Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 15 April 2021(1)

Case C-487/19

W.Ż.

joined parties:

Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokurator Prokuratury Krajowej Bożena Górecka,

Rzecznik Praw Obywatelskich

(Request for a preliminary ruling from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU – Article 267 TFEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Court established by law – Principle of judicial independence – Appointment to the position of Supreme Court judge by the President of the Republic on the proposal by the National Council of the Judiciary – Judge appointed despite a pending legal action attacking the resolution of the National Council of the Judiciary proposing the appointment of the interested party and of a judicial decision ordering the suspension of that resolution)

1. In the present reference for a preliminary ruling, the Sąd Najwyższy (Supreme Court, Poland; 'the Supreme Court' or 'the referring court') seeks an interpretation of Article 2 TEU, Article 6(1) and (3) TEU and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. The reference arose in the context of proceedings brought by judge W.Ż. seeking the recusal of judges of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs, Supreme Court, Poland; the 'CECPA'), who are called upon to rule on an action brought by W.Ż. against a resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') relating to W.Ż.'s transfer between two divisions of the court to which he is assigned. That transfer amounts to a de facto demotion, in so far as he has been transferred from the second-instance division to a first-instance division of the court. W.Ż. was a member and spokesperson of the former KRS and has publicly criticised the judicial reforms in Poland carried out by the ruling party.

3. In the present Opinion, the national legal framework does not need to be reproduced since that is not strictly necessary for the purposes of the legal analysis. (2)

I. The facts giving rise to the dispute in the main proceedings and the question referred for a preliminary ruling

4. W.Ż. is a judge of the Sąd Okręgowy (Regional Court, Poland) in K. Pursuant to a decision of 27 August 2018, he was transferred from the division of that court where he had sat until that date to another division of that court. W.Ż. brought an appeal against that decision before the KRS, which, by means of its resolution of 21 September 2018 ('the contested resolution'), discontinued the proceedings concerning his appeal. On 14 November 2018, W.Ż. brought an appeal against the contested resolution before the Supreme Court.

5. After lodging that appeal, W.Ż. submitted a petition for all judges of the Supreme Court sitting in the CECPA of that court to be excluded from hearing his appeal. He argued that, given its systemic framework and the manner in which its members were elected by the KRS, which had been established contrary to the Constitution, the CECPA could not examine the appeal impartially and independently in any composition that included its members.

6. The motion to appoint all the judges sitting in the CECPA who were included in the petition for exclusion was included in Resolution No 331/2018 of the KRS of 28 August 2018 ('KRS Resolution No 331/2018'). An appeal was brought against that resolution in its entirety before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland; 'the Supreme Administrative Court') by other parties to the appointment proceedings in respect of whom the KRS had not submitted a motion to the Prezydent Rzeczypospolitej Polskiej (President of the Republic of Poland; 'the President of the Republic') to appoint them as judges of the Supreme Court.

7. In its decision of 27 September 2018, the Supreme Administrative Court stayed the execution of KRS Resolution No 331/2018. Despite the fact that an appeal had been brought against that resolution in its entirety and that its execution had been stayed by the Supreme Administrative Court, and despite the fact that the proceedings before the Supreme Administrative Court had not been concluded, on 10 October 2018, the President of the Republic handed letters of appointment as judges in the CECPA of the Supreme Court to the persons included in the petition for exclusion filed by W.Ż.

8. On 21 November 2018, the Supreme Administrative Court made a referral for a preliminary ruling to the Court of Justice in the context of another KRS resolution (Resolution No 317/2018) proposing to the President of the Republic the appointment of certain persons as judges of the Supreme Court. On 22 November 2018, the proceedings before the Supreme Administrative Court in cases concerning appeals against KRS Resolution No 331/2018 were adjourned by that court until the Court of Justice would rule on the questions referred to it for a preliminary ruling on whether the provisions of Article 44(1b) and Article 44(4) of the Law on the KRS were compatible with EU law (Case C-824/18 (3)).

9. Despite the ongoing proceedings, on 20 February 2019, the President of the Republic handed a letter of appointment as judge in the CECPA to A.S. (the judge in charge of examining W.Ż.'s appeal, sitting in a single-judge formation).

10. The motion for the appointment of A.S. was included in KRS Resolution No 331/2018, and therefore the appointment of A.S. also took place after an appeal had been brought against KRS Resolution No 331/2018 in its entirety before the Supreme Administrative Court and after that court had stayed the execution of that resolution, and although the proceedings before that court had not been concluded. In view of the fact that A.S. was appointed as a judge of the Supreme Court on 20 February 2019, that is, after the petition for exclusion had been filed by W.Ż. on 14 November 2018, A.S. was not included in that petition.

11. On 8 March 2019, shortly before the hearing in the Civil Chamber of the Supreme Court was scheduled to begin, the CECPA, composed of a single person (A.S.), *without having at its disposal the I NO 47/18 case files*, issued an order in the case, dismissing the appeal lodged by W.Ż. as inadmissible ('the contested order'). In that order, *the public prosecutor's position was accepted without permitting W.Ż. to submit any observations*. Moreover, the CECPA found that W.Ż's appeal was inadmissible *despite the fact that proceedings had already*

been brought before the Civil Chamber of the Supreme Court by W.Ż. for the exclusion of all the judges of the CECPA.

12. The Supreme Court bench which heard the petition for exclusion at the hearing on 20 March 2019 concluded that the issuing of the order of 8 March 2019 in Case I NO 47/18 (before the petition for exclusion could be examined) breached Article 50(3)(2) of the Code of Civil Procedure, Article 45(1) of the Constitution of the Republic of Poland, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and the second paragraph of Article 47 of the Charter.

13. The Supreme Court also addressed the question of whether A.S., in view of the circumstances in which he was appointed, was in fact a judge of the Supreme Court. This is relevant to the assessment of whether the order of 8 March 2019 in Case I NO 47/18 issued by the Supreme Court composed of a single person (A.S.) legally exists as a court ruling. The determination of that question is relevant to the outcome of the hearing of the petition for exclusion. If the order of 8 March 2019 legally exists, the proceedings in the case concerning exclusion must be terminated (discontinued) as being devoid of purpose. However, if the order of 8 March 2019 does not legally exist, the petition for exclusion must be heard.

14. In considering this matter, the Supreme Court, having serious doubts as to how to proceed, presented the following legal question to a bench of seven judges of the Supreme Court: does a decision issued by a bench consisting of a single person exist in a legal sense in a case where that person was appointed as a judge of the Supreme Court, despite the fact that the KRS resolution including the motion to appoint that person had been appealed to the Supreme Administrative Court, that the execution of that resolution had been stayed and that the proceedings before the Supreme Administrative Court had not been concluded by the time that the letter of appointment was delivered to that person?

15. The seven judges of the Supreme Court consider that a ruling by the Court of Justice is necessary for them to be able to rule upon the above legal question. The consequence of the answer of the Court of Justice may be that the rulings issued by the Supreme Court composed exclusively of persons appointed in such circumstances are deemed to be legally non-existent, since they will have been issued by a person or by persons who are not judges.

16. The referring court found that, in the procedure by which A.S. was appointed as a judge of the Supreme Court, there was a flagrant and deliberate breach of Polish laws relating to judicial appointments.

17. Therefore, the Civil Chamber of the Supreme Court, in its enlarged formation of seven judges, decided to stay proceedings and refer to the Court of Justice the following question for a preliminary ruling:

> 'Should Articles 2, 6(1) and (3) and the second subparagraph of Article 19(1) [TEU], in conjunction with Article 47 [of the Charter] and Article 267 [TFEU], be interpreted as meaning that a court composed of a single person who has been appointed to the position of judge in flagrant breach of the laws of a Member State applicable to judicial appointments – which breach included, in particular, the appointment of that person to the position of judge despite a prior appeal to the competent national court [the Supreme Administrative Court] against the resolution of a national body [the KRS], which included a motion for the appointment of that person to the position of judge, notwithstanding the fact that the implementation of that resolution had been stayed in accordance with national law and that proceedings before the competent national court [the Supreme Administrative Court] had not been concluded before the delivery of the appointment letter – is not an independent and impartial tribunal previously established by law within the meaning of EU law?'

II. Analysis

A. The jurisdiction of the Court

18. The public prosecutor submits, in essence, that the Court lacks jurisdiction to rule on the question referred, as the European Union has no competence in relation to the modalities of procedures for the appointment of judges, the validity of such appointments, the procedures for the recusal of judges or for the determination of the potential legal inexistence of decisions of national courts. Moreover, the Court is not empowered to rule on whether a certain person does or does not have the status of a national judge.

19. However, first, suffice it to point out that, 'although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU'. (4) That may be the case, in particular, as regards national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures. (5)

20. Secondly, the applicant in the main proceedings (W.Ż.) – who, in his position as a judge, may rule on questions related to the application and interpretation of EU law – is directly seeking the protection deriving from EU law in so far as the administrative measures taken against him (what appears to be a de facto demotion) may have a negative impact on his independence. The appeal brought by W.Ż. – which seeks the protection of his professional status – must also comply with EU law: in particular, with the requirement that only a judge or court complying with the requirements of Article 19 TEU and Article 47 of the Charter may rule on such an action.

21. Thirdly, the fact remains that the arguments advanced by the public prosecutor do in fact concern the very scope of the provisions of EU law discussed here and, thus, concern an interpretation of those provisions. An interpretation of that nature clearly falls within the jurisdiction of the Court under Article 267 TFEU. (6)

B. Admissibility of the question referred

22. The Polish Government raises a number of arguments why, in its view, the question referred is inadmissible. In essence, it contends that this is so because: (i) the question does not seek the interpretation of EU law, but merely seeks to reaffirm the thesis of the referring court that the judge concerned is not independent, impartial or legally appointed – all of which requires inter alia the interpretation of national law and a determination of facts; (ii) a reformulation by the Court of Justice of the question referred by the Supreme Court is impossible, as the order for reference makes clear that it is asking the Court of Justice to deliver a judgment assessing facts and ruling that the judge concerned is not a tribunal established by law; (iii) an answer to the question referred is not necessary in order for the referring court to rule on the case in the main proceedings (in particular, the appeal of W.Ż. was already dismissed as inadmissible by the contested order and, in any event, the referring court has no competence to adopt a decision which would amount to a forfeiture of a judge's mandate); and (iv) the EU law provisions cited in the question referred are not applicable to the case in the main proceedings.

23. Aside from arguments analogous to those of the Polish Government as set out above, the public prosecutor also contends that the question referred for a preliminary ruling is inadmissible in so far as: (i) the petition for exclusion of the CECPA judges at issue in the main proceedings should have been declared inadmissible under national case-law; (ii) in ruling upon an action such as the one at issue here, brought against a resolution of the KRS, the Supreme Court is not acting as a court called upon to rule on a dispute on the basis of legal provisions, but as an organ of legal protection intervening in a procedure which seeks the adoption of an 'abstract' resolution; (iii) the interpretation sought here is inapplicable in the main proceedings as – in relation to the question whether the judge who handed down the contested order is independent and impartial and the legal foundation or the possible inexistence of that order – the Court of Justice cannot deliver a judgment which would leave no doubt as to the solution in the main proceedings, but could merely provide legal guidelines on the basis of which the national court would have to give its decision, whereas the question referred is merely based on subjective and unsubstantiated allegations that the national procedure of appointment was infringed; and (iv) the reasoning of the order for reference does not comply with Article 94 of the Rules of Procedure of the

Court of Justice, as the national law cited by the referring court is selective and biased and does not substantiate the alleged breach of the national appointment procedure.

24. First of all, as a general remark, to my mind, the Court is clearly competent and is, in fact, the only court competent to answer a question asking what the criteria that an independent court or tribunal must fulfil under EU law (7) are and, subsequently, to define what consequences should follow for the decisions taken by a person or body which does not fulfil those criteria. For those reasons, questions such as the one referred must also be declared to be admissible.

25. Next, contrary to all the arguments of the Polish Government and of the public prosecutor referred to above, I agree with the referring court, the Commission and the Rzecznik Praw Obywatelskich (Ombudsman, Poland) that the answer to the question referred – that is, whether the judge concerned did indeed have the status of a judge who had the power to adopt the contested order – is necessary for the purposes of resolving the case in the main proceedings.

26. This is so because – contrary to the situation in *Miasto Łowicz* (8) – the interpretation of the second subparagraph of Article 19(1) TEU will have a direct impact on the decision of the referring court, as it allows that court to decide the question before it *in limine litis* and it is on the basis of the answer to that question that it will depend whether there is (or not) a need to adjudicate on the petition for exclusion of the judges of the CECPA in a case where the contested order would legitimately end the proceedings brought by W.Ż. or whether, on the contrary, it is necessary to conclude that the contested order does not exist in law and, therefore, that the action and the petition for exclusion will have to be adjudicated upon.

27. Such a question *in limine litis* may concern, in particular, a procedural aspect of the main proceedings (9) or the referring court's competence to rule on that action. (10) In that respect, the present case is not unlike the cases which gave rise to the judgment in *A. K. and Others*, paragraph 99 of which states: 'in the present cases, the Court notes … that, by the questions which the referring court referred to the Court for a preliminary ruling and by the interpretation of EU law sought in the present cases, the referring court wishes to be instructed not as to the substance of the cases before it which do in turn raise other questions of EU law, but as regards a procedural problem which it must answer *in limine litis*, since that problem relates to the jurisdiction of that court to hear and rule on those cases'.

28. Indeed, the answer given by the Court will allow the referring court to rule upon the status of the person appointed within the Supreme Court and the status of the CECPA, as well as the validity of A.S.'s order of 8 March 2019 (on the inadmissibility of W.Ż.'s action) and, additionally, it will allow the referring court to rule upon the petition for exclusion of all the judges of the CECPA.

29. Moreover, independently of the nature of the case in the main proceedings, the second subparagraph of Article 19(1) TEU is applicable in the present case given that the CECPA is a court which – aside from ruling on essential questions concerning the State's role under the rule of law such as validating the results of elections in Poland – may be called upon to rule on questions concerning the application or interpretation of EU law, not least because of its competence in the areas of competition law, energy regulation, telecommunications, rail transport and media control. (11)

C. Substance

1. Brief summary of the arguments of the parties

30. W.Ż., the public prosecutor, the Ombudsman, the Polish Government and the European Commission submitted observations to the Court.

31. The Polish Government argues, in essence, that the question referred should be answered to the effect that the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU, must be interpreted as meaning that the CECPA is an independent court and that the status of its judges cannot be called into question by the referring court in a case before it. Indeed, (i) the contested resolution is, in accordance with Article 44(1d)

of the Law on the KRS, now final vis-à-vis the participants in the procedure who were proposed, and so nothing stands in the way of their appointment and the Supreme Administrative Court has no competence to rule on that part of the resolution or to suspend its execution; (ii) the provisions under which the Supreme Administrative Court was seised were declared unconstitutional by the judgment of 25 March 2019 of the Trybunał Konstytucyjny (Constitutional Court, Poland; 'the Constitutional Court') and the proceedings introduced by that action were discontinued by operation of law in view of that judgment and of Article 3 of the Law of 26 April 2019; and (iii) the procedure for the appointment of the judges of the CECPA pursuant to Article 179 of the Constitution and in the Law on the KRS is not different to that in other Member States, showing even stricter requirements than some of those national systems, and has no impact on the independence of appointed judges which is in any case fully guaranteed by Articles 178 to 181 of the Constitution, which guarantees an appointment for an unlimited period, irremovability, immunity in criminal law and remuneration, whilst requiring judges to be, inter alia, apolitical.

32. The public prosecutor did not submit observations on the substance of the question referred and all his observations focus on the competence of the Court and on the admissibility of the reference. He added that the appointment procedure of the judge concerned infringed no provision of Polish law and that the court ruling on W.Ż.'s case has all the attributes of independence, impartiality and origin in law.

33. W.Ż. points essentially to the *Ástráðsson* case-law of the European Court of Human Rights ('the ECtHR') and the case-law of the Court of Justice (the judgment in *A. K. and Others*), according to which the guarantees of independence and impartiality stemming from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, read in the light of Article 6 of the ECHR, require the existence of rules governing the appointment of judges, which preclude any reasonable doubt, in the minds of the subjects of the law, as to the imperviousness of the judges concerned to interests, in particular, those of the legislative and executive powers. W.Ż. argues that the Court of Justice ruled that those requirements are not met where the objective circumstances in which a court was formed, its characteristics and the means by which its members have been appointed are capable of leading to an absence of appearance of independence or impartiality of that court which may prejudice the trust which justice in a democratic society must inspire in subjects of the law (the judgment in *A. K. and Others*). However, according to W.Ż., neither the KRS nor the members of the CECPA (whose appointment the KRS proposed to the President of the Republic) satisfy those requirements.

34. Indeed, it follows from the Court's case-law (the judgment in *A. K. and Others*) that, 'although one or other of the factors [of the modifications of the judicial system recently introduced] may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body' such as the CECPA and its judges. The various criteria resulting from that case-law show that the new KRS involved in the appointment procedure of Supreme Court judges does not offer the necessary guarantees of independence which are necessary so as to ensure that the CECPA of the Supreme Court, created *ex nihilo*, and its members may be considered to be independent and impartial as required by EU law.

35. The Ombudsman and W.Ż. submit, in essence, that, in view of the fact that the judge concerned was appointed in flagrant breach of national law and of the principle of effective judicial protection and as he constitutes neither a court or tribunal established by law nor an independent and impartial court under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, that judge could not rule on an action within the scope of EU law such as the one at issue in the main proceedings. In such a case, moreover, any national provision or practice (whether legislative, administrative or judicial) is incompatible with the inherent requirements of EU law if it diminishes the effectiveness of EU law by refusing the competent judge, when applying EU law, the power to do (at the moment of that application) all that is necessary to disapply national provisions preventing the full effectiveness of EU legal norms which are directly applicable (such as the second subparagraph of Article 19(1) TEU and Article 47 of the Charter), without the need to ask for or await the revocation of the act concerned by the legislative route or any other constitutional procedure. (12)

36. The Commission contends, in essence, that the first limb of the question referred should be answered in the negative. In contrast, it contends that the second limb calls for an affirmative answer.

2. Assessment

(a) Introduction: the referring court has already established that in the present case there were flagrant and deliberate breaches of Polish laws relating to judicial appointments

37. By its question, which relates to Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Civil Chamber of the Supreme Court asks the Court whether those provisions of EU law preclude a situation where the President of the Republic appoints a person to the position of judge of the Supreme Court, in the CECPA created ex novo and where: (i) the KRS resolution proposing the appointment of the judge concerned to that position forms the subject matter of an action pending before the Supreme Administrative Court (first limb of the question referred); and (ii) the Supreme Administrative Court, in the course of that action, stayed the execution of that resolution (second limb).

38. The question referred must be examined, inter alia, by having regard to the following related cases before the Court: (i) Case C-824/18 (see my Opinion of 17 December 2020 and the Court's judgment of 2 March 2021 (13)), in which the Supreme Administrative Court questioned the independence of national courts as EU courts in the context of judicial review of a KRS resolution proposing to the President of the Republic candidates for appointment as judges of the Supreme Court; (ii) Case C-508/19 (still pending, see my parallel, separate Opinion in that case delivered also today, on 15 April 2021), submitted to the Court by the Supreme Court, where among the legal problems concerned is the manifestly unlawful appointment of a judge who ruled on the interpretation and application of EU law and the effects of such an appointment on the decisions handed down by such a judge; and (iii) Case C-791/19 (still pending, see my Opinion in that case to be delivered on 6 May 2021, where I will also deal with the issue concerning the right to a court established by law as part of the guarantees under the second subparagraph of Article 19(1) TEU).

39. The referring court has already established that in the appointment procedure by which A.S. was appointed as a judge of the Supreme Court there were flagrant and deliberate breaches of Polish laws relating to judicial appointments.

40. Those breaches consisted primarily in the fact that A.S. was appointed as a judge of the Supreme Court by the President of the Republic despite the fact that other parties to the appointment procedure had previously appealed to the Supreme Administrative Court against KRS Resolution No 331/2018, which included the motion to appoint him, and the proceedings before the Supreme Administrative Court had not been concluded prior to the delivery of the letter of appointment to him.

41. The referring court explains, first, that, pursuant to Article 179 of the Constitution, judges in Poland are appointed for an indefinite period by the President of the Republic on the motion of the KRS. Those two complementary bodies need to work together in chronological terms. The KRS motion is merely an opinion, but gives rise to certain powers – only after it has been submitted to the President of the Republic does the President's competence to appoint the person included in the motion to the position of judge arise.

42. The motion to appoint a person as a judge submitted by the KRS to the President of the Republic is preceded by appointment proceedings, which are regulated by legislation in accordance with the constitutional requirements. In order to ensure that the rights of candidates who participate in appointment proceedings are protected, including their right of access to the public service on equal terms (Article 60 of the Constitution) and their right of access to a court in each individual case (Articles 45(1) and 77(2) of the Constitution), a judicial review of whether KRS resolutions concerning motions to the President of the Republic for appointment to the position of judge comply with the law has been provided for (Article 44 of the Law on the KRS). With respect to candidates applying to become Supreme Court judges, this review has been entrusted to the Supreme Administrative Court – which will have to take into account the Court's answers to its questions referred for a preliminary ruling in Case C-824/18 (14) and rule on the compatibility of those national provisions

(Article 44(1b) and (4) of the Law on the KRS) with EU law and ensure that national law is interpreted in conformity with EU law.

43. Secondly, in a situation where, prior to the delivery of the letter appointing a person as a judge of the Supreme Court, the resolution containing the motion to appoint that person has been appealed before the Supreme Administrative Court, the legal status of the resolution becomes dependent on that court's ruling. Where the appeal is allowed, it may subsequently be found that a prerequisite for the appointment of that judge is wanting. Therefore, until the proceedings before the Supreme Administrative Court are concluded, the President of the Republic may not use his prerogative to appoint a person as judge due to the absence of a stable basis on which the exercise of that prerogative rests.

44. The breaches of Polish laws relating to judicial appointments in the present case took place in a context where more measures were being introduced seeking to prevent effective legal review of KRS resolutions proposing appointments to the position of judge of the Supreme Court. (15)

45. In that respect, the referring court points out that, aside from the issues under review in that case, there are other irregularities relating to the appointment at issue in the main proceedings, such as the fact that the members of the KRS who are judges were designated by the Sejm (Lower Chamber of the Polish Parliament) and not, as was the case in the past, designated by their peers. Moreover, they were designated by shortening the duration of the mandate of the previous KRS, despite the fact that that duration is guaranteed in the Constitution. These issues were addressed in the judgment in *A. K. and Others*.

(b) Does A.S. sitting in a single-judge formation constitute a tribunal established by law?

46. First of all, as regards Article 47 of the Charter as a standalone provision in a case, as is apparent from the first paragraph of that provision, the person invoking that right is relying on rights or freedoms guaranteed by EU law. (16)

47. However, it is not apparent from the information in the order for reference that the dispute in the main proceedings concerns the recognition of a right conferred on the applicant in the main proceedings under a provision of EU law. It follows that Article 47 of the Charter is not applicable in the present case.

48. Next, as pointed out by the Ombudsman, the national proceedings which led to the submission of the question referred for a preliminary ruling concern an interference in the professional career of a national judge carrying out his functions in a court which forms part of the system of Polish ordinary courts. That judge may, therefore, be called on to rule on questions of application or interpretation of EU law and is also a 'court' within the meaning of Article 267 TFEU, and forms part of the Polish system of legal remedies 'in the fields covered by Union law' under the second subparagraph of Article 19(1) TEU. However, that provision obliges the Member State concerned to guarantee that such a judge satisfies the requirements inherent in effective judicial protection and, in particular, the requirement of independence and impartiality. That necessitates that W.Ż. is protected against transfers, which should, like dismissals, be subject to guarantees that are sufficient to rule out any reasonable doubt, in the minds of the subjects of the law as to the imperviousness of the judges concerned to external factors.

49. Given that W.Ż. comes under the scope of the protection afforded in the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, he has a right under those provisions – flowing directly from EU law (17) – to effective judicial protection which implies that his action must be examined by a body which has the status of a 'court or tribunal' as defined by EU law, that is, a body which is independent, impartial and established by law. (18) In this case, as the KRS is not a court or a tribunal, the only judicial body which could respect the above requirements is the Supreme Court as the only and final judicial instance called on to verify whether the interference in W.Ż.'s professional status did not undermine the guarantees which he has under those same provisions, read in conjunction with Article 6 of the ECHR, which requires the resolution of the question whether the judge concerned (A.S.) satisfied those requirements.

(1) First limb of the question referred: appointment of judges before the Supreme Administrative Court gave a ruling in the pending action attacking KRS resolution No 331/2018

50. The salient point here is whether the fact that there was an ongoing judicial review of KRS resolutions (adopted in the course of the Supreme Court appointment procedure) has (or should have) suspensory effect.

51. The Commission submits that it seems that Article 184 of the Constitution provides that the Supreme Administrative Court exercises judicial review within the limits which are established by law and it would appear to follow from Article 44(1b) and (4) of the Law on the KRS that an action against a KRS resolution does not have suspensive effect in relation to the part of that resolution proposing the appointment of a person to the position of judge of the Supreme Court.

52. However, I consider that the Commission's assessment of the first limb of the question referred is specious, not least because of the general context present in Poland. Indeed, as I argued in my Opinion in *A.B. and Others* and as the Court has confirmed in its judgment in that case in the meantime, (19) an appeal such as that brought before the Supreme Administrative Court on the basis of Article 44(1a) to (4) of the Law on the KRS is devoid of any real effectiveness and offers only the appearance of a judicial remedy.

53. That is so, in particular, on account of the provisions of Article 44(1b) and (4) of the Law on the KRS, from which it follows, in essence, that, notwithstanding the lodging of such an appeal by a candidate who has not been put forward for appointment by the KRS, the resolutions of the KRS will always be final as regards the decision contained in those resolutions to put forward candidates for appointment, since those candidates are then liable – as was the case here – to be appointed by the President of the Republic to the positions concerned without waiting for the outcome of that appeal. In those circumstances, it is clear that any annulment of the decision contained in such a resolution not to put forward an applicant for appointment at the end of the procedure initiated by him or her will still have no real effect on his or her situation as regards the position to which he or she aspired and which will thus already have been filled on the basis of that resolution.

54. As the Court explains in paragraphs 159 to 164 of the judgment in *A.B. and Others*, account must be taken of the following: (i) the national provisions at issue have significantly altered the state of national law previously in force; (ii) their effect is to undermine the effectiveness of the judicial review provided for until then in the national legislation; (iii) those provisions reduced the intensity of the judicial review of KRS resolutions which previously prevailed; (iv) the restrictions introduced in Article 44(1a) to (4) of the Law on the KRS concern only appeals brought against resolutions of the KRS relating to applications for judicial posts at the Supreme Court; (v) the contextual factors associated with all the other reforms which have recently affected the Supreme Court and the KRS (see paragraphs 130 to 135 of the judgment in *A.B. and Others*) must also be taken into account; and (vi) the provisions of Article 44(1b) and (4) of the Law on the KRS were inserted by the Law of 20 July 2018 amending the Law on the system of ordinary courts and certain other laws and entered into force on 27 July 2018, that is to say very shortly before the KRS in its new composition was called upon to decide on the applications submitted in order to fill numerous judicial positions at the Supreme Court which have been declared vacant or newly created as a result of the entry into force of the New Law on the Supreme Court, and, in particular, on the applications of the applicants in the main proceedings in case *A.B. and Others*.

55. Moreover, as a result of further legislative amendments, as of 23 May 2019 the possibility of appealing against resolutions of the KRS in individual cases concerning appointment to the position of judge of the Supreme Court was completely excluded. Suffice it to point out here that it follows from my Opinion and from the judgment in *A.B. and Others* that successive amendments to the Law on the KRS which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law (see the analysis underlying the answer to the third question referred in that case, in particular paragraph 108 et seq. of that judgment).

56. It follows from the foregoing that – while it will be for the referring court to make its own assessment, – it is my opinion that the retrograde impact of the national provisions concerned on the effectiveness of the judicial remedy available against the resolutions of the KRS proposing the appointment of judges to the Supreme Court infringes the second subparagraph of Article 19(1) TEU.

57. In making its assessment the national court will need to have regard to the guidance provided here and in the judgment *A.B. and Others* and to any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned. In addition, the court will need to assess whether national provisions, such as those contained in Article 44(1a) to (4) of the Law on the KRS, are such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and as to their neutrality with respect to any interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

58. Indeed, in the general context present in Poland, the second subparagraph of Article 19(1) TEU requires that the decisions adopted in the course of the appointment procedure for judges in the Supreme Court be subject to judicial review with suspensory effect.

59. Indeed, in its judgment of 27 May 2008 (Case SK 57/06) the Constitutional Court ruled that the limitation of the access to a judicial review of KRS resolutions not to propose to the President of the Republic a candidacy to the position of judge was unconstitutional.

60. As the Ombudsman rightly submitted, in accordance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the appointment process must not give rise to reasonable doubts, in the minds of the subjects of the law, as to the imperviousness of the judges concerned to external factors, once the interested parties are appointed as judges. Therefore, given the key role played by the KRS in the judicial appointment process and the absence of legal review of the decisions of the President of the Republic appointing a judge, it is necessary that effective legal review exists for the judicial candidates. That is particularly the case where, as in this instance, the State, by way of its conduct, is interfering in the process of appointing judges in a manner which risks compromising the future independence of those judges. The required legal review should: (a) happen before the appointment, as the judge is thus protected a posteriori by the principle of irremovability; (b) cover at least an ultra vires or improper exercise of authority, error of law or manifest error of assessment; and (c) allow clarification of all the aspects of the appointment procedure, including the requirements under EU law, if appropriate, by submitting questions to the Court inter alia concerning the requirements stemming from the principle of effective judicial protection. (20)

61. As the referring court stated in the order for reference, there has been a twofold breach of Article 179 of the Constitution. First, the President of the Republic appointed A.S. in circumstances in which the legal status of KRS Resolution No 331/2018, which included the motion for his appointment, was not permanent (paragraph 24 et seq. of the order for reference). Moreover, in the referring court's view, there has also been a breach of the principle of the separation and balancing of powers and of the principle of legality. Owing to the constitutional status of the Supreme Administrative Court as a judicial body, the fact that it has been granted the statutory competence to review – in this case – the compliance of KRS resolutions with the law, and given the need to respect the future outcome of proceedings before that court, the President of the Republic could not exercise his prerogative to appoint a person as a judge of the Supreme Court prior to the conclusion of the proceedings before that court.

62. As follows from the order for reference – and this was also confirmed by the three combined chambers of the Supreme Court in the resolution of 23 January 2020 (21) (paragraph 35, page 45) – the KRS resolutions were not definitive in that there were ongoing appeal proceedings which could result in their annulment. Such resolutions provided no grounds for a motion that the President of the Republic appoint the persons concerned to vacant judicial positions. As the resolutions were subject to appeal, the vacant judicial positions were not filled in accordance with the law.

63. As a consequence, the act of appointment as judge of the Supreme Court adopted by the President of the Republic before the Supreme Administrative Court ruled definitively on the action brought against Resolution No 331/2018 of the KRS constitutes a flagrant breach of national rules governing the procedure for the

appointment of judges to the Supreme Court, when those rules are interpreted in conformity with applicable EU law (in particular, the second subparagraph of Article 19(1) TEU).

(2) Second limb of the question referred: appointment to the post of judge of the Supreme Court despite the order of the Supreme Administrative Court suspending the execution of the KRS resolution proposing the appointment of candidates

64. It will ultimately be for the referring court to assess this point on the basis of all the relevant elements, but to my mind the irregularity committed during the appointment of the judge of the CECPA (22) in question (judge A.S.) stems a fortiori from the fact that he was appointed within the Supreme Court and within that chamber despite the decision of the Supreme Administrative Court ordering that the execution of KRS resolution No 331/2018 be stayed.

65. Therefore, I agree with the referring court and also W.Ż., the Ombudsman and the Commission that the deliberate and intentional infringement by the executive branch of a judicial decision, in particular a decision of the Supreme Administrative Court ordering interim measures (that is, the order of 27 September 2018) – manifestly with the aim of ensuring that the government has an influence on judicial appointments – demonstrates a lack of respect for the principle of the rule of law and constitutes per se an infringement by the executive branch of 'fundamental rules forming an integral part of the establishment and functioning of that judicial system' within the meaning of paragraph 75 of judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232) ('the judgment in *Simpson and HG*').

66. The interim measures in question seek to preserve the full effect of the decision of the Supreme Administrative Court in a situation where that court upholds the action contesting KRS resolution No 331/2018 and annuls the latter as requested by the applicants.

67. It is clear that the interim measures order was a legally binding definitive decision.

68. It follows that it will be for the referring court to assess, by reference to paragraph 75 of the judgment in *Simpson and HG*, whether the appointment of the judge of the CECPA in question (judge A.S.) constitutes an irregularity which creates a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge concerned.

69. The requirement that a tribunal must be established by law seeks to ensure that the organisation of the judicial system is based on rules emanating from the legislative branch and so is neither dependent on the discretion of the executive branch nor on that of the judicial authorities themselves.

70. The right to effective judicial protection under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter encompasses the right to a tribunal established by law and the scope of those provisions and of that notion must be established by having regard to the case-law of the ECtHR concerning Articles 6(1) and 13 of the ECHR.

71. It follows from the case-law of the Court of Justice that '[the] 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, in order 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'. (23)

72. The Court has also made clear that 'according to the explanations relating to Article 47 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the first and second paragraphs of Article 47 of the Charter correspond to Article 6(1) and Article 13 of the [ECHR]'. (24)

73. Article 52(3) of the Charter states that, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as those laid down by that convention.

74. In accordance with Article 6(1) of the ECHR, 'a court or tribunal must always be "established by law"'. (25)

75. As pointed out by the ECtHR, '"law", within the meaning of Article 6 § 1 of the Convention, comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular … This includes, in particular, provisions concerning the independence of the members of a court, the length of their term of office and their impartiality … In other words, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by that tribunal with the particular rules that govern it'. (26)

76. Therefore, the notion of 'establishment' includes by its very nature the procedure for the appointment of judges in the judicial system in question, which must, in accordance with the principle of supremacy of law, be conducted in strict accordance with the applicable rules of national law.

77. In *Ástráðsson v. Iceland*, the Grand Chamber of the ECtHR – largely upholding the chamber ruling of 12 March 2019 – ruled that, given the potential implications of finding a breach and the important interests at stake, the right to a 'tribunal established by law' should not be construed too broadly such that any irregularity in a judicial appointment procedure would risk compromising that right. The ECtHR thus formulated a three-step test to determine whether irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law: step 1, whether there has been a manifest breach of domestic law (§§ 244 and 245 of that judgment); step 2, whether breaches of domestic law pertained to any fundamental rule of the judicial appointment procedure (§§ 246 and 247); and step 3, whether the alleged violations of the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts (§§ 248 to 252).

78. The above principles apply not only in the case of infringements of provisions governing specifically the appointment procedure *stricto sensu*, but, as the present case shows, they must also apply in the case of disregard of judicial control introduced in relation to previous acts of appointment having a constitutive character vis-à-vis that appointment (such as KRS resolution No 331/2018 here).

79. As the Commission pointed out, in relation to the rules of appointment of judges, it is not surprising that both the ECtHR (in the judgment of 1 December 2020 *Ástráðsson v. Iceland*, § 247 (27)) and the Court (in the judgment in *Simpson and HG*, paragraph 75 (28)) make a direct link between the requirement that a tribunal must be established by law and the principle of judicial independence in the sense that it is necessary to examine whether an irregularity committed during the appointment of judges 'create[s] a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned' (*Simpson and HG*, paragraph 75).

80. It is clear from the above case-law that the requirement of a court's establishment by law and the requirements of independence and impartiality of courts and judges are intimately connected.

81. Whereas the threshold required by the Court in the judgment in *Simpson and HG* (paragraphs 75 and 79) resembles the one imposed in the judgment in *A. K. and Others*, (29) the difference between that case-law consists in the fact that the judgment in *Simpson and HG* provides criteria used for assessing a breach of the rules on the organisation of justice and, in particular, the appointment of judges: hence that judgment relates to an *infringement of rules*, whereas *A. K and Others* provides criteria for assessing whether the *legal framework concerning the organisation of justice per se* provides the necessary guarantees so as to ensure the independence and impartiality of judges.

82. Given the fact that in the present case what is at issue is an assessment of a potential irregularity in the appointment procedure of a judge (Judge A.S. of the CECPA), it is the *Simpson and HG* case-law that is directly relevant.

83. In order to determine whether such an irregularity constitutes an infringement of the requirement that a court or tribunal must be established by law within the meaning of Article 19 TEU, according to paragraph 75 of the judgment in *Simpson and HG*, it is necessary to assess whether that irregularity 'is of *such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system' (emphasis added).

84. As far as the requirement 'established by law' is concerned, as pointed out by the Ombudsman, the strict respect of appointment rules is necessary, as it gives the appointed judge the feeling that he or she obtained the position purely on the basis of their qualifications and objective criteria and at the end of a reliable procedure, avoiding the creation of any relation of dependence between the judge and the authorities intervening in that appointment. In the present case, the referring court established, in a convincing manner, on the one hand, that the effective legal review of the judicial appointment process constitutes a requirement flowing from the constitutional principles relating to the independence of the judiciary and to the subjective rights of access to a public function and to a court or tribunal and, on the other hand, that the appointment of the judge concerned arose in breach of that effective legal review and of the judicial decision having suspended the enforceability of KRS resolution No 331/2018.

85. It follows from the order for reference that the members of the CECPA of the Supreme Court, in charge of Case I NO 47/18, were appointed to that function even though the President of the Republic was aware of the Supreme Administrative Court's order of 27 September 2018. Therefore, to my mind the referring court will be able to conclude that the act of appointment was adopted in deliberate breach of that order.

86. Moreover, I consider that the act by which the President of the Republic appointed candidates indicated in KRS Resolution No 331/2018 to the post of judge of the Supreme Court undoubtedly constitutes an execution of that resolution of the KRS – despite the fact that it was not yet enforceable – which amounts to a manifest violation of the order of the Supreme Administrative Court staying the execution of that resolution while awaiting the resolution of the action pending before that court.

87. The manifest and deliberate character of the violation of the order of the Supreme Administrative Court staying the execution of KRS Resolution No 331/2018, committed by such an important State authority as the President of the Republic, empowered to deliver the act of appointment to the post of judge of the Supreme Court, is indicative of a flagrant breach of the rules of national law governing the appointment procedure for judges.

88. In relation to the criterion of gravity, to my mind, given the general context of the contentious judicial reforms in Poland, the gravity of the breaches in the present case is more serious than the irregularities at issue in *Ástráðsson v. Iceland*.

89. In any event, the very fact that the President of the Republic paid no heed to the final decision of the Supreme Administrative Court – that is, the administrative court of final instance – ordering interim measures and staying the execution of KRS Resolution No 331/2018 until that court rules on the main action pending before it, indicates the gravity of the breach that was committed.

90. The Court has already made clear that the respect by competent national authorities of a Member State of interim measures ordered by national courts constitutes 'an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded'. (30)

(c) Effects on the act of appointment of A.S. to the post of judge of the Supreme Court and/or on the order of 8 March 2019 in the light of the principles of legal certainty and of irremovability of judges

91. In order to provide the referring court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions, (31) it is necessary also to examine the effects of the finding that A.S. sitting in a single-judge formation may not constitute a tribunal established by law.

92. The second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law (judgment in *A. K. and Others*, paragraph 168 and the case-law cited), meaning that the latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU. (32)

93. As I pointed out in my Opinion in *A.B. and Others*, points 94 and 95, the Court has already implicitly recognised that the second subparagraph of Article 19(1) TEU has direct effect. This has now also been explicitly confirmed in the judgment in that case (paragraph 146): 'the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and … that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law'.

94. Hence, the second subparagraph of Article 19(1) TEU may be invoked by an individual or by a national judge in order to verify whether a judicial decision was handed down by a court or a tribunal, which fulfils the requirements of an independent and impartial court or tribunal previously established by law.

95. As the Court emphasised in the judgment in *Simpson and HG*, paragraph 57, 'the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion'.

96. If those requirements are not fulfilled, such an incompatibility may in principle be raised as a ground of annulment of the judicial decision on the basis that the formation of the court or tribunal in question was irregular.

97. Such a finding must be made within the prescribed time limits and must take into account the principle of legal certainty.

98. As the Commission pointed out, in the context of the present case, that means that when A.S. sitting in a single-judge formation gave the order of inadmissibility in question, from which no appeal lies, then – supposing that that single-judge chamber does not fulfil the requirements of a tribunal established previously by law – the legal effectiveness of that order must be limited.

99. As a result, the referring court would be able to set aside (or ignore) that order and rule on the petition for exclusion of the CECPA judges, introduced by W.Ż., so that his action may be examined by a court or tribunal which does fulfil the requirements of the second subparagraph of Article 19(1) TEU (that is, the referring court).

100. I consider that the breaches committed in the present case in the course of the judicial appointment process and the risk of W.Ż. being without effective judicial protection constitute circumstances which justify the limitation of the binding character of the order of 8 March 2019, contrary to the principle of legal certainty.

101. Next, it is necessary to address the principle of irremovability of judges and the question whether an infringement of the requirements of independence and impartiality of a court or tribunal previously established

by law, under the second subparagraph of Article 19(1) TEU, should in the present case also have *effect on the act of appointment itself* (of A.S. to the position of judge of the Supreme Court).

102. The requirements stemming from that provision, read in the light of Article 47 of the Charter, seek to protect the fundamental right of a person to effective judicial protection in the application of EU law to his or her case.

103. Such requirements therefore seek to ensure effective judicial protection of the applicant in his work as a judge and, if necessary, such protection may be ensured by the setting aside (or ignoring) of a decision given by a judge sitting in a single-judge formation who does not fulfil the requirements of the second subparagraph of Article 19(1) TEU.

104. I consider (as do the Commission and the Ombudsman) that as long as protection by way of such setting aside (or ignoring) of the contested order, resulting from the primacy of EU law, is ensured, it is not necessary for EU law to intervene in the sphere of judicial appointments, nor in the legal relationship between a judge and the Member State who appointed that judge.

105. In other words, in the present case, a potential infringement in the case in the main proceedings of the requirement for a tribunal to be previously established by law does not imply that the act of appointment of judge A.S. – the judge who gave the order of inadmissibility – is invalid per se.

III. Conclusion

106. For the reasons set out above, I propose that the Court should answer the question referred for a preliminary ruling by the Sąd Najwyższy (Supreme Court, Poland) as follows:

> The right to a tribunal established by law, affirmed by the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted in the sense that a court such as the court composed of a single person of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court (Poland) does not meet the requirements to constitute such a tribunal established by law in a situation where the judge concerned was appointed to that position in flagrant breach of the laws of the Member State applicable to judicial appointments to the Supreme Court, which is a matter for the referring court to establish. The referring court must, in that respect, assess the manifest and deliberate character of that breach as well as the gravity of the breach and must take into account the fact that the above appointment was made: (i) despite a prior appeal to the competent national court against the resolution of the National Council of the Judiciary, which included a motion for the appointment of that person to the position of judge and which was still pending at the relevant time; and/or (ii) despite the fact that the implementation of that resolution had been stayed in accordance with national law and those proceedings before the competent national court had not been concluded before the delivery of the appointment letter.

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1 Original language: English.

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2 The national provisions are cited in the order for reference and take up as many as ten pages of the reference's original language version.

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3 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153) and my Opinion in that case (C-824/18, EU:C:2020:1053).

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4 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 36 and the case-law cited).

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5 See, to that effect, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 134 to 139 and 145) ('the judgment in *A. K. and Others*').

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6 The judgment in *A. K. and Others*, paragraph 74.

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7 See on this subject, for instance, Biltgen, F., 'L'indépendance du juge national vue depuis Luxembourg', *Revue trimestrielle des droits de l'homme*, Number 123, 1 July 2020, p. 551.

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8 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234).

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9 See judgment of 20 March 1997, *Hayes* (C-323/95, EU:C:1997:169).

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10 See judgment of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432).

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11 See, in particular, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 56 and the case-law cited). See Bogdanowicz, P., and Taborowski, M., 'How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience', *European Constitutional Law Review*, Vol. 16, Issue 2, June 2020, p. 306.

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12 See, in particular, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257); and of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 57).

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13 My Opinion in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2020:1053), judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153). See also pending case C-132/20, *Getin Noble Bank*.

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14 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), and my Opinion in that case (C-824/18, EU:C:2020:1053).

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15 See judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), and my Opinion in that case (C-824/18, EU:C:2020:1053).

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16 Judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 55).

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17 Judgment in *A. K. and Others*, paragraphs 167 to 169. See inter alia Filipek, P., 'Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts', Verfassungsblog.de, 23 January 2020.

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18 Judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126, paragraph 27).

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19 This pertains to the first question referred in that case, paragraphs 156 to 167 of that judgment.

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20 The judgment in *A. K. and Others*, paragraph 134.

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21 See Garlicki, L., 'Polish Judicial Crisis and the European Court of Human Rights (a few observations on the Astradsson case)', to be published in: Bodnar, A. and Urbanik, J., *Waiting for the Barbarians – Law in the days of Constitutional Crisis*, Studies offered to Mirosław Wyrzykowski, Warsaw, 2021.

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22 In relation to the Disciplinary Chamber of the Supreme Court not constituting a court established by law, see Pech, L., *Protecting Polish judges from Poland's Disciplinary 'Star Chamber'*, https://ssrn.com/abstract= 3683683, p. 16. See also Pech, L., *The Right to an Independent and Impartial Tribunal Previously Established by Law under Article 47 of the EU Charter*, in Peers, S. et al., *The EU Charter of Fundamental Rights: A Commentary*, Hart, https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3608669.

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23 Emphasis added. Judgment in *A. K and Others*, paragraph 123 and the case-law cited.

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24 Judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 40).

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25 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, § 211).

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26 ECtHR, 1 December 2020, *Guðmundur AndriÁstráðsson v. Iceland*, Grand Chamber judgment, (CE:ECHR:2020:1201JUD002637418, §§ 212 and 213 and the case-law cited).

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27 Which corresponds to § 103 of the Chamber judgment (ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418). For an analysis of this case-law in the Polish context, see inter alia Szwed, M., 'Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Astradsson', *Europejski Przegląd Sądowy*, July 2019, p. 42 and Graver, H. P., 'A New Nail in the Coffin for the 2017 Polish Judicial Reform: On the ECtHR judgment in the case of Guðmundur Andri Ástráðsson v. Iceland (Application no. 26374/18)', Verfassungsblog.de, 2 December 2020. See also the submission of the Helsinki Foundation for Human Rights in *Ástráðsson*, 1926/2019/PSP/MSZ, 30 December 2019.

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28 See Simon, D., 'Composition du Tribunal de la fonction publique – Note sur l'arrêt Simpson c/ Conseil', *Europe*, No 5, May 2020. In relation to Poland, see Pech, L., 'Dealing with "fake judges" under EU Law: Poland as a Case Study in light of the ruling in *Simpson and HG*', *Reconnect Working Paper No 8*, May 2020.

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29 See Leloup, M., ‘The appointment of judges and the right to a tribunal established by law: The ECJ tightens its grip on issues of domestic judicial organization: Review Simpson’, *Common Market Law Review*, Vol. 57 No 4, 2020, p. 1152.

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30 See, by analogy, order of 20 November 2017, *Commission* v *Poland* (C-441/17 R, EU:C:2017:877, paragraph 102).

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31 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 71 and the case-law cited), and the judgment in *A. K. and Others*, paragraph 132.

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32 Order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, not published, EU:C:2020:800, paragraph 28).