

April 16<sup>th</sup>, 2019

**His Excellency**

**Mr. Diego García-Sayán**

**Special Rapporteur on the Independence of Judges and Lawyers**

Dear Sir,

On behalf of the Helsinki Foundation for Human Rights (HFHR) we would like to draw your attention to the case of Justice Alina Czubieniak, a judge of Regional Court in Gorzów Wielkopolski, who was recently sentenced in the disciplinary proceedings in relation to the decision she made in one of criminal proceedings.

### **I. Information about the case**

Justice Alina Czubieniak is a judge with 33 years' professional experience and has been working in Regional Court in Gorzów Wielkopolski (since 2007 as the president of its criminal appeals department).

On August 29<sup>th</sup>, 2016, Justice Czubieniak decided on a complaint against the decision of a district court to apply provisional detention to a man accused of engaging in a sexual activity with a minor under 15 years of age. The complaint was filed by an *ex officio* defence counsel of the accused 19-year old man (and backed by the public prosecutor), because there were significant doubts concerning his mental health. Justice Czubieniak set aside the ruling of the district court and referred the case to it for re-examination on the grounds that the defence counsel had not participated in actions in which their participation was mandatory (the lawyer, although having been appointed during the arrest session, did not take part in the session nor earlier, in the investigation). Therefore, the accused was released from detention on the same day and remained free until September 14<sup>th</sup>, 2016, when he was put in pre-trial detention again, this time in an arrest facility with a psychiatry ward.

Concerning this decision, disciplinary charges were brought against Justice Czubieniak in December 2017 amounting to "*an obvious and gross violation*" of several provisions of Polish Code of Criminal Procedure. During the proceedings, the judge explained that her intention was to ensure that the accused had enjoyed a real, not illusory, right of defence – in the light of his mental health and incapability of defending himself rationally. The judge referred to respective constitutional provisions and the European Convention of Human Rights. The disciplinary court of first instance acquitted Justice Czubieniak from the charge. The judgement of January 21<sup>st</sup>, 2018 was appealed against to the Supreme Court (acting as the disciplinary court of second instance) by both the Minister of Justice – Prosecutor General and the disciplinary officer.

On March 22, 2019, the newly-created Disciplinary Chamber of the Supreme Court delivered the ruling in Justice Czubieniak's case (its first sentence ever). The Disciplinary Chamber of the Supreme Court is a chamber established on the basis of the provisions of the Act on the Supreme Court which came into force in April 2018. The chamber is composed of judges appointed by the new National Council of the Judiciary. The composition of a bench adjudicating in this Chamber includes professional lawyers and lay judges. In the case of Justice Czubieniak the adjudicating judges had no previous experience in criminal law or criminal procedure. Upon receiving the written

merits, Justice Czubieniak has a right to appeal against this decision to the Disciplinary Chamber of the Supreme Court.

After the judgement was released, Justice Czubieniak criticised the judgement in a press interview. In the opinion of the disciplinary commissioner, Justice Czubieniak could have undermined the dignity of judge's office with her comments. The disciplinary commissioner launched another disciplinary proceedings in this case. The proceedings is still on-going.

## **II. The provisions concerning the mandatory presence of a defence counsel in criminal proceedings**

According to provisions of Polish Code of Criminal Procedure (Article 79), the accused must have a defence counsel if one of the following circumstances occurs: they are below the age of 18; they are deaf, mute, or blind; there is a justified doubt whether their ability to recognise the meaning of a given act or direct their behaviour was not excluded or significantly limited when committing the act; there is a justified doubt whether their mental health allows for their participation in proceedings or for running a defence in an independent and reasonable manner. The accused must have a defence counsel also when the court deems that necessary because of other circumstances impeding the defence.

If any of these occurs, the participation of a defence counsel in the entire proceedings is mandatory (during the investigation and during the main trial as well) – also in those sessions in which the presence of the accused is mandatory. Additionally, the accused must have a defence counsel in proceedings before a regional court if they are accused of a felony. In such a case, participation of the defence counsel is only mandatory during the main trial.

Where in the cases specified above the accused has no defence counsel of their own choice, the president or a clerk of the court competent to examine the case shall appoint a public defence counsel (an *ex officio* counsel) for the accused.

Furthermore, in the light of the UE Directive 2013/48/EU Member States have to ensure that "*suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively*". However, Poland has not fully implemented the Directive. The Ombudsman (several times) addressed the problem of the gaps in implementing the Directive in letters addressed to the Minister of Justice<sup>1</sup>. The Ombudsman indicated that the protection of suspects' rights was not fully adjusted to the requirements of the Directive, including (among others) the lack of provisions regulating the presence of a defence lawyer during actions undertaken by the law enforcement which involve a suspect or the lack of a guarantee for the suspect to contact a defence lawyer prior to the first hearing.

## **III. Recent changes in disciplinary proceedings against judges**

In 2018 the provisions amending the disciplinary proceedings came into force. The new provisions changed the way in which the disciplinary commissioners and judges of the disciplinary courts are appointed as well as procedural guarantees for judges.

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<sup>1</sup> Ombudsman, Letter no. DL IV 053-2/17, available at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2017/6/II.5150.9.2014/1066002.pdf> See also Grabowska-Moroz B. Prawo dostępu do obrońcy w świetle prawa europejskiego. Podręcznik, Helsinki Foundation For Human Rights, available at: <http://www.hfhr.pl/wp-content/uploads/2018/05/Prawo-dost%C4%99pu-do-obroncy-w-swietle-prawa-UE-FIN.pdf>

### *Disciplinary proceedings*

In the light of the new provisions, the disciplinary cases are heard by the disciplinary courts of the first instances at appellate courts or by the newly created Disciplinary Chamber of the Supreme Court (the latter being proper, in particular, when the disciplinary misconduct constitutes an intentional crime prosecuted by public indictment or when the defendant is a judge of the Supreme Court). In the second instance, all cases are adjudicated by the Disciplinary Chamber of the Supreme Court. A judge acquitted in the first instance and sentenced by the court of the second instance, has a right to appeal against this decision to a different bench of the court of the second instance.

Before the proceedings begin, the disciplinary commissioner (*rzecznik dyscyplinarny*) carries out an investigation, during which they may request a written or oral statement from a judge. If, after the investigation, there are grounds for initiating disciplinary proceedings, the disciplinary commissioner institutes them, draws up the disciplinary charges in writing and delivers the charges to the defendant, calling upon them to present the written explanations and to give evidence. The explanations may also be given orally. This stage of the procedure concludes with the disciplinary commissioner filing a motion for hearing the case to the disciplinary court.

The case is examined, in general, at a hearing and the proceedings are open to the public. The defendant may use a defence counsel. A judgement delivered by the disciplinary court of the first instance may be appealed against by the defendant, the disciplinary officer, the National Council of the Judiciary and by the Minister of Justice. The appeal should be heard by the Supreme Court's Disciplinary Chamber within the two-month period. The ruling of the court of the second instance is final and cannot be subject to cassation.

### *Disciplinary commissioners*

A disciplinary commissioner is a person entitled to act as a prosecutor in disciplinary proceedings against judges in Poland. There are several categories of disciplinary commissioners prescribed by the Act on common courts.

The ones of the highest importance are the Disciplinary Officer for Common Courts' Judges and two Deputy Disciplinary Officers for Common Courts' Judges, all of them appointed by the Minister of Justice for a four-year term of office. They may act as prosecutors in disciplinary cases concerning judges of appellate courts and presidents or vice-presidents of appellate and regional courts. They may also take over any case conducted by a deputy disciplinary commissioner or hand over any case to that commissioner.

The deputy disciplinary commissioners act at appellate courts (and prosecute in cases of regional courts' judges and district courts' presidents or vice-presidents) and at regional courts (where they handle the remainder of the disciplinary cases). There should be at least one deputy disciplinary commissioner at every regional and appellate court, chosen by the Disciplinary Commissioner for Common Courts' Judges from a list of six candidates (for each available post) who obtained the highest number of votes during the meeting of a general assembly of a regional or appellate court, and appointed for a four-year term of office.

The Minister of Justice may also appoint the Disciplinary Commissioner of the Minister of Justice for the purpose of conducting a specific case relating to a judge. The appointment excludes any other officer from taking actions in this case. This kind of disciplinary commissioner may be appointed from among common courts' judges or Supreme Court judges. However, with regard to disciplinary proceedings meeting the criteria of intentional crimes prosecuted by public indictment,

the officer may also be appointed from among public prosecutors indicated by the National Prosecutor.

### *Disciplinary judges*

According to the Act on common courts, the duties of a disciplinary court judge at an appellate court can be entrusted to a person who is a common court judge with at least 10 years' professional experience. Judges of a disciplinary court are appointed by the Minister of Justice, after consulting the National Council of the Judiciary, for a six-year term of office. All the cases of disciplinary courts at appellate courts are heard by a bench of three judges. The number of judges in disciplinary courts should be specified by the Minister of Justice, by means of an ordinance.

The composition of the disciplinary court (regarding to a particular case) is decided by lot from among all disciplinary judges of the court, provided that at least one of them permanently adjudicates criminal cases. The longest-serving judge who permanently hears criminal cases should be the presiding judge of the disciplinary court.

### *Disciplinary Chamber of the Supreme Court*

The new Act on the Supreme Court, which came into force on April 3<sup>rd</sup>, 2018, created two new chambers of the court, Disciplinary Chamber being one of them. This chamber is entitled to, first of all, adjudicate disciplinary cases of Supreme Court's own judges as a court of the first instance. It also serves, respectively, as a court of appeals in disciplinary proceedings against judges of common courts, or a court of cassation when it comes to disciplinary cases pertaining to attorneys at law, solicitors, notaries, public prosecutors and bailiffs. The President of the Supreme Court directing the work of the Disciplinary Chamber has insight into the actions of the disciplinary court of the first instance.

### *Liability to disciplinary actions*

According to the Act on common courts, a judge is liable to disciplinary actions for misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office (disciplinary misconduct). A judge is also liable to disciplinary actions for their conduct prior to the accession to the post if, due to such conduct, they failed to fulfil their respective duties at the state office held at that time or appeared to be unworthy of holding a judicial post.

Disciplinary proceedings may not be initiated, in general, upon the lapse of five years from the time the act was committed (the limitation period being prolonged to eight years in case the proceedings are instituted before the expiration of the 5-year term). The catalogue of possible disciplinary penalties includes: an admonition, a reprimand, lowering the basic salary by 5 to 50% for a period up to two years, dismissal from the function held, transfer to another place of service and dismissal from the office of a judge. A final convicting ruling of the disciplinary court should be published on the Supreme Court's website or in the Official Gazette of the Republic of Poland "*Monitor Polski*".

### *Insufficient procedural rights guaranteed in disciplinary proceedings*

The new provisions regulating disciplinary proceedings also undermined the procedural guarantees for judges accused of disciplinary delicts.

First of all, the new provisions abandoned the *ne peius* rule which prevents from issuing a judgement of the appellate court which could deteriorate the situation of an accused person. Currently, if a judge is acquitted in the first instance, they still can be found guilty and sentenced by the court of the second instance. In such a case the judge has a right to appeal to a different bench of the Disciplinary Chamber of the Supreme Court. As it was stated earlier, the bench in the Disciplinary Chamber which hears the case is composed of two professional judges and one lay judge.

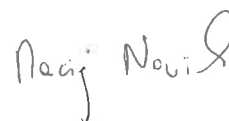
Secondly, the provisions concerning the evidence introduced a 14-day deadline for an accused person to present pieces of evidence proving their innocence. After the deadline, the disciplinary court may allow only the evidence which could not have been known to the accused judge before the deadline. Moreover, the new provisions allow to use in the disciplinary proceedings pieces of evidence obtained during an operational control – it refers also to information which concerns a crime other than a crime investigated via operational control.

#### IV. Conclusions

The case of Justice Czubieniak is the first case decided by the new Disciplinary Chamber of the Supreme Court. It reveals several significant gaps in the system of disciplinary proceedings against judges which affect their right to a fair trial and the right to defence. We do believe that the problem of protecting judges' independence in the context of the new provisions regulating disciplinary proceedings requires a close monitoring from national and international stakeholders. That is why, given the scope of the Special Rapporteur's mandate, as well as recognising your previous monitoring actions concerning the situation in Poland, we would like to appeal to you to consider addressing the case of Justice Czubieniak in a communication to the Polish Government.

*The letter was prepared by Małgorzata Szuleka and Maciej Kalisz in cooperation with advocate Marcin Wolny.  
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Yours sincerely,



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