



*Waldemar Żurek against Poland*  
Application no. 39650/18

WRITTEN COMMENTS  
BY  
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

EXECUTIVE SUMMARY:

- The case of *Waldemar Żurek against Poland* concerns important issues related to the independence of judiciary in Poland.
- With regards to termination of the applicant's term of office as a member of the National Council of Judiciary the HFHR has already stated in its previous written comments to the Court that the terms of office of the NCJ judicial members were protected by the Constitution and that the reform of the NCJ negatively affected the judicial independence.
- According to international standards of human rights, judges have a right to freedom of expression. Although they should make use of that freedom with due restraint, taking into account necessity to ensure public trust and confidence in judiciary, they cannot be deprived of the possibility to speak out on matters of public interest, especially those related to the independence of judiciary.
- In case of transgression of the limits of the freedom of expression, liability of a judge should be assessed in fair disciplinary proceedings before an independent disciplinary court. Harassment of a judge with open or concealed repressions would violate the principle of the judicial independence.
- Judges in Poland are subject to various forms of harassment. Particularly worrisome is abuse of disciplinary proceedings against judges who critical towards the Government's controversial reforms of the system of justice. Moreover, public media carry out regular "smear campaigns" against independent judges.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights, pursuant to the leave granted by the President of the Section on 7 October 2020.
2. Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. One of the leading programs of the HFHR is the Strategic Litigation Program whose activities are aimed at enhancing human rights protection in Poland through, among others, participation in legal actions undertaken for the public interest such as representing parties and preparation of legal submissions to national and international courts and tribunals. The HFHR has an established practice as regards of submission of third party interventions to the European Court of Human Rights and in representing victims in proceedings before this Court. In the past we had submitted *amicus curiae* opinions not only in cases against Poland (e.g. *M.P. v. Poland*, app. no. 20416/13; *A.K. v. Poland*, application no. 904/18), but also those against other countries, which in our opinion, concerned legal problems important also from the perspective of protection of human rights in Poland (e.g. *Baka v. Hungary*, app. no. 20261/12; *Guðmundur Andri Ástráðsson v. Iceland* [Grand Chamber], app. no. 26374/18).
3. HFHR believes that the present case concerns problems of the utmost importance from the perspective of the protection of judicial independence in Poland. The first problem is the controversial reform of the National Council of Judiciary (NCJ) adopted in 2017 which is widely

perceived as inconsistent with the constitutional and international standards of judicial independence. The second problem is related to various actions taken by of the Government officials after 2015 which may be perceived as politically motivated harassment of judges.

4. The present opinion concentrates on the second issue. The problem of termination of term of office of the NCJ members has already been discussed in details in the IHHR written comments submitted in the case of *Grzęda v. Poland* (app. no. 43572/18)<sup>1</sup>. To not to repeat our previous considerations, we would like just to reiterate that judges elected to NCJ had an entitlement under Polish law to protection against removal from NCJ. The law did not provide any possibility of premature termination of their terms of office. Termination of their terms of office threatened the independence of the NCJ and negatively affected independence of the whole judiciary. Because of that, such action was inconsistent with the rule of law standards.

5. The present written comments are divided into two sections. In the first one we present the international standards concerning protection of freedom of expression of judges arising out both binding as well as non-binding instruments. The second section is dedicated to presentation of selected examples of harassment of judges critical towards the Government's actions in the period between 2015 and 2020. None of the examples discussed concerns the applicant directly.

## II. JUDGES AND THE FREEDOM OF EXPRESSION

6. The guarantees of the freedom of expression provided in Article 10 of the Convention are applicable also to judges. The Court underlines that although judges "should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question" (*Kudeshkina v. Russia*, 26 February 2009, app. no. 29492/05, § 86), they cannot be prohibited from exercising their freedom of expression in the spheres which fall within the public interest. Questions concerning the functioning of the system of justice undoubtedly are one of such spheres and so "Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (...)" (*Baka v. Hungary* [GC], 23 June 2016, app. no. 20261/12, § 165). Similar standards with regards to the protection of the freedom of expression of judges are provided in various others international documents and recommendations.

7. According to Article 8 of the UN Basic Principles on the Independence of the Judiciary<sup>2</sup>, "members of the judiciary are like other citizens entitled to freedom of expression (...) provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". Moreover, Article 9 of the Basic Principles guarantees the right of judges the freedom to form and join associations of judges and other organizations.

8. Very similar standard is expressed in the Universal Charter of the Judge<sup>3</sup> and the Bangalore Principles of Judicial Conduct<sup>4</sup>. The commentary to the latter explains that although judges should

<sup>1</sup> Helsinki Foundation for Human Rights, *Grzęda against Poland*, app. no. 43572/18, written comments dated 28 November 2019, available at: <https://www.hfhr.pl/wp-content/uploads/2019/11/Grzeda-19290da.pdf> (last access: 22 October 2020).

<sup>2</sup> Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at: <https://www.ohchr.org/en/professionalinterest/pages/basicprinciplesofjudicialconduct.aspx> (last access: 22 October 2020).

<sup>3</sup> International Association of Judges, The Universal Charter of the Judge, adopted by the IAJ Central Council in Taiwan on 17 November 1999, updated in Santiago de Chile on 14 November 2017, available at: [http://www.iaj.org/eng/ib/import/international\\_standards/the\\_universal\\_charter\\_of\\_the\\_judge/eng-universal-charter\\_2017\\_english.pdf](http://www.iaj.org/eng/ib/import/international_standards/the_universal_charter_of_the_judge/eng-universal-charter_2017_english.pdf) (last access: 22 October 2020) - Article 3-5.

<sup>4</sup> UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, 27 July 2006, E/RES/2006/23, available at: <http://www.un.org/doc/46455abd.html> (last access: 22 October 2020) - Article 4.6.



12. The HFHR would like to underline the importance of this last conclusion. In times of the rule of law crisis, judges must be able to speak freely about threats to the independence of the judiciary. Various forms of expression of judges in this field play two very important roles. First, the judges' opposition against and criticism of some controversial reforms of the system of justice may discourage the politicians from pursuing them or at least oblige them to explain their motivations before the public opinion. Second, the opinion of judges may be of a great informative value for the citizens. After all, judges, due to their professional experience, are the best placed to assess what practical impact may given legal reform have on their job and, consequently, on the exercise of the right of access to justice by individuals.

13. Moreover, as the UN Special Rapporteur noted, every instance of alleged violation of ethical rules concerning the limits of the judges' freedom of expression should be reviewed by an independent disciplinary body in fair proceedings. Only in that way judges who exceed these limits may be punished. It would be completely unacceptable in the state ruled by law to harass judges through, for example, imposition of sanctions, dismissals, transfers or initiation of various criminal, disciplinary or other proceedings against them under false pretext to *de facto* punish them for the exercise of their freedom of expression.

14. Persecution of judges who use their freedom of expression to protest against legal reforms inconsistent with the standards of the rule of law ultimately threatens not only the rights and freedoms of judges but also the right to court of every individual. Such persecution may produce a "chilling effect" which may discourage judges not only from expressing their view on the matters of public importance but also from issuing rulings which are politically inconvenient for the ruling politicians. As discussed below, there have already been initiated proceedings against judges on account of judicial decisions issued by them.

### III. HARRASSMENT OF JUDGES IN POLAND

15. Since the parliamentary election in Autumn 2015, the Polish Government have taken various actions aimed against the independence of the judiciary. Some of the actions consisted in adoption of legislative reforms. The most important concerned organizational changes in the Constitutional Tribunal, modification of the mode of election of judicial members of the National Council of the Judiciary, reorganization of the Supreme Court and creation of two new chambers, lowering compulsory retirement age of judges (which was later revoked), changes in the process of appointment and dismissal of courts' presidents. All of these reforms raised serious controversies and led to litigations before the Court of Justice of the European Union<sup>13</sup> and the European Court of Human Rights<sup>14</sup>. In addition, all of them resulted in the state of legal uncertainty as the legal status of many Polish judges and of rulings issued by them is now being questioned.

16. In addition to the legislative changes, independence of the judiciary is undermined by various actions taken by the Minister of Justice and disciplinary commissioners appointed by him. In this context it is however worth to note that also the rules concerning the disciplinary liability of judges have been subject to extensive legislative changes in the recent years. In particular, the new Act on the Supreme Court<sup>15</sup> created a separate Disciplinary Chamber which has a wide organizational autonomy as compared to other chambers of the Supreme Court. Moreover, judges of the Supreme Court were appointed upon the motion of the reorganized NCJ, some of them did

---

<sup>13</sup> See e.g. ECJ, 24 June 2019, Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531; ECJ, 5 November 2019, Case C-192/18, *Commission v Poland (Independence of the lower courts)*, ECLI:EU:C:2019:924; ECJ, 18 November 2019, *Joined Cases C-585/18, C-624/18 and C-625/18, A.K.*, ECLI:EU:C:2019:982.

<sup>14</sup> See e.g. M. Szwed, K. Wiśniewska, *Strasbourg - A New Destination on the Road towards the Rule of Law? A report on cases against Poland before the European Court of Human Rights*, Helsinki Foundation for Human Rights 2020, available at: <https://www.hfhr.pl/wp-content/uploads/2020/09/komunikat-strasbourg-18-10-2020.pdf> (last access: 22 October 2020).

<sup>15</sup> The Act of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5).

not hide sympathy for the ruling party before the appointment<sup>19</sup> and moreover, according to the media reports, some allegedly took part in smear campaigns against judges<sup>20</sup>. According to the Supreme Court, in that circumstances the Disciplinary Chamber cannot be considered as an independent and impartial tribunal established by law.<sup>21</sup> The controversies around the Disciplinary Chamber are so serious that in the order of 8 April 2020 (C-791/19 R), the CJEU granted an interim measure in which it requested the Polish authorities "(1) to suspend, pending the judgment of the Court of Justice on the action for failure to fulfil obligations ('the final judgment'), the application of the provisions constituting the basis of the jurisdiction of the Izba Dyscyplinarna of the Sąd Najwyższy (i.e. the DCSC - authors' footnote) to rule, both at first instance and on appeal, in disciplinary cases concerning judges; (2) to refrain from referring the cases pending before the Izba Dyscyplinarna before a panel whose composition does not meet the requirements of independence defined, in particular, in A.K and Others".

17. Yet another important changes with regards to disciplinary liability of judges were introduced by the so called "Muzzle Law" adopted by the Parliament in December 2019<sup>19</sup>. The law provided, among others, that bodies of the judicial self-government cannot deliberate on the "political matters" and "in particular, it is forbidden to adopt resolutions that undermine the principles of the functioning of the authorities of the Republic of Poland and its constitutional organs." (Article 1 point 3 of the Muzzle Law). Also the freedom association of judges was limited by obliging judges to publicly disclose information on their membership in any forms of association (Article 1 point 29 of the Muzzle Law). Moreover, the law explicitly provided that actions aimed at questioning of effectiveness of judicial appointment or "the mandate of a constitutional body of the Republic of Poland" constitute disciplinary offence (Article 1 point 32 of the Muzzle Law). Therefore, the law prevents judges from applying the standards developed in the case-law of the CJEU and the Supreme Court to assess, for example, whether judges adjudicating in the first instance proceedings satisfied the criteria stemming from the right to have one's case heard by an independent and impartial tribunal established by law. In addition, the Muzzle Law provided that judge commits a disciplinary offence if he/she "carries out public activities that are incompatible with the principles of judicial independence and independence of judges". Such a broad provision in practice may be abused to prevent judges from exercising freedom of expression. The new provisions on disciplinary liability were negatively assessed by, among others, the Venice Commission, according to which: "These provisions, taken together, significantly curtail the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR, since judicial review should involve examination of all relevant aspects of the independence of the tribunal, including institutional ones. (...) Furthermore, the above provisions, taken together, aim at nullifying the effects of the CJEU ruling."<sup>20</sup> Equally negative was the Venice Commission's assessment of other

<sup>19</sup> See e.g. *Kontrowersyjne wpisy na TT sędziego Adama Tomczyńskiego z Izby Dyscyplinarnej SN*, "Rzeczpospolita", 16 October 2018, available at: <https://www.rp.pl/sztetbowan-sady/340169073-kontrowersyjne-wpisy-na-tt-sedziego-adama-tomczynskiego-z-izby-dyscyplinarnej-sn.html> (last access: 26 October 2020).

<sup>20</sup> P. Pacewicz, M. Jąłoszewski, *Akcja „Gersdorf, wypierdalaj”*, *Onet: Wymyślił sędzia SN Wytrykowski, pomogła Emilia*, "OKO.press", available at: <https://oko.press/akcja-gersdorf-wypierdalaj-onet-wymyslil-sedzia-na-s-n-wytrykowski-pomogla-emilia-rwancie-emilia/> (last access: 26 October 2020).

<sup>21</sup> Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020, ref. no. BSA I-4110-1/20, English translation available at: <http://www.snp.pl/aktualnosci/SReAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1-20-English.pdf> (last access: 22 October 2020).

<sup>22</sup> The Act of 20 December 2019 on amending the Law on the organization of common courts, the Act on the Supreme Court and certain other statutes (Journal of Laws of 2020, item 190).

<sup>23</sup> Joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (Dgi) of the Council of Europe on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws, 16 January 2020, CDL-PI(2020)002, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)002](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002) (last access: 22 October 2020) – paras. 36-37.

amendments to disciplinary liability of judges introduced in the "Muzzle Law". In particular, the Venice Commission underlined that the new law "contains overbroad and open-ended definitions and thus threatens the principle of legality. For instance, it prohibits «acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary» and «an infringement of the dignity of the office». Both of these invite very subjective interpretations and could easily be abused to interfere improperly in judicial roles."<sup>21</sup>

18. The examples of forms of harassment against judges via disciplinary proceedings were recently subject of various reports of NGOs. All of them may be divided into two categories.

19. First, some of the judges were questioned by the disciplinary commissioners or even charged before the Disciplinary Chamber of the Supreme Court for alleged transgression of the freedom of expression, usually in connection to some critical statements about the actions of the Government. Many examples of such proceedings were described in the report "Judges under pressure - report on the methods of harassment of independent judges by the authorities" published in 2019 by the largest Polish association of judges, "Iustitia"<sup>22</sup>. The document focuses on the instances of abuse of disciplinary proceedings to harass judges who oppose unconstitutional reforms implemented by the current Government. For example, judge Krystian Markiewicz, President of "Iustitia", and several other judges were questioned as witnesses or requested to present a written statements in the disciplinary proceedings initiated in relation to their participation in a music festival where they participated in the events aimed at promotion of legal education.<sup>23</sup> Subsequently judge Markiewicz was also charged in the disciplinary proceedings in connection to the letters in which he, as a President of "Iustitia", appealed to judges to not to cooperate with the Disciplinary Chamber of the Supreme Court and instead suspend disciplinary proceedings or submit preliminary references to the CJEU until the question of the legal status of this Chamber is resolved by the CJEU.<sup>24</sup> In the official communication, the Disciplinary Commissioner of the Ordinary Court Judges described the letters sent by K. Markiewicz as "a political manifesto". Judge Bartłomiej Przymusiński was questioned by the disciplinary commissioner for his critical remarks about the procedure of selecting candidates to the posts of judges before the reorganized National Council of the Judiciary.<sup>25</sup> Judges Piotr Gąciarek, Marek Celej and Małgorzata Kluziak were requested by the disciplinary commissioner to provide a written statement concerning their participation in the TV programme concerning the NCJ and its vice-president, judge Dariusz Drajewicz.<sup>26</sup> In January 2019 the Deputy Disciplinary Commissioner of the Judges of the Ordinary Courts took actions with regards to the adoption by the representatives of the judges of the Poznań and Kraków Appellate Jurisdictions resolutions criticizing various actions of the Government and the President which could threaten the independence of the judiciary. In course of these proceedings some of the judges who participated in passing of these resolutions were called to testify as witnesses.<sup>27</sup>

---

<sup>21</sup> Ibid., para. 14; see also: OSCE Office for Democratic Institutions and Human Rights, Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (As Of 20 December 2019), 14 January 2020, Opinion-Nr.: JUD-POL/365/2019 [AIC], available at: <https://www.osce.org/files/document/12274137> (last access: 26 October 2020) – paras. 53-62, 68-77.

<sup>22</sup> J. Kościarzyński, *Judges under pressure - report on the methods of harassment of independent judges by the authorities*, Iustitia 2019, available at: [http://www.iustitia.org.pl/images/stories/Iustitia/Judges\\_under\\_pressure\\_Raport\\_2019.pdf](http://www.iustitia.org.pl/images/stories/Iustitia/Judges_under_pressure_Raport_2019.pdf) (last access: 22 October 2020).

<sup>23</sup> Ibid., p. 5.

<sup>24</sup> Association of judges "Themis", *Response of the Polish authorities to the CJEU judgment of 19 Nov 2019 (the report containing translations of source documents)*, available at: <http://themis.wdznawac.eu/wp-content/uploads/2020/01/Response-of-Polish-authorities-to-CJEU-judgement-19-11-2019-1.pdf> (last access: 22 October 2020) – p. 12-15.

<sup>25</sup> J. Kościarzyński, *Judges under pressure...*, p. 6.

<sup>26</sup> Ibid., p. 13-14.

<sup>27</sup> Ibid., p. 31-33.

20. Second category of cases includes those in which judges were subject to disciplinary charges or were questioned as witnesses (on the preliminary stage of the disciplinary proceedings) in connection to the ruling which they issue or other procedural actions which they took in course of the judicial proceedings. This type of disciplinary proceedings were initiated in particular against judges who questioned or analysed the legal status of judges appointed by the President upon the motion of the reorganized National Council of the Judiciary. In this context it must be underlined that doubts concerning the legal status of such "new" judges are not unfounded – on the contrary, according to the Supreme Court's resolution of 23 January 2020, bench of the Supreme Court composed with participation of a person appointed upon the motion of the reorganized NCJ is always unlawful, while participation of such persons in the bench of ordinary courts may lead to its unlawfulness "if the defective appointment causes, under specific circumstances, a breach of the standards of independence (...)". The said resolution was adopted in response to the earlier judgment of the CJEU.<sup>28</sup> Therefore, in the light of these rulings, judges are not only entitled but even obliged to assess the impact of participation of irregularly appointed judge on the protection of the individual's right of access to and independent court. In spite of this, some of the judges who carried out such assessment faced disciplinary charges. One of such judges is Paweł Juszczyński, judge of the District Court in Olsztyn, delegated in September 2019 to the Circuit Court in Olsztyn. In November 2019, while reviewing an appeal against the judgment issued by a judge appointed upon the motion of the reorganized NCJ, Paweł Juszczyński requested the Chief of the Chancellery of the Sejm to provide documents concerning the process of election of the judicial members of the NCJ. Such a request was justified by the fact that these documents were not disclosed to the public what led to doubts as to the legality of the whole procedure. In response, the Minister of Justice revoked the delegation of the judge Juszczyński and the disciplinary charges brought a disciplinary charges against him, accusing him of obvious and blatant offense against the law and breach of the dignity of the office.<sup>29</sup> On 4 February 2020 judge Juszczyński was suspended in his professional duties on the virtue of the resolution of the Disciplinary Chamber. In addition his salary was reduced by 40%. In the reasoning of the resolution, the Disciplinary Chamber held that judge Juszczyński violated the constitution and set an exceptionally bad example for other judges.<sup>30</sup> In November 2019 the Disciplinary Commissioner of the Ordinary Court Judges presented charges to three other judges who took actions aimed at assessment of correctness of appointment of assessor who issued the first instance ruling. Subsequently, analogous disciplinary proceedings were opened against other judges.<sup>31</sup> In December 2019, the Disciplinary Commissioner initiated disciplinary proceedings against judge Anna Bator-Ciesielska who, acting as a presiding judge in cases pending before the Circuit Court in Warsaw, refused to adjudicate in the bench with judges who were appointed as the deputy disciplinary commissioners by the Minister of Justice, and submitted a preliminary references to the CJEU concerning the right to an independent court.<sup>32</sup> It must be noted that, according to the media relations, those two judges might have been involved in actions aimed at discrediting of independent judges, coordinated by the deputy Minister of Justice (see below).<sup>33</sup> In this context it is also worth to mention the case of judge Ewa Maciejewska, who were questioned as witness in the disciplinary proceedings on the account that she submitted a preliminary reference to the CJEU regarding threats to the independent of Polish judges resulting from the new rules on disciplinary proceedings.<sup>34</sup>

<sup>28</sup> ECJ, 18 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., ECLI:EU:C:2019:982.

<sup>29</sup> Association of judges "Themis", *Response of the Polish...*, p. 7-8.

<sup>30</sup> Resolution of the Disciplinary Chamber of the Supreme Court of 4 February 2020, ref. no. II DO 1/20.

<sup>31</sup> Association of judges "Themis", *Response of the Polish...*, p. 10.

<sup>32</sup> *Ibid.*, p. 16-17.

<sup>33</sup> See e.g. E. Ivanova, *Przełomowa decyzja sądu: nie chce orzekać z rzecznikiem dyscyplinarnym delegowanym przez Ziobrę*, 30 August 2019, available at: <https://Asyborcza.pl/7,75338,25148030,przełomowa-decyzja-sadu-nie-chce-orzekać-z-rzecznikiem-dyscyplinarnym.html> (last access: 22 October 2020).

<sup>34</sup> Association of judges "Themis", *Response of the Polish...*, p. 9.



20. However, some judges faced disciplinary charges for ruling and procedural actions which were not connected to the dispute over the legality of judicial appointments and independence of newly appointed judges. For example, judge Alina Czubieniak faced disciplinary charges after she quashed decision of the district court which placed defendant, person with intellectual disability not represented by the professional defender, in the preliminary detention. Judge Czubieniak was acquitted the disciplinary court of the first instance but the Disciplinary Chamber reversed the ruling and punished the judge with reprimand. However, in the second instance the Disciplinary Chamber lifted the reprimand and ruled that although the judge committed an obvious procedural mistake she shall not be punished.<sup>35</sup> In yet another case, judge Sławomir Jęksa faced disciplinary charges in connection to the ruling in which he acquitted the mayor of Poznań of the charge of using indecent language in a public place. According to the relation provided in the Iustitia's report "The charges applied to breaching the dignity of the office of judge through the pronouncement by the judge in the oral justification for the judgment and later in the written justification for a political manifest that applied to his views and assessments related to the constitutional activities of the state authorities."<sup>36</sup>

21. In addition to disciplinary proceedings, in some cases the authorities apply to the Disciplinary Chamber to waive the criminal immunity of judges in in the context which may suggest political motivations. It must be underlined that waiver of the judge's immunity has severe consequences – judge whose immunity was waived does not only face criminal charges which may ultimately lead to his/her conviction, but is also automatically suspended in his/her professional duties and his salary is reduced by 25% to 50%.<sup>37</sup> Prosecutors submitted such a motion, for example, in the case concerning judge Igor Tuleya, who is well known for his criticism of the reforms and other actions of the current Government which threaten the judicial independence and the standards of the rule of law. According to the prosecutors, judge Tuleya may have committed a crime by reviewing an appeal against decision on the discontinuation of criminal proceedings regarding the alleged unlawful deliberations of the Parliament in December 2016, on the public, instead of closed, hearing. In June 2020 the Disciplinary Chamber refused to waive judge Tuleya's immunity, but the prosecutor's office appealed.<sup>38</sup> The second instance ruling has not yet been issued. It is also worth to mention the case of judge Beata Morawiec, head of the judges' association "Themis", who, after removal from the position of the president of the Circuit Court in Kraków, sued the Minister of Justice and won in the first instance. In September 2020 the media informed that the special Department of Internal Affairs of the State Prosecutor's Office is conducting a criminal investigation against judge Beata Morawiec. The Prosecutor's Office suspects the judge of, among others, taking remuneration for preparation of an opinion, which she allegedly did not prepare, and of receiving a mobile phone from a defendant in 2012 for passing sentence in his favour. In October 2020 the Disciplinary Chamber waived judge Morawiec's immunity<sup>39</sup>, what raised serious

<sup>35</sup> J. Kościerzyński, *Judges under pressure...*, p. 38-39; A. Wójcik, *Despite CJEU verdict, Judiciary Council and Disciplinary Chamber not slowing down*, available at: <https://eulomblog.pl/2020/10/22/polecamy-nie-tylko-sadownictwo-dyscyplinary-chamber-not-slowing-down/> (last access: 22 October 2020); Judgment of the Disciplinary Chamber of the Supreme Court of 21 November 2019, ref. no. II DSS 2/18.

<sup>36</sup> J. Kościerzyński, *Judges under pressure...*, p. 16.

<sup>37</sup> Article 129 §§ 2 and 3a of the Act of 27 July 2001 – Law on the organization of common courts (Journal of Laws of 2020, item 365).

<sup>38</sup> M. Jąłoszewski, *Porozka Ziobry. Izba Dyscyplinarna nie uchyliła immunitetu sędziemu Tulei*, „OKO.press”, 9 June 2020, available at: <https://oko.press/porozka-ziobry-izba-dyscyplinarna-nie-uchyli-la-immunitetu-sedziemu-tulei/> (last access: 22 October 2020).

<sup>39</sup> Resolution of the Supreme Court of 12 October 2020, ref. no. I DO 42/20; A. Łukaszewicz, *Immunitet sędzi Morawiec uchyłony przez Izbę Dyscyplinarną Sądu Najwyższego*, „Rzeczpospolita”, 13 October 2020, available at: <https://www.rp.pl/Sedziowie-i-sady/201019846-immunitet-sedzi-morawiec-uchylony-przez-izbe-dyscyplinarna-sadu-najwyzszego.html> (last access: 22 October 2020); P. Figurski, J. Sidorowicz, *Izba Dyscyplinarna uchyliła immunitet sędzi Beacie Morawiec*, „Wyborcza.pl”, 12 October 2020, available at: <https://krakow.wyborcza.pl/krakow/7,14425,26390688,jest-decyzja-ws-immunitetu-sedzi-morawiec.html> (last access: 22 October 2020).

controversies in Poland<sup>40</sup> and abroad<sup>41</sup>. The second instance proceedings are now pending before the Disciplinary Chamber. The Prosecutor's Office applied for waiver of the immunity also in the case of judge Irena Majcher. The judge is suspected by the prosecutors of failure to fulfil her duties in the case concerning the re-registration of the company.<sup>42</sup> According to the Ombudsman, "The actions of the National Public Prosecutor's Office may, in a manner inconsistent with the principle of the independence of judges, interfere in the exercise of judicial power by causing judges to fear of negative consequences for taking actions in accordance with their own conviction and knowledge, in order to resolve cases entrusted to them".<sup>43</sup> Eventually, on 21 October 2020, the Disciplinary Chamber refused to waive the judge's immunity.<sup>44</sup>

22. While analysing various forms of harassment of judges in Poland, one should also not ignore the role of the public media which carry out regular "smear campaigns" against independent judges. For instance, the public media repeatedly covered individual cases of petty thefts committed judges, which may suggest the public opinion that this is a common problem. There was even created a special programme, entitled "Kasta" ("The Caste"), dedicated solely to the alleged pathologies in the judiciary. Independent judges are also frequently accused of fighting against the democratically elected Government on political grounds.

23. It must be also noted that, according to articles published by the private media in August 2019, some officials of the Ministry of Justice and some of the newly-elected members (judges themselves) of the reorganized NCJ allegedly coordinated online smear campaigns against independent judges. According to portal Onet.pl, as part of this campaign, woman identified as Emilia (who was in relationship with one of the new members of the reorganized NCJ) anonymously distributed discrediting materials about judge Krystian Markiewicz and moreover she "She also became known as an Internet hater who attacked judges in a very harsh way under a pseudonym on social media. This is one of her entries on Twitter regarding judge Waldemar Zurek, known for his criticism of PiS's actions: «Fu... off!!! You bring shame to honest judges and disgrace to Poland.»".<sup>45</sup> After publication of the Onet's report, the then deputy Minister of Justice,

<sup>40</sup> See e.g. Statement of Iustitia, 13 October 2020, available at: <http://www.iustitia.pl/13-komunikaty-iustiti-13-oktobra-2020-sprawozdanie-z-zaopiniowania-sędziów-polskiej-w-członach-z-organizacji-imi-2020-10-13> (last access: 22 October 2020); Resolution of the Council of the Faculty of Law and Administration of the University of Warsaw, 19 October 2020, available at: <http://monitor.konstytucyjny.eu/archiwum/15712> (last access: 22 October 2020).

<sup>41</sup> See e.g. Statement of the European Association of Administrative Judges, 13 October 2020, available at: <https://www.eaaaj.org/About/2020/status/1316027635914824832/photo/1> (last access: 22 October 2020); Statement of the European Association of Judges, 12 October 2020, <https://www.eaj.org/en/wp-content/uploads/2020/10/Statement-EAJ-Beata-Morawiec-1.pdf> (last access: 22 October 2020); Statement of the Magistrats européens pour la démocratie et les libertés, 13 October 2020, available at: <https://www.madel.fr/en/index.php/news/europe/685-medel-statement-on-judge-beata-morawiec> (last access: 22 October 2020).

<sup>42</sup> P. Szymantak, M. Kryszkiewicz, *Obywatel zawinił, sędziego skazał. Prokuratura żąda uchylenia immunitetu sędzi Ireny Majcher*, „Gazetaprawna.pl”, 21 October 2020, available at: <https://www.gazetaprawna.pl/arttykul/1494460,obywatel-zawinil-sedziego-skazal> (last access: 22 October 2020).

<sup>43</sup> See communication available on the Ombudsman's website: <https://www.rpo.gov.pl/pl/content/rpoc-3-19-10-2020-rozpatrzenie-sprawy-immunitetu-sedzi-ireny-majcher> (last access: 22 October 2020).

<sup>44</sup> M. Gałczyńska, *Izba Dyscyplinarna Sądu Najwyższego nie uchyliła immunitetu sędzi Ireny Majcher. Zarzutów nie będzie*, „Onet.pl”, 21 October 2020, available at: <https://wiadomosci.onet.pl/tylko-w-odpowiedzi/izba-dyscyplinarna-sadu-najwyzszego-nie-uchyliła-immunitetu-sedzi-ireny-majcher/g1h9Pk> (last access: 22 October 2020).

<sup>45</sup> M. Gałczyńska, *Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli "za czynienie dobra nie wsadzamy"*, „Onet.pl”, 19 August 2019, available at: <https://wiadomosci.onet.pl/tylko-w-odpowiedzi/ledztwo-onetu-farma-trolli-w-ministerstwie-sprawiedliwosci-czyli-za-czynienie-dobra-nie-wsadzamy/100> (last access: 22 October 2020); M. Gałczyńska, *Farma trolli w Ministerstwie Sprawiedliwości, cz. 2, Tak człowiek Piębiaka polował na szefa Iustitii*, „Onet.pl”, 21 August 2019, available at: <https://wiadomosci.onet.pl/tylko-w-odpowiedzi/farma-trolli-w-ministerstwie-sprawiedliwosci-cz-2-tak-czlowiek-piebika-polowal>

