Written observations of the Commissioner for Human Rights of the Republic of Poland in case *Wałęsa v. Poland*

(application nº 50849/21)

1. The introduction

The application in *Wałęsa v. Poland* case concerns a final judgment of the court stating the violation of the plaintiff's personal rights by the defendant, quashed by the Chamber of Extraordinary Control and Public Affairs of the Supreme Court as a result of an extraordinary appeal lodged by the Prosecutor General. The applicant therefore alleges a violation of his right to an independent and impartial tribunal established by law (Article 6 of the European Convention on Human Rights; **ECHR**) and his right to respect for his private life (Article 8 of the ECHR). In his observations, the Commissioner will focus on the certain general principles relevant to the interpretation of Art. 6 of the Convention, namely:

1) the essence of the legal problems concerning the structure of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, with particular emphasis on status of judges appointed upon recommendation of National Council of the Judiciary (**NCJ**) after 6 March 2018 in the light of national and European case-law;

2) the extraordinary appeal – its origins, features, objectives and practical importance as a tool for defending civil rights and freedoms from the point of view of the Commissioner for Human Rights.

2. The Chamber of Extraordinary Control and Public Affairs

The Chamber of Extraordinary Control and Public Affairs (**CECPA**) is a unit of the Supreme Court existing since 2018, responsible, inter alia, for examination of extraordinary appeals lodged against final court rulings, validity of elections, cassations against rulings in the field of competition law, telecommunications law or energy law.

In the case of this Chamber, two key legal problems can be distinguished:

1) compliance of the current appointment procedure of judges in Poland with the standards of Polish and European law. Judges are appointed by the President at the request of the National Council of the Judiciary, which is currently composed mostly of representatives of the legislative and executive authorities (elected under the Act of 8 December 2017 amending the Act on the National Council of the Judiciary[1]). Before 2018, the National Council of the Judiciary consisted mostly of judges – representatives of the judiciary;

2) legal status of a judge appointed at the request of the National Council of the Judiciary in a new composition. The question is whether such mode of appointment automatically means that judge never meets the requirements of independence under Art. 6 of ECHR and Art. 47 of Charter of Fundamental Rights of the EU, or whether it depends on individual circumstances. Related to this is **the concept of the so-called independence test**.

Both problems concern about 2,500 judges in Poland appointed under the new procedure, whom the Commissioner will refer to as "judges appointed after 6 March 2018", as the new National Council of the Judiciary, elected mostly by the parliament and the government, started its work on that day.[2] The

[1] Journal of Laws 2018, item 3. Currently the National Council of the Judiciary consists of 25 members, of which 19 are elected by the first chamber of the parliament - the Sejm (15 judges and 4 MPs), 2 are elected by the second chamber of the parliament - the Senate (2 senators), 1 is nominated by of the President, 3 are included due to the office held: Minister of Justice, First President of the Supreme Court and President of the Supreme Administrative Court.

[2] More precisely, these are judges appointed on the basis of a resolution of the National Council of the Judiciary adopted after 6 March 2018.

Chamber of Extraordinary Control and Public Affairs consists of 17 judges who have been appointed after 6 March 2018.

2.1. Compliance of the current appointment procedure of judges in Poland with the standards of Polish and European law

As regards the first problem, the Supreme Court, in a resolution of the Civil Chamber, the Criminal Chamber and the Labour and Social Insurance Chamber, explicitly recognized the composition of National Council of the Judiciary since 2018 as incompatible with Art. 10 (1) (principle of separation of powers), Art. 173 (principle of separation and independence of courts) and Art. 178 (principle of independence of judges) of the Polish Constitution. [3] Taking into account this position of the Supreme Court, the Court of Justice of the European Union (**CJEU**)[4] and the European Court of Human Rights (**ECtHR**)[5] have found several times that if a judge was appointed at the request of the NCJ formed in a manner inconsistent with national law, a judgment issued with the participation of such a judge violates the right to a court established by law.

2.2. Legal status of a judge appointed at the request of the National Council of the Judiciary in a new composition – the issue of individual independence test

As regards the second problem, in the jurisprudence of Polish courts (in the aforementioned resolution of the three chambers and the resolution of the Criminal Chamber[6]) there is a position that the composition of the court is unlawful when a judge appointed after 6 March 2018 sits in it and *if the defectiveness of the appointment process leads to, **in specific circumstances** to breach the standard of independence and impartiality within the meaning of Art. 45 (1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union and Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms*. Consequently, an assessment of specific circumstances related to the appointment of a judge and his/her adjudication in particular case is carried out, which allows to determine whether he/she demonstrates the required independence necessary to fairly resolve the case. Such an assessment can be described as a **test of individual independence**, which requires to analyse all relevant factors that can affect judge's ability to conduct a fair trial: not only mode of appointment (in particular whether he/she was selected on the basis of objective criteria), but also behaviour before and after the appointment, formal and informal relations with the executive and legislative branches, evenhandedness of decisions already made in the particular case.[7] However, in the Polish legal literature, more radical views are formulated - from which the Supreme Court distances itself - that all judges appointed after 6 March 2018 are not judges at all, and as a result, all judgments issued by them are automatically invalid, regardless of individual circumstances.[8]

Meanwhile, in the jurisprudence of the Court of Justice of the EU, there is a tendency to avoid the automatic presumption that a judge appointed after 6 March 2018 never meets the requirements of independence. In this regard, the position of the CJEU is similar to that of the Supreme Court.

Although, of course, the ECtHR is in no way bound by the position of the CJEU, the interpretation of Art. 47 of the Charter of Fundamental Rights (**CFF**) may affect interpretation of Art. 6 of the ECHR due to the

[3] Resolution of three chambers of the Supreme Court of 23.01.2020, Ref. No. BSA I-4110-1/20.
[4] Judgment of the CJEU of 6.10.2021, C-487/19, *W. Ż.* (Grand Chamber)
[5] Judgments of the ECtHR of: 15.03.2022, *Grzęda v. Poland* (Grand Chamber); 8.10.2021 r., *Dolińska-Ficek and Ozimek v. Poland*; 3.02.2022, *Advance Pharma sp. z o.o. v. Poland*.
[6] Resolution of the Supreme Court of 2.06.2022, Ref. No. I KZP 2/22.
[7] See e.g. judgment of the Supreme Court of 26.07.2022, Ref. No. III KK 404/21.
[8] E.g. A. Kappes, J. Skrzydło, *Czy wyroki neo-sędziów są ważne? – Rozważania na tle uchwały trzech połączonych izb Sądu Najwyższego z 23 stycznia 2020 r. (BSA I-41 10-1/20)*, „Palestra" 2020/5, p. 124–127; G. Kamieński, *Wyłączenie z mocy samego prawa sędziego delegowanego na podstawie art. 77 Prawa o ustroju sądów powszechnych (art. 48 § 1 pkt 1 k.p.c.)*, „Przegląd Sądowy" 2022/10, p. 46-47. See also resolution no. 4 of Association of Polish Judges „Iustitia" of 17.04.2021, https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/4159-uchwaly-zwyczajnego-zebrania-delegatow-ssp-iustitia-w-dniu-17-kwietnia-2021r (access: 7.02.2023).

principle of equivalence, according to which, it is presumed that acts of EU law guarantee the same level of protection as the Convention.[9]

It should be then noted that the CJEU jurisprudence distinguishes three types of cases in which the Court applies a test of individual independence: 1) references from Polish courts for a preliminary ruling concerning cases examined with the participation of judges appointed after 6 March 2018; 2) preliminary references from judges appointed after 6 March 2018, concerning various types of cases, not necessarily related to the rule of law, but in which the CJEU assesses the independence of the referring court to decide whether it is "independent enough" to ask the question; 3) references from courts of other EU countries regarding the effectiveness of the European Arrest Warrant issued by a Polish court, the independence of which raises doubts.

First of all, it should be underlined that the CJEU has never stated that the election of the National Council of the Judiciary by the parliament is *per se* incompatible with EU law - **only the election of the NCJ in conjunction with other circumstances** leads to a violation of the individual's right to effective judicial protection (Art. 47 of CFF and Art. 19 (1) of TEU). It is for the national court to assess these circumstances, and if so, each case must be assessed individually.

Responding to preliminary questions from Polish courts regarding cases heard with the participation of judges appointed after 6 March 2018, the CJEU emphasized that one of the circumstances to be taken into account is the activity of such a judiciary council: the court should therefore take into account *the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive*[10] and should ensure *that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges*.[11]

The Court remains extremely cautious about assessment of provisions providing for the election of the majority of the National Council of the Judiciary by the parliament, pointing out that *such changes are liable to create a **risk**, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the KRS* [Polish abbreviation for the National Council of the Judiciary] *and of the independence of that body being undermined*. [12] The fact that the CJEU talks about "risk" and not "certainty" proves that the mere fact that the majority of the National Council of the Judiciary is staffed by representatives of the executive and legislative branches does not automatically mean that each judge appointed upon its recommendation will never be independent. Therefore, if the National Council of the Judiciary conducts a fair competition procedure and selects a candidate for a judge solely on the basis of objective criteria, then the risk he or she will not meet the minimum requirements of EU law in terms of independence is reduced.

This line of reasoning was confirmed in a case concerning the right to an effective remedy of a certain circuit court judge. The judge was transferred against his will from one division to another by the decision of the president of the court - he appealed against the decision to the Supreme Court, requesting the recusal of all judges of the CECPA competent in this case due to their appointment at the request of the NCJ in a new composition. The application for recusal was handed over by the President of CECPA to the Civil Chamber. Nevertheless, the appeal of the regional court judge was

[9] Judgment of ECtHR of 30.06.2005, *"Bosphorus Airways" v. Ireland* (Grand Chamber), §155-165. See also decision of the Commission of 9.01.1990, *M & Co. v. Federal Republic of Germany* and decision on the admissibility of 18.06.2013, *Povse v. Austria*.
[10] Judgment of the CJEU of 19.11.2019, C-585/18, C-624/18 and C-625/18, *A.K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy,* §144.
[11] C-585/18, C-624/18 and C-625/18, §134.
[12] Judgment C-791/19, §104.

rejected by the decision of the judge of CECPA - even before the consideration of the request for recusal by the Civil Chamber. The Civil Chamber referred a question to the CJEU for a preliminary ruling whether a court composed of a single person appointed to hold the office of a judge in gross violation of the rules of the law of a Member State regarding the appointment of judges can be considered a court within the meaning of EU law. The CJEU replied that the referring court should *recognise as null and void the decision by which the single-judge adjudicating body rejected the appeal if,* ***from all the conditions and circumstances in which the process of appointing that judge was carried out*** *adjudicating single-handedly, it follows that this appointment was made in gross violation of the fundamental norms constituting an integral part of the system and functioning of the judiciary in question, and that the correctness of the result to which the said process led was at risk, which, in the opinion of individuals, could give rise to justified doubts as to the independence of and impartiality of the judge*.[13]

Therefore, the CJEU opted for an individualized analysis of the circumstances of the appointment of a given judge, and at the same time against the abstract and automatic nullification of judgments of all judges appointed at the request of the NCJ elected in the majority by the parliament. The defectiveness of the said ruling of the judge of CECPA resulted not only from mode of appointment, but also from many additional circumstances, including: i) the fact that the adjudicating judge was appointed to a judicial position by the President on the basis of the resolution of the NCJ, which was then still in the middle of appeal review before the Supreme Administrative Court[14]; ii) his appointment as a judge was in violation of the decision of the Supreme Administrative Court suspending the execution of the resolution of the NCJ recommending his candidacy[15]; iii) he was appointed without waiting for the CJEU's answer to the request for a preliminary ruling from the Supreme Administrative Court aimed at establishing the compliance of certain provisions of the Act on the NCJ with EU law[16]; iv) a ruling has been issued before the request for recusal has been considered by Civil Chamber[17].

The second category of cases in which the CJEU applies a test of individual independence are references for a preliminary ruling by judges appointed after 6 March 2018. The examination of a judge's independence is an element of assessing the formal admissibility of a reference for a preliminary ruling, which may only be submitted by a "court or tribunal" within the meaning of Article 267 of the TFEU. In its case-law to date, the Court of Justice has on several occasions recognized the adjudicating panel of the Supreme Court composed of judges appointed after 6 March 2018 as a "court" within the meaning of Art. 267 TFEU. The Court relies on the **presumption of independence** of the referring court, which *may be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter.* In the opinion of the CJEU *the possible flaws that may have vitiated the national procedure for the appointment of that judge are not capable of leading to the inadmissibility of the request for a preliminary ruling*.[18]

Therefore, the mere fact of appointment at the request of the National Council of the Judiciary, composed mostly of representatives of the legislative and executive authorities, is not sufficient to rebut the presumption of independence. Therefore, the Court considered admissible a question from the 3-member panel of the Civil Chamber of the Supreme Court, composed of judges appointed after 6 March 2018, indicating that *no specific and precise evidence has been submitted which would make it possible to rebut, in the circumstances set out in the preceding paragraph, the presumption that the present request for a preliminary ruling comes from a body satisfying the requirements [of the Article 267 TFEU]*[19]*.* However, the

[13] Ratio decidendi of C-487/19.
[14] Judgment C-487/19, §134.
[15] Judgment C-487/19, §§138-139.
[16] Judgment C-487/19, §140.
[17] Judgment C-487/19, §151.
[18] Judgment of CJEU of 29.03.2022, C-132/20, *Getin Noble Bank*, §72-73.
[19] Judgment of CJEU of 13.10.2022, C-355/21, *Perfumesco*, §35.

Court expressly stipulates that *it cannot be inferred from this that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter.*[20] It follows from this that the minimum threshold of independence resulting from Art. 267 of the TFEU is lower than the independence threshold resulting from Art. 47 of the Charter of Fundamental Rights.

In this regard, **the approach of the Court of Justice of the EU differs from the position of the Polish Supreme Court, which allows the application of a test of individual independence only in relation to lower courts, while excluding its application to judges of the Supreme Court**, considering that in their case the very fact of appointment at the request of the National Council of the Judiciary dependent on the executive and legislative authorities, means that they do not meet the minimum threshold of independence (the above-mentioned resolutions BSA I-4110-1/20 and I KZP 2/22). **Meanwhile, the Court of Justice takes into account individual circumstances also in the case of judges of the Supreme Court.**

In the third category of cases, the Court of Justice excludes the possibility of automatic refusal to execute the European Arrest Warrant only because of systemic or generalized deficiencies concerning the independence of the judiciary in the issuing Member State. The CJEU emphasizes that the national authority deciding on the execution of the European Arrest Warrant issued by a Polish court may refuse to execute the EAW *only if that authority finds that, **in the particular circumstances of the case**, there are substantial grounds for believing that, having regard inter alia to the information provided by that person* [who is subject to particular arrest warrant] *relating to the composition of the panel of judges who heard his or her criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.*[21]

As can be seen, in all cases, **the CJEU assesses the independence of a judge, taking into account not only the manner of his/her appointment, but also other individual circumstances (relevant factors mentioned above).**

The European Court of Human Rights has not commented directly on the concept of an individual test of independence. In the opinion of the Commissioner, the concept of a test of individual independence as defined in the CJEU jurisprudence may fall within the third stage of the *Ástráðsson* test, i.e. whether an obvious and serious breach of national law has been effectively investigated and remedied by national courts. [22] However, it is advisable for the ECtHR to take a clear position on this issue.

3. Extraordinary appeal

3.1. Introductory remarks

An extraordinary appeal is a special measure of judicial supervision of the Supreme Court over the jurisprudence of common and military courts, inspired by the institution of extraordinary review functioning in Poland in the years 1950-1996. An extraordinary appeal fills the gap between two types of remedies: citizens' constitutional complaints to the Constitutional Tribunal against unconstitutional legal provisions and a cassation to the Supreme Court against court rulings inconsistent with the provisions of civil and criminal law. An extraordinary appeal makes it possible to challenge a court ruling

[20] Judgment C-132/20, §74.
[21] Judgment of CJEU of 22.02.2022, C-562/21 PPU and C-563/21 PPU (Grand Chamber).
[22] Judgment of ECtHR of 1.12.2020, *Guðmundur Andri Ástráðsson v. Iceland*, §§ 243–273.

particularly on the grounds that it violates constitutional rights and freedoms (Art. 89 § 1 point 1 of the Supreme Court Act).

This measure was introduced in 2018 as "the last resort for people who feel wronged by unjust judgments."[23] An extraordinary appeal allows for full verification of any ruling of a common or military court which became final after 17 October 1997 (entry into force of the Constitution) – it can result in change or repeal and referral of the case to the court for re-examination.

However, it should be stressed that the purpose of an extraordinary appeal is by no means to set aside all judgments that citizens feel may be unjust. As the Chamber of Extraordinary Control and Public Affairs itself emphasizes, **the purpose of an extraordinary appeal is to eliminate only judgments with defects of fundamental nature**. The violations found must be serious in order to justify an interference with the stability and validity of judicial rulings and the legal relationships they shape (the principle of legal certainty, *res judicata*).[24] It does not serve to provide citizens with a third instance, but to protect the constitutional order against rulings unacceptable in the state ruled by law. As discrepancies in jurisprudence as well as occasional errors are inevitable even in the best-functioning judiciary, not each violation of the law is sufficient to overturn a ruling by an extraordinary appeal.

The unique nature of an extraordinary appeal is expressed in a narrowly defined group of entities authorized to bring it and relatively narrowly defined grounds for appeal.

3.2. Subject of the extraordinary appeal

The subject of an extraordinary appeal may be any final ruling of a common or military court concluding the proceedings in the case, provided that it cannot be repealed or amended by other means of appeal (Article 89 § 1 of the Act on the Supreme Court[25]). The provision does not require the exhaustion of remedies, but only the non-appealability of the judgment. It is therefore possible to appeal against a ruling of the court of first instance which has become final as a result of failure to appeal to the court of second instance. This solution serves to protect citizens who, due to ignorance of the law and clumsiness, have not used the means of appeal to which they are entitled.

Therefore, an extraordinary appeal may be lodged both against the decision of the court of second instance and the court of first instance, even if the party has not used its legal remedies (appeal, cassation, petition for the revival of proceedings etc.). However, an extraordinary appeal cannot be lodged against rulings of administrative courts or the Supreme Court.

3.3. Grounds for extraordinary appeal

An extraordinary appeal may be brought:

1) if it is necessary to ensure compliance with the principle of a democratic state ruled by law implementing the principles of social justice (general ground of appeal) and

2) if the judgment contains at least one of the three legal defects (specific ground of appeal): a) violates the principles or human and civil rights and freedoms specified in the Constitution or b) flagrantly violates the law through its incorrect interpretation or incorrect application, or c) there is

[23] A quote from the President of the Republic of Poland Andrzej Duda in an interview for "Dziennik Gazeta Prawna" - who, of course, is not formally a legislator, but is the actual author of the bill introducing the institution of extraordinary appeal - P. Zaremba, *Prezydent Andrzej Duda dla DGP: Dla mnie weryfikacja SN przez prokuratora generalnego jest nie do przyjęcia*, „Dziennik Gazeta Prawna" of 27.09.2017, https://prawo.gazetaprawna.pl/artykuly/1073746,wywiad-z-andrzejem-duda-o-reformie-sadownictwa.html (access: 6.02.2023).

[24] Rulings of Supreme Court (CECPA) of: 9.01.2020 r., I NSNu 1/20; 13.01.2021, I NSNk 3/19; 20.10.2021, I NSNc 3/21; 2.12.2021, I NSNk 13/20; 6.04.2022, I NSNc 63/22; 11.05.2022, I NSNc 431/21.

[25] Supreme Court Act of 8 December 2018, Journal of Laws 2021, item 1904 as amended.

an obvious contradiction between the significant findings of the court and the content of the evidence collected in the case (Art. 89 § 1 of the Supreme Court Act).

The mere occurrence of a legal defect is not a sufficient basis for verification of the judgment by the Chamber of Extraordinary Control and Public Affairs. It is necessary to demonstrate that the legal defect is fundamental, i.e. that interference with *res judicata* is necessary to ensure respect for the rule of law (Article 2 of the Constitution). The Supreme Court has repeatedly rejected extraordinary appeals against rulings due to the applicant's failure to demonstrate the fulfilment of the general premise, i.e. the fundamental (and not just ordinary) nature of the violation of the law and to justify the need to interfere with *res judicata*.[26]

3.4. Authorized entities

An extraordinary appeal may be lodged by 9 entities: the Prosecutor General, the Commissioner for Human Rights and, within the scope of their competence, the President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chairman of the Polish Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for Small and Medium-Sized Entrepreneurs and the President of the Office of Competition and Consumer Protection (Art. 89 § 2 of the Supreme Court Act). In practice, the majority of extraordinary appeals are lodged by the Prosecutor General and the Commissioner for Human Rights.

The listed entities may lodge an extraordinary appeal *ex officio* (on their own initiative) or at the request of the person concerned. Therefore, natural and legal persons who are parties to court proceedings may not lodge an extraordinary appeal on their own, but they only can petition one of abovementioned authorities to lodge one on their behalf.

3.5. Deadline for submission

An extraordinary appeal may be lodged within 5 years of the ruling becoming final, which is shortened to one year if a cassation has been filed (Article 89 § 3 of the Supreme Court Act). However, the Act establishes a 6-year transitional period, during which the deadline is extended to even 20 years from the date of issuing the ruling - until 3 April 2024, any court ruling that became final after 17 October 1997 may be the subject of an extraordinary appeal (Art. 115 § 1 of the Supreme Court Act).

In response to the European Commission's allegations against the institution of extraordinary appeal as a threat to the principle of legal certainty, an amendment to the Supreme Court Act was adopted, according to which rulings which became final before 3 April 2018 may only be appealed by the Prosecutor General or the Commissioner for Human Rights (Art. 115 § 1a of the Supreme Court Act). In the case of judgments which became final from 3 April 2018, the subjective scope of the extraordinary appeal remains unchanged.

3.6. Consideration of the appeal by the Supreme Court

If an extraordinary appeal is upheld, the Supreme Court may:

– quash the appealed ruling and refer it for re-examination (Article 91 § 1 of the Supreme Court Act);

– set aside the contested ruling and decide on the merits of the case itself (Article 91 § 1 of the Supreme Court Act);

[26] See e.g. decisions of Supreme Court of 30.06.2020, I NSNp 3/19; 28.09.2020, I NSNc 51/19; 6.04.2022, I NSNc 63/22; 22.06.2022, I NSNc 309/21.

– declare that the contested ruling was issued in violation of the law and indicate the circumstances which led to such a decision - if the contested ruling caused irreversible legal effects, in particular if 5 years have passed since the contested ruling became final, and if the repealing of the ruling would violate international obligations of the Republic of Poland (Art. 89 § 1 of the Supreme Court Act).

It is worth noting that the second power is a novelty – until 2018, the powers of the Supreme Court have been, in principle, of a purely cassation nature, and modification of contested ruling was possible by way of exception, in the case of an obviously justified violation of substantive law and at the same time no violation of procedural law (Article 398^{16} of the Code of Civil Procedure). Article 91 § 1 of the Supreme Court Act requires that if the Supreme Court upholds extraordinary appeal, it should first seek to change the appealed judgment, and only in exceptional cases may it limit itself to repealing it and remanding the case for reconsideration.

3.7. Extraordinary appeals filed by the Commissioner

The experience of the Commissioner for Human Rights shows that tens of thousands of people feel aggrieved by final court decisions that cannot be challenged in the usual way. Most of them turn to the Prosecutor General, or the Commissioner for Human Rights, who received about 13,700 requests for extraordinary appeals by the end of 2022. The Commissioner for Human Rights systematically reviews citizens' requests for an extraordinary appeal, balancing the interests of the individual with the need to protect legal certainty. Most of the citizens' applications examined so far turned out to be unfounded or concerned violations of the law that could not be considered as fundamental legal defects. Some of the applications, however, were justified.

The Commissioner for Human Rights uses the instrument of extraordinary appeal with restraint, bearing in mind not only the need to protect citizens' rights, but also the need to respect *res judicata*. So far, the Commissioner has lodged 112 extraordinary appeals, mainly in civil and commercial matters (a sub-category of civil law). The most frequently appealed decisions come from the 2010-2018, although there have been cases of appealing against older rulings - the oldest was rendered in 1999.

Civil cases. The Commissioner's Office's Civil Law Team lodged 60 extraordinary appeals. 39 appeals have already been considered by the Supreme Court, including: 30 appeals were upheld (contested judgment has been quashed or modified), 7 were dismissed, and 2 were rejected.

For example, the appeals concerned the defence of:

- the right to inheritance (Art. 64 of the Constitution) related to the so-called double inheritance decisions i.e. situations in which two different courts independently affirmed the acquisition of the inheritance by different heirs. Thanks to the opportunity presented by the extraordinary appeal, the Commissioner identified a significant systemic problem;

- children's rights (Article 72 of the Constitution) in the context of inheritance debts by minors; denial of court's permission to reject the biological father's inheritance where the child has been adopted; the problem of imposing joint and several liability on minors for occupying dwellings without a legal title;

- the right to respect for private property (Article 64 of the Constitution) in the context of a court error in the calculation of cash payments when abolishing co-ownership of real estate; division of possessions, the problem of hyperinflation and grossly incorrect settlement of outlays from personal property to the joint property of spouses in the form of payment of a housing contribution; an order for payment due for a non-contractual occupation of the premises, despite living elsewhere;

- consumer rights (Article 76 of the Constitution) in the context of sanctioning by the court of usurious interest for a delay in the performance of contractual obligation, as well as in the context of issuing an order for payment based on a promissory note without *ex officio* examination of fairness of the loan agreement, which the promissory note was supposed to secure;

- the rights of the homeless (Article 75 of the Constitution) in the context of the eviction of a disabled person without the right to social housing;

- the right to a court (Article 45 of the Constitution) in the context of examining a case in camera or the court's omission to conduct *ex officio* evidentiary proceedings before issuing the eviction judgment in absentia;

- the right to respect for private life (Article 47 of the Constitution) in the context of the right to obtain certainty of the child's biological origin and establish kinship ties with a parent.

Economic cases. The Economic Law Team filed 28 extraordinary appeals, of which 13 have already been considered by the Supreme Court, including 8 upheld, 3 dismissed, 2 rejected. The appeals most often concerned the protection of consumer rights (Article 76 of the Constitution) violated by the negligence of the courts in the examination of the abusiveness of the provisions of foreign currency loan agreements. Due to the intervention of the Commissioner, the Supreme Court reassured the position that the court should *ex officio* examine whether the provisions of the contract between the bank and the borrower are fair, regardless of the motion from the borrower.

Labour law cases. The Labour Law Team filed 4 extraordinary appeals, of which 2 have already been considered by the Supreme Court, both dismissed. 3 appeals concerned the principle of protection of the employment relationship in the context of a dispute between an employee and an employer over reinstatement (Article 24 of the Constitution), and 1 appeal concerned the right to a public hearing of the case (Article 45 of the Constitution).

Other cases. The Constitutional, International and European Law Team filed 6 extraordinary appeals, of which 2 have already been considered by the Supreme Court, 1 upheld, 1 dismissed. One case concerns education law, four cases concern civil law (protection of personal rights, compensation for the death of a relative) and one case concerns electoral law (proportionality of a sanction imposed on a political party due to accounting irregularities in the financial statements). The Criminal Law Team filed 2 extraordinary appeals, both of which were dismissed. The Commissioner's field offices in Katowice and Wrocław filed 12 extraordinary appeals, of which 3 have already been considered by the Supreme Court, including 1 accepted, 1 dismissed and 1 rejected.

3.8. Possible reforms of the extraordinary appeal

In the opinion of the Commissioner for Human Rights, there is a room for improvement of the extraordinary appeal instrument - for example, specifying the grounds for the appeal in a way that would exclude the lodging of appeals by public authorities serving only the interest of the State Treasury. In the opinion of the Commissioner for Human Rights, the extraordinary appeal should only serve to protect the rights of the individual. Meanwhile, there have already been cases where public authorities brought extraordinary appeals to the Supreme Court that were not related to the protection of citizens' rights, but only served to protect the property interest of the state.[27]

[27] See more about Commissioner's intervention before Supreme Court regarding extraordinary appeal lodged by the Prosecutor General against ruling in favor of a citizen who successfully sued State Treasury for violation of his personal rights caused by air pollution - https://bip.brpo.gov.pl/pl/content/rpo-smog-obywatel-wyrok-skarga-nadzwyczajna-pg-sn (access: 6.02.2023).

4. Conclusions

Having regard to the above, the Commissioner for Human Rights concludes as follows:

1) Although the European Court of Human Rights is obviously not bound by the case-law of the Court of Justice of the European Union, the interpretation of Art. 47 of the Charter of Fundamental Rights may be taken into account when interpreting Art. 6 of the European Convention on Human Rights.

2) It follows from the CJEU jurisprudence to date that the status of judges appointed on the basis of a resolution of the National Council of the Judiciary adopted after 6 March 2018 - among whom there are also judges of the Chamber of Extraordinary Control and Public Affairs - should not be assessed *in abstracto*, but *in concreto*, taking into account the individual circumstances of the appointment and the type of case in which a given judge adjudicates (**the concept of a test of individual independence**). A similar position is taken by Polish courts, which, however, unlike the CJEU, exclude Supreme Court judges appointed after 6 March 2018 from application of a test of individual independence.

3) In the current legal situation, in which the National Council of the Judiciary is mostly elected by the parliament, a test of individual independence applied by national courts is a more optimal way of resolving doubts as to the status of a judge than an *a limine* nullification of the appointment of all judges after 6 March 2018, and all judgments issued by them.

4) The concept of a test of individual independence as defined in the CJEU jurisprudence may fall within the third point of the *Ástráðsson* test, that is, whether a manifest and serious breach of domestic law has been effectively investigated and remedied by national courts.

5) It is advisable for the ECtHR to comment on the concept of a test of individual independence, and in the event of its positive assessment, to define its relation to the *Ástráðsson* test and to specify the guidelines for its application. In particular, it needs to be clarified whether the third stage of the *Ástráðsson* test can be applied to judgments rendered by judges of the court of last instance, namely the Supreme Court.

6) An extraordinary appeal is an important and necessary element of the Polish legal system, as it allows for the elimination of judgments with fundamental legal defects. Providing proper restraint of the Supreme Court, it is possible to balance the values protected by the extraordinary appeal and principle of legal certainty (*res judicata*). If Polish law did not provide for the institution of an extraordinary appeal, the Commissioner for Human Rights would not have sufficient tools to provide legal assistance to many citizens who have been victims of violations of their rights caused by unconstitutional judgments.

7) The Commissioner himself uses the instrument of extraordinary appeal with due caution and restraint, bringing it only in absolutely exceptional cases, when there have been gross violations of law unacceptable in the state ruled by law.