30/A/2021

DECISION
of 15 June 2021
Case P 7/20

The Constitutional Tribunal consisting of:

Julia Przyłębska – presiding judge
Wojciech Sych – judge rapporteur
Michał Warciński,

having examined the request of the Commissioner for Human Rights ‘to remove Mr Justin Piskorski from participating in the examination of Case P 7/20’ in a closed session on 15 June 2021

d e c i d e s:

to dismiss the request.

The judgment was passed unanimously.

JUSTIFICATION

I

1. In a request of 11 May 2021, pursuant to Article 379(4) in connection with Article 54 of the Civil Procedure Code of 17 November 1964 (Journal of Laws of 2020, item 1575, as amended) in connection with Article 36 of the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal of 30 November 2016 (Journal of Laws of 2019, item 2393; hereinafter: Act on the CT) and in connection with the second subparagraph of Article 19(1) of the Treaty on European Union (Official Journal of the European Union, No. C 202 of 07/06/2019, p. 13; hereinafter: TEU) and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284; hereinafter: ECHR), and pursuant to the second subparagraph of Article 19(1) TEU, the Commissioner for Human Rights (hereinafter: Ombudsman), as a participant in the proceedings in the case P 7/20 requested ‘the removal of Mr Justin Piskorski from participating in the examination of [this] case (...)’.

The Ombudsman explained that his successive request to remove Mr Justyn Piskorski, Judge of the Constitutional Tribunal, from case P 7/20 was made ‘because of the emergence of new circumstances of fundamental importance to the establishment that it is inadmissible

for the person encompassed by the request to participate in the adjudication' (justification of the request, p. 2), i.e. the issuance by the European Court of Human Rights (hereinafter: ECtHR) of the judgment in *Xero Flor w Polsce sp. z o.o. v Poland* on 7 May 2021 (application no. 4907/18), while the reasons for the removal apply to 'both the lack of his proper empowerment in the Constitutional Tribunal and the lack of guarantees of independence and impartiality' (*ibid*).

2. The Ombudsman pointed out that, in the above judgment, the ECtHR ruled on a breach by the Republic of Poland of the right to a tribunal previously established by law (Article 6(1) ECHR), because the Constitutional Tribunal's bench in the applicant company's case consisted of a person who was not authorised for this (Constitutional Tribunal Judge Mariusz Muszyński), namely a person elected in clear breach of domestic law and therefore of the ECHR, to an office that had previously been correctly filled. According to the Ombudsman, this conclusion applies to the successive people elected to the Tribunal in the same situation. Therefore, Judge Justyn Piskorski, who, in the Ombudsman's opinion, was elected in breach of Article 194(1) of the Constitution, is also such a person, as he replaced the late Judge Lech Morawski, who had been elected by the Sejm as a judge, even though there was no vacancy in the Tribunal. For this reason, 'Mr Justyn Piskorski is not entitled to hold office in the Constitutional Tribunal and to perform activities that are appropriate for a judge of a constitutional court' (justification of the request, p. 2).

The Ombudsman argued that, in the light of the judgment of the ECtHR of 7 May 2021, a ruling passed with the participation of a person who is not entitled to hold office in the Constitutional Tribunal will be fundamentally defective. According to the Ombudsman, any court will be able to decide not to take it into account, while any individual will be able to lodge an individual complaint to the ECtHR. The case P 7/20, in which Constitutional Tribunal Judge Justyn Piskorski should be removed, applies to the further functioning of the Disciplinary Chamber of the Supreme Court. According to the Ombudsman, the scope of jurisdiction of the Disciplinary Chamber of the Supreme Court falls within the scope of protection of the individual guaranteed by Article 6(1) of the ECHR and therefore individuals in whose cases this Chamber rules will be entitled to invoke protection from the Convention. Therefore, given the 'huge risk that any judgment of the Constitutional Tribunal regarding the rights and freedoms guaranteed by [the ECHR], which is passed with the participation of a person who is not entitled to adjudicate thereon, is defective under Article 6(1) ECHR and jeopardises the effectiveness of the protection from the Convention (...), and people, who are in the same situation as the person to whom the *Xero Flor* judgment applies, should refrain from adjudicating or be removed from adjudication, in order to maintain legal certainty and the stability of judicial decisions' (justification of the request, pp. 3–4).

3. According to the Ombudsman, the second subparagraph of Article 19(1) TEU, which constitutes a principle of effective judicial protection, also constitutes independent grounds for removing Judge Piskorski from participating in the examination of the case P 7/20. Since the Tribunal is to rule on issues which are encompassed by EU law in the case in question, the membership of the bench must satisfy the requirements of the EU principle of judicial protection, namely be independent, impartial and established by law. The Ombudsman emphasised that the provisions of the TEU are binding on all the bodies of a Member State, including the Constitutional Tribunal, and take precedence over the Act on the CT, so a possible lack of legal grounds in the said Act for removing a person from the bench is of no decisive significance for the reasons given by the Ombudsman. The failure to remove a person who is not authorised to adjudicate will make a judgment on matters of European

Union law passed by a bench that does not reflect the requirements of that law ineffective and inapplicable within the framework of European Union law.

II

The Constitutional Tribunal considered the following:

1. Legal grounds for the request for removal – formal analysis.

1.1. The Commissioner for Human Rights (hereinafter: Ombudsman) based his request firstly on Article 379(4) in connection with Article 54 of the Civil Procedure Code of 17 November 1964 (Journal of Laws of 2020, item 1575, as amended, hereinafter: CPC) in connection with Article 36 of the Act on the organisation and procedure of proceeding before the Constitutional Tribunal of 30 November 2016 (Journal of Laws of 2019, item 2393; hereinafter: Act on the CT) and in connection with the second subparagraph of Article 19(1) of the Treaty on European Union (Official Journal of the European Union, No. C 202 of 07/06/2019, p. 13; hereinafter: TEU) and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No. 61, item 284; hereinafter: ECHR), as well as, secondly, the second subparagraph of Article 19(1) TEU.

1.2. The Constitutional Tribunal reiterates that the institution of the removal of a judge from adjudication in a given case is regulated in Section II, Chapter 3 of the Act on the CT. The circumstances of removal by law (*iudex inhabilis*) are specified in Article 39(1) of the Act on the CT. The second paragraph of this article also provides for the removal of a judge for circumstances ‘that can raise doubts as to his impartiality’, and therefore in the situation of *iudex suspectus*. Furthermore, the provisions of the Act regulate the procedure for removing a judge (cf. Articles 39(3) and Articles 40–41 of the Act on the CT).

In the judgment of 15 February 2017, case K 2/15 (OTK ZU A/2017, item 7), the Constitutional Tribunal explained in detail the subjective and objective scope of the institution of removing a judge of the Tribunal from adjudicating, emphasising its comprehensive and exhaustive nature. In particular, the Tribunal pointed out that the provisions of the Civil Procedure Code do not apply to the removal of a judge of the Tribunal – on the principle of referring to Article 36 of the Act on the CT. The regulation of the Act on the CT is complete and encompasses all cases where a judge of the Tribunal is removed from adjudicating in a given case. Therefore, it is unreasonable to refer to the provisions of the CPC as the grounds for removing a judge of the Tribunal.

The position expressed in the cited decision remains applicable. It is also known to the Ombudsman, who is the author of the request on the removal of judges from participating in the examination of the case K 2/15. Given that the Ombudsman is persistently once again erroneously indicating Article 379(4) of the Civil Procedure Code as the basis for removing a judge of the Constitutional Tribunal applied accordingly, the current bench of the Constitutional Tribunal once again explains that this provision does not regulate the grounds for removing a judge, but indicates one of the reasons for the invalidity of civil proceedings (inconsistency of the court’s bench with the provisions of the law or the participation of a judge removed by law in the examination of a case). It cannot constitute the basis for removing a judge in civil proceedings, and all the more so, a premise for removing ‘a person who is not entitled to hold office in the Constitutional Tribunal’, because such an institution does not exist either in the provisions of the Act on the CT or in the provisions of the CPC.

1.3. Furthermore, the Tribunal mentions the unreasonable reference in the request to Article 54 CPC as the legal basis for the removal. This provision requires the provisions of the CPC on the removal of a judge to be applied accordingly to the removal of a court referendary, a lay judge, other judicial authorities and a public prosecutor. It also provides that a request to remove a court referendary and a lay judge is decided on by the court in accordance with the provisions of this section and, in other cases, it is referred to the respective superior authority. Notwithstanding the fact that the provisions of the CPC do not apply to the removal of a judge of the Constitutional Tribunal at all, Article 54 CPC cannot be applied in proceedings before the Tribunal in any situation.

1.4. The Ombudsman also specified the provisions of international law, i.e. Article 6(1) ECHR and the second subparagraph of Article 19(1) TEU as the basis for his request. Article 6(1) ECHR provides that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' Meanwhile, the second subparagraph of Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The said provisions cannot constitute grounds for a request to remove a judge of the Constitutional Tribunal not only because of the comprehensive regulation of this institution in the provisions of the Act on the CT, but primarily because they do not apply to the Polish Constitutional Tribunal (for more details on this, see point 2, part II of the justification). This assessment is not changed by the principle of precedence of a ratified international agreement over the provisions of the rank of a statute, which is invoked by the Ombudsman in his attempt to justify the admissibility of making the second subparagraph of Article 19(1) TEU an independent basis for the request for removal.

1.5. In conclusion, the Constitutional Tribunal holds that the Ombudsman's request is based on incorrect legal grounds and, as such, does not have the attribute of a request for the removal of a judge from participating in the examination of the case. This fact in itself constitutes a premise for dismissing the request, although, due to the precedent-setting nature of the case, the Tribunal will nevertheless address the merits of the allegations and arguments formulated by the Ombudsman.

2. Substantive analysis of the allegations.

2.1. The Ombudsman's allegations that Judge Justyn Piskorski should be removed from participating in the examination of case P 7/20 are based on the judgment of the European Court of Human Rights (hereinafter: ECHR) of 7 May 2021 in *Xero Flor w Polsce sp. z o.o. v Poland* (application no. 4907/18; hereinafter: ECtHR judgment of 7 May 2021). According to the Ombudsman, in the light of this judgment, adjudication by a person appointed in clear breach of the law to the office of judge of the Constitutional Tribunal nullifies the right to a tribunal previously established by law, as stipulated in Article 6(1) ECHR, and consequently, any judgment issued with the participation of such a judge, regarding the rights and freedoms guaranteed in the ECHR, will be fundamentally defective.

2.2. According to the Constitutional Tribunal, the ECtHR judgment of 7 May 2021, to the extent to which it refers to the Constitutional Tribunal, is based on arguments testifying to the Court's ignorance of the Polish legal system, including the fundamental constitutional assumptions specifying the position, system and role of the Polish constitutional court. To this extent, it was issued without legal grounds, overstepping the ECtHR's jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction; for these reasons it must be considered as a non-existent judgment (*sententia non existens*). This is evidenced by the following considerations:

2.3. In its judgment of 7 May 2021, the ECtHR unreasonably overstepped its jurisdiction by assessing the legality of the formation of the membership of the Constitutional Tribunal. This is an unprecedented encroachment onto the jurisdiction of the constitutional authorities of the Republic of Poland – the Sejm, which elects the judge, and the President, before whom the elected judge takes the oath. The conclusions undermining the correctness of the election of Constitutional Tribunal judges by the Sejm of the 8th term of office in 2015, on which the ECtHR based its decision, demonstrate the Court's ignorance of the Polish legal system and the judgments of the Constitutional Tribunal. Contrary to the Ombudsman's assertions and what follows from the ECtHR's judgment of 7 May 2021, the Constitutional Tribunal has not yet made a final decision on the legal status of any of the Tribunal's judges. In particular, it should be emphasised that it did not rule on this matter in the case K 34/15. The judgment issued in that case on 3 December 2015 (OTK ZU No. 11/A/2015, item 185), on which the ECtHR relied, in short, is not a judgment on the correctness of the election of any of the judges, but is a judgment on the law, on the compatibility or incompatibility with the Constitution of the challenged provisions of the Act on the Constitutional Tribunal of 25 June 2015 (Journal of Laws, item 1064; hereinafter: the Act on the CT of 2015). Therefore, in this case, the Tribunal considers it necessary at this point to refer to that part of the operative part of that judgment which, misconstrued, incites controversies. Indeed, in para. 8 of the operative part of the judgment in the case K 34/15, the Court ruled that Article 137 of the Act on the CT of 2015: 'a) is compatible with Article 112 of the Constitution and is not incompatible with Articles 62(1) and 197 of the Constitution, b) to the extent to which it applies to judges of the Tribunal whose term of office expires on 6 November 2015, is compatible with Article 194(1) of the Constitution, c) to the extent to which it applies to judges of the Tribunal whose term of office expires on 2 and 8 December 2015 respectively, is incompatible with Article 194(1) of the Constitution.' It clearly transpires from this that the Tribunal was not ruling on the election of new judges, but on the constitutionality of the contested provision of the Act on the CT of 2015 to the extent to which it applied to judges whose terms of office expired on 6 November, 2 December and 8 December 2015, respectively. It should be recalled at this point that every judgment of the Constitutional Tribunal is binding only with regard to the operative part, while the justification of the judgment is only of motivational significance, on condition that it does not extend beyond the framework set by the operative part.

In the case K 34/15, the Constitutional Tribunal also commented on the final stage of the procedure for electing a judge of the Tribunal, stating that '[t]aking an oath before the President (...) is not merely a solemn ceremony of a symbolic nature relating to the traditional inauguration of a period of office. The event has two important functions. Firstly, it is a public pledge by a judge to behave in accordance with the oath taken. In this way, the judge declares his personal liability for performing his duties impartially and diligently, in accordance with his conscience and with respect for the dignity of the office held. Secondly, taking the oath allows a judge to take up office, namely to exercise the mandate entrusted to him. These two important aspects of the oath prove that it is not merely a solemn ceremony, but an event that

incites specific legal effects. For this reason, the involvement of the President in taking the oath of judges of the Constitutional Tribunal elected by the Sejm should be treated as part of the exercise of the powers of the head of state.' The cited words of the Constitutional Tribunal unequivocally prove that the selection procedure ends with taking the oath before the President, with the result that only the judge who took the oath is authorised to take office and adjudicate.

With regard to the lack of grounds for questioning the status of any of the judges, these issues were clarified by the Constitutional Tribunal in its decision of case K 2/15 and numerous other decisions dismissing the Ombudsman's requests to remove the Tribunal's judges from adjudication. The judgments of the Constitutional Tribunal mentioned in the ECtHR judgment of 7 May 2021 did not apply to the assessment of the correctness of the election of specific people to the office of judge, but applied to the hierarchical control of the compliance of provisions of the Act with the Constitution. There are no bodies or mechanisms in the Polish legal system that would enable the verification of the legality of the election of the Tribunal's judges. The Constitutional Tribunal itself regarded itself as being inadequate in this respect, which, in its order of 7 January 2016, case U 8/15 (OTK ZU A/2016, item 1), which was issued in its full membership, discontinued the proceedings on the examination of compliance of the resolutions of the Sejm of the 8th term regarding the election of judges of the Tribunal with the Constitution. It could not have acted otherwise, because the lawmakers had not created a tool for examining the Sejm's creative competence, and therefore did not introduce a procedure enabling any of the other two remaining authorities – the judiciary and the executive – to challenge resolutions on the election of Constitutional Tribunal judges; nor did they give the Constitutional Tribunal itself such an ability.

In this light, any attempt to undermine the status of Constitutional Tribunal judges, either by domestic or international bodies, constitutes a material breach of the rights of the Sejm and the President, as well as an infringement of the constitutional principle of the separation and balancing of powers.

The membership of the Constitutional Tribunal in each of its cases is correct and all its judges are legally elected. The actions of the Ombudsman, who is persistently questioning the status of the judges of the Tribunal, despite being ineffective, undermine the constitutional order and devalue the role of the Polish constitutional court, creating a destabilising effect on the legal order.

2.4. The standard of examination in the proceedings before the ECtHR, which ended in the judgment of 7 May 2021, was Article 6(1) ECHR which, in its first sentence provides that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The ECtHR considered this provision to be an adequate standard of examination for assessing whether the proceedings before the Constitutional Tribunal in the case that lay at the foundations of the judgment of 7 May 2021 satisfied the Convention standard of the right to a tribunal previously established by law set out therein.

The above assumption is a result of the ignorance of the Polish legal order, including the provisions of constitutional rank, determining the establishment and powers of the Constitutional Tribunal. Article 6(1) ECHR unequivocally provides for the right to a court in an individual civil or criminal case. 'There is no doubt that proceedings before the Constitutional Tribunal are neither criminal nor civil proceedings in the meaning of Article 6 ECHR' (L. Bosek, M. Wild, komentarz do art. 79 Konstytucji [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016, Legalis, Nb 13). Therefore, deciding on such matters does not lie within the competence of the Constitutional Tribunal,

which is not a court in the meaning of Article 6(1) ECHR. This unambiguously arises from the constitutional position of the Tribunal and its constitutional competences.

2.5. In view of the clear instruction contained in Article 10(2) of the Constitution, the Constitutional Tribunal is a body of the judicial authority, although it does not exercise the administration of justice in the sense of adjudicating on individual civil, criminal or administrative cases. In accordance with Article 175(1) of the Constitution, the exclusive competence in this respect rests with the Supreme Court, the ordinary courts, the administrative courts and the military courts, which exercise the administration of justice in the Republic of Poland. The separate nature of the Tribunal arises from the systematic structure of the Constitution, which, in Chapter VIII, distinguishes between courts and tribunals, granting the latter specific powers, which differ from those of the ordinary courts.

In the light of the case law of the Constitutional Tribunal, '[T]he lawmakers clearly (...) distinguish between courts and tribunals (Article 10 and Article 173 of the Constitution), as well as listing the bodies that are courts, including the Supreme Court, the ordinary courts, the administrative courts, the military courts and the *ad hoc* court (Article 175 of the Constitution). This means that the Constitutional Tribunal is not a court in the meaning of Article 175 of the Constitution, although it is undoubtedly a body of judicial authority, which is a separate authority that is independent of the other authorities' (see judgment of 9 December 2015, case K 35/15, OTK ZU No. 11/A/2015, item 186).

2.6. The basic competence of the Constitutional Tribunal is the examination of the hierarchical compliance of norms. The doctrine of constitutional law emphasises that the activity of the Tribunal specified by the provisions of the Constitution is twofold. 'On the one hand, the Constitutional Tribunal acts in a similar mode and on similar principles to those of the courts, but the effects of its activities – to the extent encompassing the examination of the hierarchical compliance of norms – are realised in the same sphere as the activities of the legislative authority (they involve making changes to the system of law). On the other hand, its activities involve examining the effects of the activities of the law-making bodies, as well as the protection of human and civil freedoms and rights, namely activities that are typical of bodies protecting the law, whereas, according to the constitutional systematics, it is not a body of state control and the protection of the law' (A. Mączyński, J. Podkowik, komentarz do art. 188 Konstytucji [in:] *Konstytucja RP. Tom II. Komentarz do art. 87–243*, ed. M. Safjan, L. Bosek, Warsaw 2016, Legalis, Nb 22).

Therefore, the competence of the Tribunal does not allow it to be considered to be a court adjudicating on individual disputes in the meaning of Article 6(1) ECHR, as well as Article 45(1) of the Constitution. The Constitutional Tribunal is a court of law and not a court of facts. It is neither a body of appeal nor a body for the extraordinary review of court rulings. Judgements of the Constitutional Tribunal have universally binding force and are final (Article 190(1) of the Constitution), but they only incite effects in the normative sphere, namely they do not overrule judgments and other decisions passed on the basis of provisions that have been challenged in proceedings before the Tribunal, but they only overrule provisions that have been held by the Tribunal to be inconsistent with the Constitution.

The confirmation of the role of the Constitutional Tribunal formed in this way is the model of the Polish constitutional complaint, specified in Article 79(1) of the Constitution. The complaint may only be about a legal norm, on the basis of which a court or a body of public administration finally adjudicates on freedoms or rights, or about obligations of the complainant specified in the Constitution. The review of the application of the law in a particular case, or judgments that have shaped the rights or obligations of the complainants does not lie within the competence of the Tribunal. A judgement passed in the proceedings

initiated by a constitutional complaint does not automatically lead to the undermining of a given decision, but purely constitutes the basis for re-opening proceedings, overruling a judgment or another decision on the principles and in the procedure specified in the regulations that are appropriate to given proceedings (Article 190(4) of the Constitution).

2.7. The above analysis leaves no doubt that the Constitutional Tribunal is not a court in the meaning of Article 6(1) ECHR (or Article 45(1) of the Constitution), so this provision cannot constitute the basis for assessing whether proceedings before the Tribunal satisfy the Convention standards. This ultimately means that the Ombudsman's request had to be dismissed not only for formal reasons (point 1.5., part II of the justification), but was also lacking in substantive grounds.