

UPDATE “Reform” of the judiciary in Poland

9 October 2018

This briefing is an update to one submitted by Amnesty International ahead of the General Affairs Council meeting in September 2018.¹

Changes within the Supreme Court

As of 28 September, Poland’s Supreme Administrative Court (SAC) had put on hold three recruitments of new judges to the Supreme Court.² The recruitments were carried out by the KRS and SAC put them on hold pending its decisions on the cases of appeals of unsuccessful candidates.

On 21 September, the President of Poland appointed ten judges to the newly-established Disciplinary Chamber.³ The role of the Chamber is twofold: review of the disciplinary cases against Supreme Court judges; and serving as the second instance for disciplinary cases against common court judges and prosecutors.⁴ The Chamber thus retains the power to decide on the future of any judge facing disciplinary proceedings, including the power to remove a judge from the bench. Under the Chamber’s rules, it is possible to conduct disciplinary proceedings in the justified absence of a judge or his/her counsel, which raises serious concerns over the right to fair hearing.⁵

Disciplinary proceedings against judges

On 20 September, a judge of the Regional Court in the town of Łódź, Ewa Maciejewska, was questioned for over two hours by the deputy disciplinary prosecutor.⁶ Maciejewska was the first judge to refer to the CJEU questions regarding the compatibility of the new disciplinary proceedings with EU law.⁷ After the questioning, Maciejewska said that the way it was carried out confirmed her concerns over the political pressure on judges. She said that the questioning verged on the breach of a judge’s professional privilege and that it reassured her that she was right when she referred the questions to the CJEU.⁸

On 9 August, the deputy disciplinary prosecutor summoned Igor Tuleya, a Judge of the Regional Court in Warsaw, and required the judge to provide written explanation, within 14 days, about his statements during an appearance on a TV programme (TVN24). In a separate summons issued on 14 August

¹ Amnesty International, Poland: Briefing ahead of the General Affairs Council meeting taking place on 18 September 2018, available on <https://www.amnesty.org/download/Documents/EUR3790512018ENGLISH.PDF>

² <http://wyborcza.pl/7,75398,23981249,nsa-zatrzymuje-reforme-dudy-juz-trzy-konkursy-do-sn-zamrozone.html>

³ <http://wyborcza.pl/7,75398,23950240,prokuratorski-desant-w-sadzie-najwyzszym-juz-sie-zjawil-to.html>

⁴ Article 27 of the Law on the Supreme Court.

⁵ Article 115a para 3 of the Law on the System of Ordinary Courts.

⁶ Under Article 114.1 of the Law on Common Courts, a disciplinary prosecutor carries out the initial stage of disciplinary proceedings. He acts either *ex officio* or pursuant to a request of the Ministry of Justice; a president of an appeal or regional court; or college of an appeal or regional court.

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<http://www.lodz.so.gov.pl/index.php?p=new&id=858&idg=mg.121&keyword=pytanie%20prejudycjalne%20do%20t sue>

⁸ <http://prawo.gazetaprawna.pl/artykuly/1267433,sedzia-maciejewska-u-rzeczniaka-dyscyplinarnego.html>

2018, the deputy disciplinary prosecutor requested that Judge Tuleya provide a written explanation regarding the “possible publication” of details related to a case of opposition MPs who had filed a complaint over their de facto exclusion from a parliamentary session in December 2017. It is feared that this summons could lead to the beginning of disciplinary proceedings against Judge Tuleya. And finally, on 5 September, Judge Tuleya was summoned by the deputy disciplinary prosecutor to provide explanations in person on 21 September in relation to a suspicion of exceeding his right to give public statements and providing comments on other judges or constitutional bodies.

Judge Tuleya is a vocal critic of the government’s “reform” of the judiciary and has openly participated in protests against it. In addition to his public stand, on 4 September 2018, he submitted a request for a preliminary ruling from the CJEU. He asked the EU’s highest court for an interpretation of Article 19 of the Treaty of the European Union; that is, if the legislation that has removed the guarantees of impartiality in disciplinary proceedings against judges and the concomitant risk of using disciplinary proceedings to exert political control over court judgements contradict member states’ obligation to ensure remedies sufficient to ensure effective legal protection.

European Commission refers Poland to the CJEU

On 24 September, the European Commission referred Poland to the European Court of Justice (CJEU) for undermining the independence of the Supreme Court.⁹ The EC also called on the Polish government to halt ‘reforms’ which undermine the rule of law and highlighted the urgent nature of the situation by requesting an expedited procedure and that the CJEU impose interim measures. This is an unprecedented move and indicates the seriousness of the situation in Poland’s judiciary and its potential implications for the broader EU region. It comes after months of criticism of the “reforms” of the judiciary in Poland by the European Commission as well as other independent bodies.

The EC’s decision comes exactly two months after the ruling of the CJEU in another case involving Poland: the Celmer case¹⁰, which involved an extradition request for the transfer from Ireland to Poland of a Polish national arrested in Ireland pursuant to an arrest warrant issued by a Polish court.¹¹ An Irish court referred the matter to the CJEU. Taking into consideration the serious concerns over judicial independence in Poland, the CJEU held that when issuing decisions on whether to execute a European Arrest Warrant (EAW) courts in the EU have an obligation to determine whether there is a risk of breach of the right to a fair trial in the country to which a person is subject to transfer under the EAW.¹²

On 26 September, pursuant to the CJEU decision, a court in Madrid sent questions to the Rzeszów Regional Court in Poland in relation to an extradition case under an EAW involving the potential transfer of an individual from Spain to Poland. The questions related to concerns over judicial independence in Poland.¹³ According to media reports on October 8, the Regional Court in Rzeszow responded that “after a series of amendments to the Law on the system of common courts, as well as

⁹ http://europa.eu/rapid/press-release_IP-18-5830_en.htm

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<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddb139808afaa14365994aaefc45ffb1a.e34KaxiLc3qMb40Rch0SaxyOahf0?text=&docid=204384&pageIndex=0&doclang=EN&mode=req&dir=&oc c=first&part=1&cid=791910>

¹¹ The person is accused, among other things, of trafficking in narcotic drugs and psychotropic substances.

¹² Case C-216/18 PPU, para 79.

¹³ <https://wiadomosci.onet.pl/tylko-w-onecie/sad-w-madrycie-pyta-o-niezawislosc-sedziowska-w-polsce-w-tzw-sprawa-celmera/9vh20ef>

other regulations, the Minister of Justice, who is also the Prosecutor General, has gained considerable influence on the functioning of courts, which may raise doubts about the full independence of judges and courts (...). In practice, politicians are able to remove judges by changing retirement rules, as exemplified by the lowering of the retirement age in the new Supreme Court Act."¹⁴

On 4 October, the Court of Amsterdam refused to authorize an extradition request for the transfer from The Netherlands to Poland of a man accused of drug trafficking. The court justified the decision by concerns over the lack of independence of the judiciary in Poland. "The Court noted that the recent judicial reforms in Poland are jeopardizing the independence of the courts in the country." Therefore, "[the extradition may lead to] to a violation of a suspect's fundamental right to fair trial."¹⁵

The CJEU decision in the Celmer case as well as the subsequent decisions of courts in Madrid and Amsterdam represent a departure from the principle of mutual trust between member states, on which the EAW is based.

Suspension of the National Council of the Judiciary in the European Network of Councils for the Judiciary

On 17 September, the General Assembly of the European Network of Councils for the Judiciary (ENCJ) suspended the membership of Poland's National Council of the Judiciary (KRS).¹⁶ The ENCJ concluded that due to the 2017 "reforms", the KRS could no longer be considered independent of the executive and legislature. As a consequence of the suspension, the KRS has been stripped of its voting rights and excluded from participation in ENCJ activities.

The decision of the ENCJ is based on an assessment that the KRS is no longer the guardian of the independence of the judiciary in Poland.¹⁷ The main reason for that is the process for the election of KRS members. Pursuant to the "reform", the members of the KRS who are judges are no longer elected by their peers but instead are selected by the Parliament. The ENCJ also noted that the amendment of the law on the KRS "is part of an overall reform to strengthen the position of the executive, infringing very seriously on the independence of the judiciary".¹⁸

Conclusion

Amnesty International remains concerned that there is a "clear risk of a serious breach" by the Polish government of the values protected by Article 2 TEU, and has concluded that Poland is already in breach of its international obligations to uphold the rule of law and protect human rights.

¹⁴ <http://wiadomosci.gazeta.pl/wiadomosci/7,114883,24020401,rzeszow-sad-odpowiada-na-pytania-z-hiszpanski-w-praktyce-wladza.html>

¹⁵ <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:7032>

¹⁶ <https://www.encj.eu/node/495>

¹⁷ <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf>

¹⁸ See note 7, p. 4.