

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application nos. 26691/18 and 27637/18

BETWEEN:

Mariusz Broda and Alina Bojara

Applicants

and

Poland

Respondent

and

**Amnesty International
International Commission of Jurists**

Interveners

**WRITTEN SUBMISSIONS ON BEHALF OF THE
INTERVENERS**

Introduction

1. These submissions are made by Amnesty International and the International Commission of Jurists (the 'Interveners') pursuant to the leave to intervene granted by the President of the Section in response to an application dated 22 November 2019 under Rule 44 § 3 of the Rules of Court.
2. The present case is situated within the context of the "reform" of the judiciary in Poland, which involves a set of policy measures and legislative changes implemented between 2016 and 2020 that have undermined the independence of the judiciary. Drawing on the Court's own jurisprudence, EU law, the work of UN Special Procedures and their own research into the situation within the judiciary in Poland, the Interveners focus on three main issues:
 - the scope of application of Article 6.1 of the European Convention on Human Rights (the 'Convention') in cases relating to the role of presidents and vice-presidents of courts in an independent judiciary;
 - the role of presidents and vice-presidents of courts in Poland;
 - the situation of the independence of the judiciary in Poland as the context in which to assess the application of Article 6.1.
3. It will be argued that in Poland, the role of court presidents and vice-presidents is a significant one for the independence and impartiality of the judiciary.

I. The scope of application of Article 6.1 in cases relating to the presidents and vice-presidents of courts

4. An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law, as well as an inherent part of the Convention and a necessary condition for the effective protection of human rights.¹ Judicial independence, as affirmed by the jurisprudence of the Court, comprises both an institutional, systemic dimension and a personal dimension relating to the situation and conduct of an individual judge.² The former may be characterised by the independence of the institution of the judiciary from other branches of government, as well as the public, in other words: structural independence. The latter, which is of equal importance, refers to the independence of an individual judge, including his or her independence within the judicial system.³

¹ UN Basic Principles on the Independence of the Judiciary, adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, and endorsed by General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985; UN Human Rights Council, *Resolution 35/12 on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, UN Doc. A/HRC/RES/35/12, 22 June 2017; UN General Assembly, *Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, UN Doc. A/RES/67/1, 30 November 2012, para. 13; ICJ, *Declaration of Delhi*, 10 January 1959; *Stafford v. UK*, ECtHR, Application no. 46295/99, Judgment of 28 May 2002, para. 78, which states that: "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court"; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), UN Docs. E/CNA/Sub2/1988/20/AddI and AddII CorrI, Articles 4 and 74; Bangalore Principles, Value 1.

² *Parlov-Tkalčić v. Croatia*, ECtHR, Application no. 24810/06, Judgment of 22 December 2009, para. 86; *Agrokompleks v. Ukraine*, ECtHR, Application no. 23465/03, Judgment of 6 October 2011, para. 137.

³ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, paras. 23 and 39, that states that: "judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges". See also International Association of Judges (IAJ), *The Universal Charter of the Judge*, as adopted by the IAJ Central Council on 17 November 1999 and updated on 14

5. Court presidents and vice-presidents play an important role in upholding both aspects of judicial independence. To maintain the institutional independence of the judiciary, they must perform their role independently from the executive, the parliament and other outside pressures and interests.
6. The UN Special Rapporteur on the independence of judges and lawyers has set out the applicable procedures for the appointment or election of court presidents. Acknowledging that “judges need to work in an environment which is conducive to independent decision-making”, the Special Rapporteur warned of the need to avoid internal judicial hierarchies running counter to the independence of judges, and therefore encouraged Member States to “consider introducing a system whereby court chairpersons [i.e. Presidents] are elected by the judges of their respective court.”⁴
7. Although the role of court president – and by extension of vice-presidents - varies among national systems, in many European jurisdictions, court presidents play a significant role in the self-governance of the judiciary. They typically, *inter alia*, hold powers relating to judicial appointments, evaluations, promotions and disciplinary proceedings; make decisions regarding judicial salaries and benefits; and assign cases to judges in their court.⁵ As such, the functions of court presidents and vice-presidents have an impact on the independence and impartiality of individual judges and the independence and impartiality of the judiciary as a whole.⁶ Below the interveners set out examples of how such functions have, in practice, impacted the independence and impartiality of judges and the judiciary in general.
8. In contrast to executive officials who in some systems are assigned a role in the administration of the courts, court presidents exercise administrative and managerial functions but do so as judges, in the interests of the effective and efficient self-governance of the judiciary. Their role as court president is an intrinsic part of their judicial career. In its Opinion on the role of court presidents, the Consultative Council of European Judges (CCJE) noted that court presidents, as part of the judiciary and sitting in cases as regular judges in line with the principle *primus inter pares*⁷, have special functions that are distinct from those of their colleagues. The CCJE noted the key role played by court presidents in representing the courts⁸ and their fellow judges⁹ and in maintaining judicial independence.
9. Recommendation 1 of CCJE Opinion 19 identifies the essential features of the role: “The role of court presidents is to represent the court and fellow judges, to ensure the effective functioning of the court, thus enhancing its service to society, and to perform jurisdictional functions ... In performing their tasks, court presidents protect independence and impartiality of the court and individual judges and they have to act at

November 2017, Article 3.

⁴ UN Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council. UN Doc. A/HRC/11/41, 24 March 2009, paras. 48-49.

⁵ See CCJE Opinion 19 on the Role of Court presidents, para.6-8. Regarding specific country examples, see for example, ICJ, *Securing Justice: the Disciplinary System for Judges in the Russian Federation*; ICJ, *Appointing the judges: Selection of Judges in the Russian Federation*; ICJ, *Serbia: the long road to judicial self governance*.

⁶ See for instance UN Basic Principles on the Independence of the Judiciary, *op cit*, Principles 11, 13, 14, 17-20; *Measures for the Effective Implementation of the Bangalore Principles*, paragraphs 3.1-3.3, 4.1, 10.1(h), 12.1-12.7, 13.5, 14.1-14.2, 15.1-15.8, 17.1-17.4; UN Human Rights Council, resolution 35/12, U.N. Doc. No. A/HRC/RES/35/12 (22 June 2017), para. 3.

⁷ CCJE, Opinion No.19 (2016), *op cit*, para. 15.

⁸ *Ibid*, para. 7.

⁹ *Ibid*, para. 6.

all times as guardians of these values and principles”.

10. While the CCJE acknowledged that the level, intensity and scope of the role of court presidents varies in national systems, it recognised that court presidents typically take part in “[...] the work of relevant bodies of judicial self-government and autonomy, such as the Council for the Judiciary, Congress of Judges, General Assembly of Judges, professional organisations of judges, depends on the national legal system.”¹⁰ Court presidents “contribute to developing the whole judicial system as well as to ensuring the maintenance and delivery of high quality independent justice by their individual courts”.¹¹
11. The extensive powers and responsibilities sometimes accorded to court presidents also carry risks of abuse. The jurisprudence of this Court illustrates the potential for court presidents to misuse their power to the detriment of internal independence of judges of their court, leading to violations of human rights.¹² Recognising this potential, the Kiyev Declaration on Judicial Independence in Eastern Europe, South Caucasus and Central Asia recommends limits on the role of court presidents in regard to powers of remuneration, privileges, case assignment, or disciplinary action, and prescribes limited terms of office for court presidents and independent and transparent processes for their selection.¹³
12. Such concerns are borne out by the research of the International Commission of Jurists, including in several jurisdictions in the Council of Europe region, where it has found that the power of court presidents can be abused to interfere with the individual independence of judges, or can be a conduit for undue executive or other influence on judges. In a report on the Russian Federation, for example, the ICJ found that: “Court presidents expect to, and do, exercise significant power over judges in their courts and beyond, and in some cases, that power is abused. The powers of court presidents extend throughout the judicial system and affect the disciplinary process, the appointments process, allocation of cases and the salaries and benefits of judges.”¹⁴ Separately, ICJ research into the procedure for the selection of judges in the Russian Federation raised concerns regarding the undue informal influence of court presidents on judicial appointments.¹⁵ In a report on the Serbian judicial system, the ICJ highlighted the “hierarchical grip” of court presidents on judges through case assignment and raised concerns regarding procedures for the appointment of court presidents, and the role of court presidents in evaluation of judges.¹⁶
13. Averting the risk of such abuses requires systems for the independence and accountability of court presidents. It equally requires that procedures for the selection

¹⁰ *Ibid*, para. 8.

¹¹ *Ibid*, para. 7.

¹² *Pavlov-Tkalcic v Croatia*, *op cit*, para.86; *Agrokompleks v. Ukraine*, *op cit*, para.137; *Daktaris v Lithuania*, Application no 42095/98, Judgment of 10 October 2000, para.35; *Moiseyev v. Russia*, Application no. 62936/00, Judgment of 9 October 2008, para. 182.

¹³ OSCE/ODIHR, *Kiyev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, 2010, paras. 11-16.

¹⁴ ICJ, *Securing Justice: the Disciplinary System for Judges in the Russian Federation* (2012), p.7. See also pp.9, 18-19, 21, 28-29, 47, available at <https://www.icj.org/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf> .

¹⁵ ICJ, *Appointing the judges: procedure for the selection of judges in the Russian Federation* (2014) p.9, 16-17, 37 -40, 59-62, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf> .

¹⁶ ICJ, *Serbia's Judges and Prosecutors: the Long Road to Independent Self-Governance* (2016), pp.27, 43 – 45 , <https://www.icj.org/wp-content/uploads/2016/02/Serbia-Long-Road-to-Indep-Self-Gov-Publications-Reports-Fact-Finding-Mission-Report-2016-ENG-1.pdf> .

and removal of judges from the role of court president be conducted by independent bodies or the judiciary itself, and apply standards of due process which prevent undue influence on court presidents through the disciplinary process. Removal or the threat of removal of a judge from the office of court president, while they continue in office as a judge, has the potential to affect their personal independence as a judge. It may also have a chilling effect, causing court presidents to be less likely to discharge their management functions in a way that respects and protects the independence of individual members of their court.

14. It is therefore essential for the protection of judicial independence that safeguards are in place to ensure fair proceedings in decisions affecting the career and security of tenure of presidents and vice-presidents of courts.

International standards on security of tenure of judges performing administrative functions

15. Appointment as a court president or vice president differs from appointment as a judge in that most national systems do not contemplate life appointment for such positions; in many systems, court presidents or vice presidents are appointed for a short, fixed term of office.¹⁷ Nevertheless, security of tenure for the designated term of office for these positions is necessary to preserve both the independence of the court president and that of the judges in the court over which the court president presides.

16. Indeed, the significant powers that court presidents often hold within the judiciary, and their capacity to influence the independence of judges of their court, make security of tenure vital. As judges Pinto de Albuquerque and Dedov noted in a concurring opinion in *Baka v Hungary* (in comments cited by the CCJE) "there is nothing in these standards to suggest that the principle of irremovability of judges should not apply to the term of office of presidents of courts, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions".¹⁸

17. Almost every aspect of the judicial career, from judicial appointments to the conditions governing promotion, transfer, suspension and cessation of judicial functions, is relevant to judicial independence.¹⁹ In its Recommendation CM/Rec (2010)12 on judges, the Committee of Ministers stated that "where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice".

18. Standards developed by the CCJE make explicit the application of the principle of

¹⁷ CCJE Opinion No.19, *op cit*, para.44; *Kiev Declaration*, para.15: "Court chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal." *Bangalore Implementation Measures*, para 27: "The procedure in certain states of the Chief Justice or President of the Supreme Court being elected, in rotation, from among the judges of that court by the judges themselves, is not inconsistent with the principle of judicial independence and may be considered for adoption by other states."

¹⁸ Consultative Council of European Judges (CCJE), *Opinion N° 19 (2016), The Role of Court presidents; Baka v. Hungary [GC] op cit*, joint concurring opinion of Judges Pinto de Albuquerque and Dedov. para.19.

¹⁹ CCJE, *Opinion No 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the Independence of the Judiciary and the Irremovability of Judges*, Recommendation No. R(94)12, 23 November 2001, para. 11.

security of tenure to the office of court president.²⁰ CCJE Opinion No 19 on the Role of court presidents envisages that serious organisational failures or an incapacity to fulfil the functions of court president can lead to a procedure for removal, but affirmed that “the safeguards of irremovability from office as a judge apply equally to the office of a court president.”²¹ It clarified that “[w]hen judges are appointed to the presidency of a court for a particular term, they should serve that term in full. A president can only be removed from office (e.g. following disciplinary proceedings) following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge.”²² It therefore recommended that: “[t]he principle of irremovability of judges should apply to the term of office of court presidents, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions.”²³

19. In light of these standards the Interveners consider it established that the independence of the presidents and vice-presidents of courts is directly linked to the independence with which individual judges perform their roles.

20. The Interveners therefore submit that the principle of independence of the judiciary necessarily implies a substantial degree of security of tenure of the presidents and vice-presidents of courts, for the duration of their term of office. In order to ensure such security of tenure and to maintain the independence of courts, proceedings for the removal from the position of president or vice president of a court during a judge’s term of membership should provide guarantees of independence and fairness of the proceedings.

Special considerations in the application of Article 6.1 to dismissal of presidents and vice-presidents of courts

21. The Interveners submit that these general principles should also be reflected in the application of Article 6.1, both as regards its scope of application and in the substance of the protection it affords. As has been reiterated by the Court’s Grand Chamber in *Baka v. Hungary*, the existing “presumption of applicability of Article 6” encompasses cases of employment disputes concerning employees of the State, including judges.²⁴ Following *Eskelinen and Others v. Finland*, in order for protection under Article 6.1 to be excluded in such cases, two conditions must be met: the national law must expressly exclude access to a court for the post or category of staff; and the exclusion must be justified on objective grounds in the State’s interest.²⁵ Under this doctrine, it is presumed that Article 6.1 applies to employment disputes involving public sector workers, in the absence of convincing reasons put forward by the State.²⁶ Applying the *Eskelinen* test, this Court has, in a number of cases, found Article 6.1 to be applicable to questions regarding the judicial career and removal of judges from office,²⁷ disputes on

²⁰ CCJE Opinion No.19 (2016), *op cit*, para. 45.

²¹ *Ibid*.

²² *Ibid*, para.46.

²³ CCJE, *Opinion no.19, op cit*, recommendation 10

²⁴ *Baka v. Hungary*, ECtHR, Application no. 20261/12, Judgment of 23 June 2016, paras. 103-105.

²⁵ *Vilho Eskelinen and Others v. Finland*, ECtHR, Application no. 63235/00, Judgment of 19 April 2007, para. 62.

²⁶ *Ibid.*, para. 62.

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

suspension²⁸ or dismissal²⁹ from judicial office, and removals from a senior administration position within the court³⁰ or as court president,³¹ even when the person retained their underlying judicial position.

22. The Court held in *Baka* that the need to respect the full term of a judge in charge of court administration tasks is “supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges.”³² The termination *ex lege* of this term could not remove the judge’s right under Article 6.1 and was found to have “impaired the very essence of the applicant’s right of access to a court.”³³ Any law excluding access to a court “should be compatible with the rule of law.”³⁴

23. In the submission of the Interveners, when assessing any justification advanced by the State for excluding judges’ access to court in regard to their career and security of tenure, consideration must be given to the strong public interest of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. The Interveners submit that it can never be in the legitimate interests of the State to deprive judges who are performing functions as presidents or vice presidents of courts, of access to court or of due process protection in disputes capable of affecting their institutional or individual independence.

24. The Interveners further submit that in the assessment of the adequacy of procedural safeguards in accordance with Article 6.1, and in considering the justification of any restrictions on aspects of Article 6.1 rights in cases concerning the careers of judges, consideration should be given to the particular significance of these proceedings for judicial independence and the rule of law, founding principles of the Convention system. The protection ultimately benefits all persons entitled under Article 6.1 to the “independent and impartial tribunal” of which the individual judge is part.

II. Reforms affecting judicial independence and the role of presidents and vice-presidents of courts in Poland

The situation of the independence of the judiciary, including the common courts, in Poland

25. While assessing the application of Article 6.1 to the present case, it is important to take account of the broader context of attacks on judicial independence in Poland and the consequences of these on the right to fair trial and the rule of law, “one of the fundamental principles of a democratic society [...] inherent in all the Articles of the Convention”.³⁵

²⁸ *Paluda v. Slovakia*, ECtHR, Application no. 33392/12, Judgment of 23 May 2017, para. 34.

²⁹ See for example, *Volkov v. Ukraine*, *op. cit.*, paras. 91 and 96; *Kulikov and Others v. Ukraine*, ECtHR, Applications nos. 5114/09 and 17 others, Judgment of 19 January 2017, paras. 118 and 132; *Sturua v. Georgia*, ECtHR, Application no. 45729/05, Judgment of 28 March 2017, para. 27; and *Kamenos v. Cyprus*, ECtHR, Application no. 147/07, Judgment of 31 October 2017, para. 88.

³⁰ *Denisov v. Ukraine*, ECtHR, Application no. 76639/11, Judgment of 25 September 2018.

³¹ *Baka*, *op. cit.*, paras. 34 and 107-11.

³² *Ibid.*, para 108.

³³ *Ibid.*, para 121.

³⁴ *Ibid.*, para. 117.

³⁵ *Káracsony and Others v. Hungary*, ECtHR, Application no. 37494/02, Judgment of 18 April 2006.

26. Since late 2015, the government of Poland has adopted and implemented a set of legislative and policy measures that have severely undermined the independence of the judiciary.
27. Amendments to the laws governing all arms of the judiciary – the Constitutional Tribunal, National Council of the Judiciary (NCJ), common courts and the Supreme Court – have rendered courts, judges and judicial institutions vulnerable to political influence.
28. These reforms have had particular consequences for presidents and vice presidents of courts. In July 2017, the President of Poland signed an amendment to the Law on the System of Common Courts. The amendment entered into force in August 2017 and empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts. Within the first six months of the law coming into force, the Minister was empowered to replace the presidents or vice-presidents without providing any justification. Between September 2017 and February 2018, the Minister of Justice dismissed at least 130 presidents and vice-presidents of common courts and appointed other judges as replacements.³⁶ There are 377 courts in Poland³⁷ and the government has acknowledged that the Minister has replaced about 18% of presidents and vice-presidents of these courts.³⁸ The powers of the presidents of courts include transferring judges between divisions within a court, which, pursuant to the amendment of the Law on Common Courts of 2017, can be challenged only before the NCJ.³⁹ Amnesty International has documented cases in which the NCJ has dismissed judges' complaints that claim that their transfers were punitive and/or effectively amounted to demotions, without any or adequate justification.⁴⁰
29. In a decision in *Commission v Poland (Independence of the Supreme Court)* from 24 June 2019, the Court of Justice of the European Union (CJEU) held that the 2017 amendment of the Law on the Supreme Court had undermined the principle of irremovability of Supreme Court Judges, which is essential for their independence.⁴¹
30. On 19 November 2019, the CJEU clarified that in order for a court to meet the EU law independence requirements, it must: a) be able to function autonomously without taking

³⁶ The estimate is of 130-160 presidents and vice-presidents as reported by Helsinki Foundation of Human Rights in *Od Kadr Sie Zaczyna, Zmiana prezesów i wiceprezesów sądów powszechnych w okresie od sierpnia 2017 r. do lutego 2018 r.* 2018, p. 16, available at <http://www.hfhr.pl/wp-content/uploads/2018/04/HFPC-Od-kadr-sie-zaczyna.pdf>. See also, *Iustitia*, Ostatecznie 130 prezesów i wiceprezesów zostało odwołanych przez Ministra Sprawiedliwości w trybie spec ustawy z lipca 2017 roku, 13 February 2018, available at <http://www.iustitia.pl/informacja-publiczna/2100-ostatecznie-130-prezesow-i-wiceprezesow-zostalo-odwolanych-przez-ministra-sprawiedliwosci> (accessed 25 November 2019). The changes in the posts of presidents and vice-presidents of common courts continued even after February 2018. According to information published by the association of judges *Iustitia*, by May 2018 the total number of replaced presidents and vice-presidents was of 195 (150 were removed by the Minister of Justice and 45 resigned). The list is available at <http://monitorkonstytucyjny.eu/archiwa/3982> (accessed on 25 November 2019).

³⁷ *Sonar*, *Wyborcza*, PiS zapowiada "reformę reformy" sądownictwa. Władza idzie na ustępstwa wobec Komisji Europejskiej?, available at <http://sonar.wyborcza.pl/sonar/7,156422,22492032,sonarwsadach-pis-poprawia-ustawy-ziobro-powoluje-prezesow.html> (accessed on 25 November 2019).

³⁸ *Polish Government*, White Paper on the Reform of the Polish Judiciary, Executive summary, March 2018, p. 5, available at https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf.

³⁹ USTAWA z dnia 27 lipca 2001 r., available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Lj.pdf>.

⁴⁰ Article 22a.5 and 6; *Amnesty International*, Poland 2019: The State of the Judiciary, November 2019. See also, *Wyborcza*, Decyzja KRS o umorzeniu sprawy odwołania złożonego przez sędziego Żurka bez uzasadnienia, 18 October 2018, available at <https://krakow.wyborcza.pl/krakow/7,44425,24061190,decyzja-krs-o-umorzeniu-sprawy-odwolania-zlozonego-przez-sedziego.html> (accessed on 25 November 2019).

⁴¹ *European Court of Justice*, *Judgment of the Grand Chamber of 24 June 2019*. *European Commission v Republic of Poland*, para. 96

orders or instructions from any source;⁴² b) be objective and its work must strictly apply the rule of law.⁴³ The operation of the rule of law necessitates that the judiciary is independent from the legislative and executive powers.⁴⁴ Under the Constitution, the body that is supposed to ensure the independence of judicial appointments is the National Council of the Judiciary. Therefore, the CJEU clarified, the degree of independence of the NCJ is a precondition for the independence of judicial nominations and appointments.⁴⁵

31. Following the CJEU decision on 19 November 2019, the panel of the Labour Chamber of the Supreme Court of Poland ruled on 5 December 2019 that the new National Council of the Judiciary was appointed in a manner that does not guarantee its independence. As a result, the Disciplinary Chamber of the Supreme Court appointed by the NCJ does not meet the criteria of an independent court.⁴⁶

32. On 23 January 2020, the Parliament (Sejm), adopted an amendment to the Law on the Common Courts, as well as the Law on the Supreme Court.⁴⁷ The President signed the amendment on 4 February.⁴⁸ The amendment effectively prevents the courts in Poland from implementing the decision of the CJEU from 19 November 2019, as Article 42a.1 expressly prohibits questioning the legitimacy of Polish judicial institutions.

Current role of Court Presidents and Vice-Presidents of Courts in Poland

33. Presidents and vice-presidents of courts in Poland have wide-ranging powers to “direct and represent the court externally” (Article 22.1.1 of the Law on Common Courts).⁴⁹

34. The presidents and vice-presidents⁵⁰ of courts also play a significant role in the careers of individual judges in the courts over which they preside. They have the power – in consultation with the college of a court (*kolegium sądu*) – to assign and transfer judges and assessors to the respective court divisions (Art. 22a.1.1. LCC); they are the managers of judges, court assessors and other court staff (Art. 22.1.1b LCC) and decide on the scope of duties of judges and assessors (Art. 22a.1.12 LCC).

35. It is the role of court presidents to analyse the consistency of the case-law within their courts. In case of significant discrepancies, the president informs the First President of the Supreme Court (Art. 22.1.2 LCC).

36. The Interveners have noted a limited number of cases when the new presidents of courts, appointed by the Minister of Justice under the amended Law on Common Courts, have used the power to transfer judges from one court division to another without consultation and without the consent of the judges concerned.⁵¹ For example, in the

⁴² *European Court of Justice. Judgment of the Grand Chamber, 19 November 2019, A. K. and Others v Sąd Najwyższy., para. 121*

⁴³ *A. K. and Others v Sąd Najwyższy, 19 November 2019. para. 122*

⁴⁴ *ibid. para. 124*

⁴⁵ *ibid. para. 139*

⁴⁶ *The Decision of the Supreme Court, 5 December 2019 (in Polish), para. 88*
http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/III-PO-0007_18.pdf

⁴⁷ <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU2020000190/T/D20200190L.pdf>

⁴⁸ <https://www.prezydent.pl/prawo/ustawy/podpisane/art,54,luty-2020-r.html>

⁴⁹ Hereafter “LCC”

⁵⁰ Under Art. 22b.1. of the Law on Common Courts, the vice-president of a court substitutes the president of a court during the times of his/her absence. In cases when the president of a court has not been appointed, the role is performed by the vice-president of a court (Art. 22b.2).

⁵¹ *Amnesty International, Poland 2019: The State of the Judiciary, November 2019. Para 13.5 of the Implementation*

case of the transfer – against his will – of Judge Biliński, who is known for adjudicating several cases of protesters in Warsaw and upholding their rights, from the criminal to family division of the Court Warszawa-Śródmieście, the Court’s president, Maciej Mitera, referred to Art.22a.4b.2 of the Law on Common Courts, which does not require the consent of a judge to a transfer “in case no other judge in the division agreed to be transferred”. Such justification implies that the president of the court approached all the judges in the criminal division seeking their consent to the transfer and all refused.

37. The Interveners have also noted cases where the presidents of courts have intervened against judges working in their courts who were either involved in activities in the defence of judicial independence or who questioned the legitimacy of the “reform” of the judiciary.

- a. On 5 April 2019, during one of the solidarity pickets with judges who had been subjected to politicized disciplinary proceedings in the town of Olsztyn, Maciej Nawacki, the President of the District Court and a member of the new National Council of the Judiciary appointed after the “reform”, summoned the police to where the judges and lawyers were assembled.⁵² On his twitter account, Judge Nawacki stated that the assembly was “illegal” and therefore the “police [had] an obligation to respond”.⁵³
- b. In September 2019, three judges from the Regional Court in Krakow sitting on a panel adjudicating an appeal against a decision of the first instance court (District Court in Chrzanow) requested information about appointment of the assessor who issued the first instance decision. The request was issued in the context of concerns over the legitimacy of the judicial appointment by the new National Council of the Judiciary.⁵⁴ On 31 October 2019, the President of the Regional Court in Krakow, Dagmara Pawełczyk-Woicka notified the Disciplinary Prosecutor for the Common Courts about the judges’ request. The Disciplinary Prosecutor started an investigation against the three judges on the same day. Lawyers observing the case raised concerns that the investigation could lead to a chilling effect on judges who would fear the consequences of questioning the legitimacy of the judicial appointments made by the new National Council of the Judiciary.⁵⁵
- c. On 29 November 2019, the president of the District Court Olsztyn Maciej Nawacki, suspended Judge Paweł Juszczyzyn. The decision came amid proceedings that raised concerns over the use of the disciplinary system to silence judges defending the rule of law in Poland. Judge Juszczyzyn was seconded from the District to the Regional Court, where he dealt with a case adjudicated in the first instance by a judge appointed by the new National Council of the Judiciary (Judge Nawacki is one of the new members of the

Measures for the Bangalore Principles provides: “Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not be transferred from one jurisdiction, function or location to another without his or her consent.” See also Universal Charter of the Judge, article 2-2, “A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only as the effect of disciplinary proceedings, under the respect of the rights of defence and of the principle of contradiction.”

⁵² <https://oko.press/maciej-nawacki-prezes-sadu-w-olsztynie-z-nominacji-ziobry-naslal-policje-na-swoich-sedziow/>

⁵³ https://twitter.com/Maciej_Nawacki/status/1114217041811128320

⁵⁴ Court of Justice of the European Union. *Joined Cases C-585/18, C-624/18 and C-625/18. Judgment of the Court (Grand Chamber) of 19 November 2019*

⁵⁵ <https://oko.press/rzecznik-dyscyplinarny-piotr-schab-sciga-krakowskich-sedziow-za-badanie-legalnosci-wyroku/>

NCJ). Having doubts about the quality of the decision, Judge Juszczyzyn requested the Parliament to provide lists of judges who supported the appointment of the new NCJ members who then appointed the first instance judge. On 29 November 2019, the Disciplinary Prosecutor for Common Courts responded to this request by starting an investigation against Judge Juszczyzyn for “offending the dignity of the office of a judge”. On 23 December 2019 the Disciplinary Chamber of the Supreme Court in the first instance overturned the decision of the President of the District Court in Olsztyn to suspend Judge Juszczyzyn. On 4 February 2020, the Disciplinary Chamber in the second instance overturned the decision, suspended Juszczyzyn and cut his salary by 40%.⁵⁶

38. **The Interveners submit that the application of Article 6.1 and its attendant safeguards to cases concerning the tenure of presidents and vice-presidents of courts, should be informed by their role in law and in practice within the national system in which they preside, and the significance of the legal and practical safeguards for security of tenure of court presidents and vice-presidents for the independence of individual judges and the institutional independence of the judiciary.**

⁵⁶ <https://oko.press/izba-dyscyplinarna-probuje-uciszyc-juszczyzyna-zawiesila-go-w-obowiazkach-sedziego-i-obciela-pensje/>