Information Note on the Court’s case-law 259

February 2022

Advance Pharma sp. z o.o v. Poland - 1469/20

Judgment 3.2.2022 [Section I]

Article 6

Civil proceedings

Article 6-1

Tribunal established by law

Manifest breaches, following legislative reform, in appointment to Supreme Court’s Civil Chamber of judges who examined applicant company’s civil appeal: violation

*Facts –* The applicant company’s cassation appeal, in civil compensation proceedings it had brought, was examined by a panel of three judges of the Civil Chamber of the Supreme Court. The judges had been newly appointed through the procedure involving the new National Council of the Judiciary (NCJ) as established by the 2017 Amending Act on the NCJ as part of the large-scale legislative reform of the Polish judicial system initiated by the government in 2017. The NCJ’s judicial members were now elected by Sejm. Pursuant to the relevant domestic provisions read as a whole, judges were appointed to all levels and types of courts, including the Supreme Court, by the President of Poland following a recommendation of the NCJ which the latter issued after a competitive selection procedure in which it evaluated and nominated the candidates.

The applicant company complained that the Civil Chamber’s judges who had examined its case, had been appointed by the President of Poland upon the NCJ’s recommendation in manifest breach of the domestic law and the principles of the rule of law, separation of powers and the independence of the judiciary.

*Law* – *Article 6 § 1*: The Court’s task in the present case, as in previous similar cases, was to assess the circumstances relevant for the process of appointment of judges to the Civil Chamber of the Supreme Court in the procedure involving the NCJ established under the 2017 Amending Act and not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole. The Court examined whether the hearing of the applicant’s case by the Civil Chamber of the Supreme Court – sitting in a formation of judges who had all been appointed in the impugned procedure – gave rise to a violation of its right to a “tribunal established by law” in the light of the criteria laid down in *Guðmundur Andri Ástráðsson v. Iceland* [GC] and as applied in *Xero Flor w Polsce sp. z o.o. v. Poland* and *Reczkowicz v. Poland*. In reaching its conclusions, the Court took into account in particular the rulings of the Polish Supreme Court and the Court of Justice of the European Union, as well as multiple reports and assessments by European and international institutions.

(a) *Whether there was a manifest breach of the domestic law* – the alleged breach was twofold:

(i) *The alleged lack of independence of the NCJ from executive and legislative powers*

The Court followed the reasoning and methodology applied in *Reczkowicz*, the alleged violation originating in the same fundamental breach of the domestic law. Given that the new judges of the Civil Chamber had been appointed through an identical procedure, all the Court’s considerations and findings in the above case as to the characteristics of the NCJ and the existence of a breach of the domestic law caused by the participation of the NCJ in the appointment procedure were equally valid in the present case. Since the NCJ, as established under the 2017 Amending Act, did not provide sufficient guarantees of independence from the legislative or executive powers, there had been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to that Chamber. The Court also noted that the Constitutional Court’s recent ruling of 24 November 2021 holding Article 6 § 1 of the Convention and the right to a fair trial enshrined therein to be incompatible with various provisions of the Polish Constitution, had been given in an apparent attempt to prevent the execution of the Court’s judgment in *Xero Flor w Polsce sp. z.o.o* under Article 46 of the Convention and to restrict the Court’s jurisdiction under Articles 19 and 32 of the Convention in respect of Poland.

(ii) The *lack of effective judicial review of NCJ resolution no. 330/2018 and the President of Poland’s appointment of judges to the Civil Chamber despite the stay of the implementation of that resolution*

On 27 September 2018 the Supreme Administrative Court, had issued an interim order staying the implementation of NCJ resolution no. 330/2018 of 28 August 2018 - which had recommended candidates for seven posts of judges in the Civil Chamber of the Supreme Court, including those who had dealt with the applicant company’s case, - pending its examination of a number of appeals by a number of non-recommended candidates contesting the legality of the resolution. Notwithstanding the stay and the fact that the appeals were pending, the President of Poland had proceeded with the appointment of the candidates. Further, whilst the judicial review of the above resolution was still ongoing, by virtue of new amendments introduced by the 26 April 2019 Act, the hitherto existing right to appeal against NCJ resolutions concerning appointment to the Supreme Court in individual cases was extinguished and any pending appeals against such resolutions had to be discontinued by operation of law.

The executive power by proceeding with the above appointments despite the pending judicial review of resolution no. 330/2018, and the legislature, by intervening in pending judicial proceedings in order to extinguish any legal or practical effects of judicial review, had acted in manifest disregard for the rule of law and in flagrant breach of the requirements of a fair hearing within the meaning of Article 6 § 1. They had demonstrated an attitude which could only be described as one of utter disregard for the authority, independence and role of the judiciary. Assessing all the circumstances as a whole, the Court concluded that their actions had amounted to a manifest breach of the domestic law. Deliberate disregard of a binding judicial decision and interference with the course of justice, in order to vitiate and render meaningless a pending judicial review of the appointment of judges, could only be characterised as blatant defiance of the rule of law.

(b) *Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges* – The manifest breach of domestic law had adversely affected the fundamental rules of procedure for the appointment of judges to the Supreme Court’s Civil Chamber. That was because the recommendation for the appointments- a condition *sine qua non* for appointment by the President of Poland – had been entrusted to the NCJ, which, as established under the 2017 Amending Act, lacked sufficient guarantees of independence from the legislature and the executive. That breach had been compounded and, in effect, perpetuated by the legislature’s and the President of Poland’s actions taken in blatant defiance of the rule of law in order to render meaningless the judicial review of the NCJ’s resolution recommending the candidates.

By virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers, had achieved a decisive influence on the composition of the NCJ. The Act had practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard enabling the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities had taken advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ. This situation had been further aggravated by the subsequent appointment of judges to the Civil Chamber by the President of Poland, carried out in flagrant disregard for the fact that the implementation of NCJ resolution no. 330/2018 recommending their candidatures had been stayed.

A procedure for appointing judges which, as in the present case, disclosed undue influence of the legislative and executive powers on the appointment of judges was *per se* incompatible with Article 6 § 1 and, as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed.

Thus, the breaches in the procedure for the appointment of seven judges to the Civil Chamber, including three judges who had dealt with the applicant company’s case, were of such gravity that they impaired the very essence of the applicant company’s right to a “tribunal established by law”.

(c) *Whether the allegations regarding the right to a “tribunal established by law” were effectively reviewed and remedied by the domestic courts* – NCJ resolution no. 330/2018 had been subject to judicial review by the Supreme Administrative Court which, on 6 May 2021, had given judgment quashing that resolution. However, the Polish authorities’ actions, taken in manifest breach of the domestic law, had rendered that judicial review meaningless and devoid of any purpose. Further, having regard to its decision to reject the Government’s non-exhaustion objection as in the particular circumstances a constitutional complaint contesting the rules governing the procedure of appointment lacked sufficiently realistic prospects of success, the Court found that no remedies were provided to the applicant company.

*Overall*: The formation of the Civil Chamber of the Supreme Court, which examined the applicant company’s case, was not a “tribunal established by law”.

*Conclusion*: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 46: The Court refrained from giving any specific indications as to the type of individual and/or general measures that might be taken in order to remedy the situation and limited its considerations to general guidance. Its 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 Article 6 § 1 would have consequences for its assessment of similar complaints in other pending or future cases. The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court’s Civil Chamber, and in *Reczkowicz* in respect of the Disciplinary Chamber of that court, and in *Dolińska-Ficek and Ozimek v. Poland* of the Chamber of Extraordinary Review and Public Affairs, had already adversely affected existing appointments and were capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts.

The violation of the applicant company’s rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State was required.

In that context, various options were open to the respondent State; however, it was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction as established by the Court and might in the future result in potentially multiple violations of the right to an “independent and impartial tribunal established by law”, thus leading to further aggravation of the rule of law crisis in Poland. As regards the legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ’s recommendation and the effects of such judgments in the Polish legal order, the Court at this stage noted that one of the possibilities to be contemplated by the respondent State was to incorporate into the necessary general measures the Supreme Court’s conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations.

That being said it fell upon the respondent State to draw the necessary conclusions from the judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

(See also *Guðmundur Andri Ástráðsson* *v. Iceland* [GC], 26374/18, 1 December 2020, [Legal summary](http://hudoc.echr.coe.int/eng?i=002-13028); *Xero Flor w Polsce sp. z o.o. v. Poland*, 4907/18, 7 May 2021, [Legal Summary](http://hudoc.echr.coe.int/eng?i=002-13246); *Reczkowicz v. Poland*, 43447/19, 22 July 2021, [Legal Summary](http://hudoc.echr.coe.int/eng?i=002-13371); *Dolińska-Ficek and Ozimek v. Poland*, 49868/19 and 57511/19, 8 November 2021, [Legal Summary](https://hudoc.echr.coe.int/eng?i=002-13490))

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