Przegląd Prawa Konstytucyjnego
-----ISSN 2082-1212-----
DOI 10.15804/ppk.2022.04.33
-----No. 4 (68)/2022-----

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Gloss to the Judgement of the European Court of Human Rights of 8 November 2021 in the Case of Dolińska-Ficek and Ozimek v. Poland (Applications no. 49868/19 and 57511/19)

Keywords: process guarantees, justice system, National Council of the Judicary
Słowa kluczowe: prawo do rzetelnego procesu, wymiar sprawiedliwości, Krajowa Rada Sądownictwa

Abstract

Judgement of ECHR of 8 November 2021 in the case of Dolińska-Ficek and Ozimek v. Poland is undoubtedly one of the most important judgements issued by the Strasbourg Court in recent times. At the same time, it constitutes a continuation of the existing case-law of the ECHR in similar cases against Poland, in particular the reasoning expressed in the judgement of 22 July 2021 in the case of Reczkowicz v. Poland (Application no. 43447/19). In the judgement, the ECHR held that Poland's action resulted in a violation of Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which establishes a set of due process guarantees.

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Streszczenie

Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 8 listopada 2021 r. w sprawie Dolińska-Ficek i Ozimek p. Polsce (skargi nr 49868/19 i 57511/19)

Wyrok Europejskiego Trybunału Praw Człowieka z 8 listopada 2021 r. w sprawie Dolińska-Ficek i Ozimek p. Polsce jest niewątpliwie jednym z ważniejszych wyroków wydanych w ostatnim czasie przez Trybunał w Strasbourgu. Stanowi jednocześnie kontynuację dotychczasowego orzecznictwa ETPCz w podobnych sprawach przeciwko Polsce, a zwłaszcza tez wyrażonych w wyroku z 22 lipca 2021 r. w sprawie Reczkowicz p. Polsce (skarga nr 43447/19). W wyroku ETPCz uznał, że w wyniku działania Polski doszło do naruszenia art. 6 ust. 1 Konwencji o ochronie praw człowieka i podstawowych z 4 listopada 1950 r., który ustala zespół gwarancji rzetelnego procesu.

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I. Introduction

Judgement of the European Court of Human Rights (hereinafter: Court or ECHR) of 8 November 2021 in the case of Dolińska-Ficek and Ozimek v. Poland is undoubtedly one of the most important judgements issued by the Strasbourg Court in recent times. At the same time, it constitutes a continuation of the existing case-law of the ECHR in similar cases against Poland, in particular the reasoning expressed in the judgement of 22 July 2021 in the case of Reczkowicz v. Poland (Application no. 43447/19).

In the judgement, the ECHR held that Poland's action resulted in a violation of Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter: Convention), which establishes a set of due process guarantees[2]. This provision is undoubtedly of fundamental importance for the activities of the ECHR, which is re-

[2] Dz.U. 1993, No. 61, item 284.

flected in the statistics of the Court's judgements, among which those on Article 6 are prevailing[3].

II. Facts and main arguments of the judgement

The complaints that gave rise to this judgement were filed by judges (M. Dolińska-Ficek and A. Ozimek) who applied for vacant judge positions in other courts but were not recommended by the NCJ. In their view, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (hereinafter: IKNSP SN), which had considered their appeals against the NCJ's resolutions, was not an "independent and impartial court established by law" within the meaning of Art. 6 § 1 of the Convention. Specifically, the complainants alleged that "the judges of this Chamber were appointed by the President of Poland on the recommendation of the NCJ in clear violation of national law and the principles of the rule of law, separation of powers and independence of the judiciary"[4].

The Court held that the right of access, on an equal basis, to public functions, had been recognised by Polish law and was protected under the Polish Constitution and was accompanied by procedural guarantees to obtain judicial review of a resolution of the NCJ before the Supreme Court. The Court applied the three-step test set out in *Guðmundur Andri Ástráðsson*[5] to assess the case in merit.

The Court found that the appointments of judges to IKNSP SN were made on the basis of a recommendation by the NCJ that did not guarantee independence from the legislative and executive branches of government, and therefore the chamber is not a "court established by law".

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[3] P. Hofmański, A. Wróbel, *Komentarz do art. 6,* [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18,* eds. L. Garlicki, P. Hofmański, A. Wróbel, Warsaw 2010, p. 249.

[4] § 140 of the judgement.

[5] More on this test in M. Wrzołek-Romańczuk, *Glosa do wyroku z 1.12.2020 r. wydanego przez Wielką Izbę Europejskiego Trybunału Praw Człowieka w sprawie Guðmundur Andri Ástráðsson przeciwko Islandii (skarga nr 26374/18),* „Iustitia" 2021, no. 1, p. 40 et seq.

III. Selected legal effects of the judgement

This judgement, like the one in the case of Reczkowicz v. Poland, relates, in principle, to the functioning (legality) of the so-called new chambers of the Supreme Court. But in reality, its effects are more far-reaching. In fact, this judgement has a real impact on the functioning of the entire justice system in Poland.

The main and most important reason for this situation is that the Court has challenged the legality of the selection of the composition of the NCJ appointed under the provisions of the new amending law of 2017[6]. Thus, in principle, it will be possible to challenge any composition of judges of courts at different levels (common, military and administrative) that was selected by the new NCJ. The Court, moreover, explicitly expressed in the judgement that conclusions regarding the incompatibility of the judicial appointment procedure involving the NCJ with the requirements of an "independent and impartial tribunal established by law" under Art. 6(1) of the Convention would have consequences for its assessment of similar complaints in other pending or future cases. In principle, applications to Strasbourg may be made in the context of any legal proceedings, as long as there are reasonable doubts that the judge in the case may have been appointed in violation of Art. 6(1) of the Convention[7]. There is also a risk that a judge appointed in contravention of the law within the meaning of the Convention may become, in a sense, a "pretext" preventing the case from proceeding. An increased flow of applications to the Court, and thus an increased number of its judgements, will also result in financial consequences for Poland.

Another important issue is the role of the President of Poland in the judicial appointment procedure. This is an issue that the Court addressed verbatim in the judgement under review. Undoubtedly, the provisions of the Con-

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[6] Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Dz.U. 2018, item 3).

[7] W. Hermeliński, B. Nita-Światłowska, *Orzeczenie sądowe wydane z udziałem sędziego powołanego wadliwie a naruszenie prawa do sądu gwarantowanego przez art. 6 ust. 1 Konwencji o ochronie praw człowieka – glosa do wyroku Wielkiej Izby Europejskiego Trybunału Praw Człowieka z 1.12.2020 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii*, „Europejski Przegląd Sądowy" 2021, no. 5, p. 46.

stitution of the Republic of Poland grant the head of state large autonomy in carrying out the act of judicial nomination, although a motion of the NCJ to appoint a person to serve as a judge is obviously an indispensable element initiating this procedure[8]. However, it has been noted in the legal doctrine that granting to an official act of the head of state the ability to cure legal defects in actions preceding its issuance (in this case, creative actions taken by the NCJ), is at least questionable[9]. This view was also expressed by the ECHR, which stressed in its judgement that the improper appointment of the composition of the NCJ affects the entire subsequent process of judicial appointments, including those made by the President. Looking at this issue from the perspective of the judgement in question, one would have to draw the conclusion that all judicial appointments made by the President would suffer from a legal defect resulting from irregularities in the appointment of the NCJ after 2017. However, the situation is much more complex[10].

It should be noted that the President is the guardian of the Constitution, including the principle of supremacy of the Constitution in the system of sources of law expressed in its Art. 8, Thus, he should, above all, implement its provisions and, in particular, fulfil its competences, which, in this particular case, concern the judicial power. It should be emphasized, moreover, that according to the judgement of the Constitutional Tribunal of 20 April 2021 in the case file ref. no. U 2/20 concerning resolution of the Joined Chambers of the Supreme Court of 23 January 2020: "The President's prerogative is not subject to review under any procedure […] Acts issued under the President's prerogative are sovereign in nature, and the role of the President issuing acts implementing the prerogative is not to confirm a decision made elsewhere, but

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[8] The importance of the motion of the NCJ was stressed by the Constitutional Tribunal in the justification to the judgement of 5 June 2012, file ref. no. K 18/09.

[9] M. Zubik, *Prawo konstytucyjne współczesnej Polski*, Warsaw 2020, pp 295–296; differently L. Bosek, G. Żmij, *Uwarunkowania prawne powoływania sędziów w Europie w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r.,* 26374/18, *Guðmundur Andri Ástráðsson przeciwko Islandii*, „European Judicial Review" 2019, no. 7, p. 40.

[10] It should be noted, among other things, that the appellate panels of courts of second instance overturn judgements delivered in the first instance by judges appointed in the legally defective procedure before the NCJ, see, for example, the judgement of the Appellate Court in Białystok, file ref. no. IIIA AUA 1032/21.

to make an independent determination that is not subject to review by other organs of state"[11].

However, the Court has challenged the above judgement of the Constitutional Tribunal. It considered the judgement arbitrary and irrelevant to the Court's assessment of whether there had been a manifest violation of national law in connection with the procedure for appointing judges to the IKNSP SN. As a side note, the ECHR noted that the composition of the Constitutional Tribunal which delivered the judgement included M. Muszyński, whose appointment to the Tribunal was the subject of the ECHR's assessment in the case Xero Flor w Polsce sp. z o. o. v. Poland[12].

The above arguments of the ECHR are also related to another important issue, namely the possible liability of state authorities that do not respect ECHR judgements on judicial appointments. The question arises as to whether they can be ascribed the commission of a constitutional tort through the act of violating the principle of *pacta sunt servanda* expressed in Art. 9 of the Constitution of the Republic of Poland and in Art. 26 and 27 of the Vienna Convention on the Law of Treaties of 23 May 1969[13]. In this case, the standard for assessing the behaviour of the entities incurring liability before the Court of Justice would be Art. 9 of the Constitution, which has an intrinsic legal basis, while the violated provisions of the treaties have non-intrinsic basis. The latter cannot be the sole basis for liability before the Court of Justice. However, in accordance with the well-established understanding of the content of Art. 27 of that Convention in the doctrine of international law and in the international case law cited by it[14], this principle also applies to provisions contained in acts of domestic law of a constitutional nature[15]. This provision reaffirms the general principle of international law binding on Po-

[11] Paragraph 4.1 of the U 2/20 judgement.

[12] Judgement of Xero Flor in Poland sp. z o.o. v. Poland of 7 May 2021, file ref. no. 4907/18; see also judgement of the Constitutional Tribunal of 24 November 2021 in file ref. no. K 6/21.

[13] Dz.U. 1990, No. 74, item 439.

[14] E.g.. *The Treatment of Polish Nationals in Danzig Case*, PCIJ (1932) Series A/B no. 44, 24.

[15] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden–Boston 2009, p. 370.

land, "agreements must be kept", which requires the state to take all necessary steps to comply with international obligations, including at the level of domestic law[16]. The principle is reinforced by the principle of the primacy of international law over domestic law, as expressed, for example, in Art. 27 of the Vienna Convention; nevertheless, this principle applies to international relations and not to domestic relations[17], and thus states that in the international legal order international law takes precedence over the domestic law of the states[18]. As a consequence, the resolution of conflicts between national and international law will depend on the legal order in which the authority responsible for resolving such conflicts is located[19]. The obligation arising from Article 9 of the Constitution for public authorities, including the President of the Republic of Poland, to observe international law may consequently be "overruled" by a judgement of the Constitutional Tribunal declaring a given provision of the Convention unconstitutional. Then the obligation arising from Art. 9 of the Constitution would be in a way "overriden" by the obligation to observe Art. 8 of the Constitution consisting in the necessity to ensure the implementation of the principle of supremacy of the Constitution in the system of sources of law of the Republic of Poland.

The judgement in the case of Dolińska-Ficek and Ozimek v. Poland has not been challenged by Poland before the High Chamber because the norms of international law, which form the basis of the commented judgement, have been challenged before the Constitutional Tribunal[20]. In the judgement file

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16 A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warsaw 2006, p. 551.

17 Ibidem.

18 "Art. 27 of the Vienna Convention merely prescribes that in the international legal order, international law prevails over the internal law of the States", A. Schaus, *Article 27. Internal law and observance of treaties* [in:] *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, part. III, eds. O. Corten, P. Klein, Oxford 2011 (series: Oxford Commentaries on International Law), p. 688 et seq. (31.05.2021).

19 Ibidem; on the subject of the application of the Convention by the Constituional Tribunal see. J. Podkowik, *Stosowanie konwencji o ochronie praw człowieka i podstawowych wolności przez Trybunał Konstytucyjny-perspektywy i granice jednolitości orzecznictwa*, [in:] Studia i analizy Sądu Najwyższego. Materiały naukowe vol. I, Warsaw 2015, e.g. pp. 104–105.

20 The Constitutional Tribunal also referred to the following ECHR judgements:

ref. no. K 7/21, the Constitutional Tribunal declared the norms of international law incompatible with the Constitution. It also stated that the effect of the Constitutional Tribunal's ruling is to render ineffective the legal norms with their source being Article 6 of the Convention. They lost their binding force with regard to Poland. Consequently, they will not come within the scope of Art. 6(1) of the Convention as a law binding on Poland under Art. 9 of the Polish Constitution, and will not have the attribute provided for in Art. 46 of the Convention (the obligation of enforceability), as having been issued on a basis outside the scope of the State's legal obligations.

IV. Conclusive remarks

To sum up, it should be noted that the current situation relating to the effects of the judgement in question and other judgements of international courts remaining within the scope of Polish judicature, boils down to creating two "parallel worlds", the reconciliation of which seems unrealistic in the current Polish political reality. One of them consists of judgements of the ECHR and the CJEU, and the other of judgements of the Polish Constitutional Tribunal. The positions of these bodies result in mutually exclusive directives to public authorities.

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