://www.politico.eu/article/poland-warsaw-ignore-ecj-ruling-on-justice-reform/>

<sup>13</sup> HFHR statement – <http://www.hfhr.pl/stanowisko-hfpc-ws-podwazania-orzeczenia-sadu-najwyzszego/>.

<sup>14</sup> [http://europa.eu/rapid/press-release\\_IP-18-4341\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4341_en.htm)

<sup>15</sup> [http://europa.eu/rapid/press-release\\_IP-18-4987\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4987_en.htm)