Warsaw, 14 October 2021

928/2021/PSP

The European Court of Human Rights
President of the First Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Biliński v. Poland*
Application no. 13278/20

Pursuant to the letters of Ms Renata Degener, the Section Registrar of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 14 September 2021 granting leave to make written submission to the Court by 5 October 2021, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Łukasz Biliński against Poland (application no. 13278/20).

On behalf of the Helsinki Foundation for Human Rights,

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Warsaw, October 2021

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Biliński v. Poland

Application no. 13278/20

EXECUTIVE SUMMARY

- The case of *Biliński v. Poland* concerns two important issues related to the situation of the judiciary in Poland and interpretation of Article 6 of the Convention, that is, first, the problem of recognition of subjective right of judges to have their independence safeguarded and respected and, second, the importance and scope of protection of judges against "internal" threats to their independence.
- The Polish Constitutional Tribunal rejected the idea of subjective rights of judges to protect their independence. However, subjective right of judges to respect their irremovability was recognised by the Inter-American Court of Human Rights. Certain legal scholars propose to derive subjective right of judges to have their independence safeguarded and respected from Article 6 § 1 of the Convention.
- Without recognition of subjective right of judges, judicial independence is protected primarily through the prism of right of individuals an independent tribunal or rights of judges to access to court, freedom of expression or protection of privacy. However, not all threats to judicial independence can be effectively addressed in this way.
- Recognition of subjective right of judges would therefore contribute to stronger protection of judicial independence which is a necessary condition for the effective functioning of the domestic human rights protection system.
- To effectively protect judicial independence it is necessary not only to protect judiciary against interferences undertaken by other branches of power but also against undue pressure exerted by other judges, in particular court presidents. The importance of such protection had been noted also in the case-law of the Court.
- In the specific Polish context the protection of independence of individual judges against "internal threats" is even more important taking into account recent legislative reforms which increased the impact of the Minister of Justice on appointment and dismissal of court presidents.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights ("HFHR"), pursuant to the leave granted by the President of the Section on 14 September 2021.

2. The present written comments are divided into two sections (excluding introduction and conclusions). In the first part we address the problem of whether the subjective right of a judge to have his independence respected and protected by the State authorities can be derived from Article 6 § 1 of the Convention. In the second part we discuss the

importance of protection of judges against threats to their judicial independence resulting from actions of organs of judiciary, in particular court presidents.

II. THE SUBJECTIVE RIGHT OF A JUDGE TO HAVE HIS INDEPENDENCE SAFEGUARDED AND RESPECTED

3. In the communication of the present case the Court asked the parties, whether Article 6 § 1 of the Convention can "be interpreted in such a way as to recognise a subjective right for judges to have their individual independence safeguarded and respected by the State".

4. In the Polish legal system, the guarantees of judicial independence have usually been perceived as legal norms of systemic and institutional nature and not as sources of subjective rights of judges. In particular, such view has been consistently presented by the Polish Constitutional Tribunal, even in its case law prior to personal and legal changes introduced after 2015. For example, in the judgment of 7 November 2005 (ref. no. P 20/04) the Constitutional Tribunal held that "constitutional provisions relating to judges do not contain regulations that would be an «end in themselves», and in particular do not constitute personal «privileges» for a certain group of public officials, intended primarily to protect their interests. These provisions should be viewed primarily from the institutional point of view, i.e. through the prism of striving to ensure actual compliance with the most important constitutional principles on the system of justice and the judiciary". The Constitutional Tribunal admitted that some subjective rights of judges may arise out of constitutional guarantees of judicial independence, however "from the functional point of view, these are not personal rights, the primary purpose of which would be to protect the interests of specific persons (or professional groups) and which, therefore, could at all be compared with the constitutional rights and freedoms of humans and citizens, provided in the Chapter II of the Constitution". This view had been upheld, among others, in the Constitutional Tribunal's decision of 30 November 2015 (ref. no. SK 30/14): "guarantees of the status of a judge provided for at the constitutional level and then developed on the statutory basis cannot be easily equated with constitutional subjective rights. The regulations shaping the legal situation of a judge are instrumental in nature in relation to the rules of organization of the state apparatus and its individual segments. Therefore, one cannot talk about the constitutional right of a judge «to be irremovable» or «to occupy a certain official position in a specific court». Such «rights» do not belong to the constitutional freedoms and rights within the meaning of Article 79 section 1 of the Constitution".

5. The approach of the Polish Constitutional Tribunal is not, however, the only possible option. Notably, in the views adopted in the case of *Bandaranayake v. Sri Lanka* the UN Human Rights Committee (hereinafter: HRC) held that the arbitrary removal of the complainant from the position of judge violated her right to have equal access to public service (Article 25[c] ICCPR) interpreted in conjunction with the right of access to court (Article 14 ICCPR). The HRC stated that "the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary"[1]. Even though the HRC did not explicitly held that the ICCPR guarantees judges subjective right to have their

[1] Human Rights Committee (Views), *Soratha Bandaranayake v. Sri Lanka*, 24 July 2008, Communication No. 1376/2005, CCPR/C/93/D/1376/2005.

independence protected and respected and moreover Article 14 was invoked only in conjunction with Article 25(c) ICCPR which does not have its equivalent on the grounds of the Convention, it is important that it referred to the concept of judicial independence to justify finding of violation of rights of judge. That is because it may suggest that for the HRC the principle of judicial independence has not only an institutional aspect but has also influence on the rights of judges.

6. The explicit recognition of the subjective right of judges to have their irremovability respected can be found in the case law of the Inter-American Court of Human Rights (hereinafter: IACtHR). In the judgment in the case of *Quintana Coello et al. v. Ecuador* the IACtHR held that: "the scope of judicial independence translates into a judge's subjective right to be dismissed from his position exclusively for the reasons permitted, either by means of a process that complies with judicial guarantees or because the term or period of his mandate has expired"[2]. Unlike the Polish Constitutional Tribunal, the IACtHR holds that the institutional aspect of the principle of judicial independence is linked with the individual subjective right of judges: "the institutional guarantee of judicial independence is directly related to the right of the judge to remain in office as a result of the guarantee of tenure (...) the State must guarantee the autonomous exercise of the judicial function as regards both its institutional aspect, that is, in relation to the Judiciary as a system, and also as regards its individual aspect, that is, in relation to the person of the specific judge"[3].

7. However, so far, the European Court of Human Rights has not adopted analogous interpretation in its case law. Usually, cases concerning judicial independence are reviewed from the perspective of rights of individuals (parties to proceedings) to have their case heard by an independent and impartial tribunal established by law. In this situation, it is a right of party to proceedings to an independent court what is at stake and not the right of a judge to have his or her independence respected. However, the Court has also issued numerous rulings concerning judges whose rights guaranteed under the Convention were violated by various measures which extensively interfered with their judicial independence. The number of such judgments increased in the recent years thanks to, among others, evolution of interpretation of Article 6 in the Court's judgments in cases such as *Vilho Eskelinen and Others v. Finland* (19 April 2007, app. no. 63235/00) or *Baka v. Hungary* (23 June 2016, app. no. 20261/12) as well as the phenomenon of "rule of law crisis" in certain Member States. Still, even though in such cases the Court takes into account the importance of the rule of law and judicial independence (see e.g. *Bilgen v. Turkey*, 9 March 2021, app. no. 1571/07, §§ 63 and 79), the direct object of its considerations is not violation of a right of a judge to have his independence safeguarded and respected, but allegations of violations of rights explicitly guaranteed in the Convention, in particular Article 6, 8 or 10.

8. This approach is especially visible in the context of interpretation of Article 6 § 1 of the Convention where the Court, while analysing whether the said provision is at all applicable to the case at hand, determines first whether given measure imposed on a judge interferes with some of his/her civil rights recognised in the domestic law. The HFHR notes that in the recent case law the Court does not examine the existence of "civil

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[2] Inter-American Court of Human Rights (Judgment), *The Supreme Court pf Justice (Quintana Coello et al.) v. Ecuador*, 23 August 2013, § 155.

[3] Inter-American Court of Human Rights (Judgment), *López Lone et al. v. Honduras.*, 5 October 2015, §§ 193-194.

rights" of judges too restrictively (see e.g. *Bilgen v. Turkey*, §§ 53-64), however in some cases the question of existence of "civil rights" of judge raised certain controversies among judges of the Court (see e.g. *Broda and Bojara v. Poland*, 29 June 2021, app. nos. 26691/18 and 27367/18, dissenting opinion of judge Krzysztof Wojtyczek - §§ 4-8). Still, under the present approach it may happen that some measure colliding with the principle of judicial independence would fall outside the scope of Article 6 § 1 of the Convention because it would not affect civil rights recognised in the domestic law.

9. Furthermore, Article 6 § 1 of the Convention has procedural nature. Therefore, while considering complaints of judges under this provision, the Court concentrates on the examination of whether the applicants were provided with access to court, adequate procedural guarantees etc. At the same time the Court underlines that "Article 6 § 1 does not guarantee any particular content for (civil) «rights and obligations» in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned" (*Boulois v. Luxembourg* [GC], 3 April 2012, app. no. 37575/04, § 91). In some circumstances, however, measures affecting with the judicial independence may be reviewed from the perspective of substantive rights guaranteed in the Convention, in particular Article 8 (see e.g. *Denisov v. Ukraine* [GC], 25 September 2018, app. no. 76639/11, §§ 95-134; *Gumenyuk and others v. Ukraine*, 22 July 2021, app. no. 11423/19, §§ 93-101) or Article 10 (see e.g. *Baka v. Hungary*, cited above, §§ 140-176). Nevertheless, the scope of these provisions is limited and certainly not all measures interfering with judicial independence constitute restriction of privacy or freedom of expression of judges.

10. What is important, in the legal literature one can find attempts to derive subjective right of judges to have their independence safeguarded and respected from Article 6 § 1 of the Convention. Particularly significant in this context is the interpretation proposed by the former President of the Court, judge Linos-Alexander Sicilianos, in his concurring opinion to the judgment in the case of *Baka v. Hungary* and the recent article "The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, Para. 1 of the ECHR"[4]. The author, referring to, among others, case law of the Human Rights Committee and the Inter-American Court of Human Rights (see above), held that in order to protect the rule of law and to safeguard rights of individuals to have their cases heard by independent courts, States must be obliged to provide adequate safeguards protecting judicial independence. Such an obligation shall be corresponded with subjective right of a judge to judicial independence. According to judge Sicilianos, such a subjective right is inherent in Article 6 of the Convention.

11. Similar interpretation has been recently proposed by Mathieu Leloup[5]. According to this author, protection of substantive right of judges to have their independence protected and respected is justified, among others, from the perspective of the principle of subsidiarity. In the light of this principle, domestic judges play a fundamental role in the protection of rights and freedoms guaranteed in the Convention. However, in order to

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[4] Linos-Alexander Sicilianos, *The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, Para. 1 of the ECHR* [in:] *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano*, eds. P. Pinto de Albuquerque and K. Wojtyczek, Springer 2019, pp. 547-557.

[5] Mathieu Leloup, *Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR*, European Constitutional Law Review 2021, First View, pp. 1-28, DOI: https://doi.org/10.1017/S1574019621000286,

allow them to apply the Convention standards in a proper way, their own independence must be safeguarded. Furthermore, argues M. Leloup, deriving a subjective right of judges from Article 6 § 1 of the Convention would make it possible for the Court to adequately address complaints concerning attacks on judicial independence, without necessity of applying other, substantive rights guaranteed in the Convention. It will also allow the Court to focus not only on the independence of courts, but also address the problems of threats to the independence of individual judges. At the same time, the author noted certain difficulties with interpretation of the right of judge to have his independence protected and respected. One of them concerned the necessity of establishing a severity threshold to determine which interferences with judicial independence amount to violation of subjective right of a judge.

12. HFHR believes that reinterpretation of Article 6 § 1 of the Convention in a way proposed by the abovementioned legal scholars would allow the Court to examine a wider scope of measures interfering with judicial independence in terms of their compliance with the Convention[6]. As already mentioned, at the moment cases concerning judicial independence are reviewed from the perspective of rights of parties to proceedings to have their case heard by an independent and impartial tribunal established by law. In this situation, focus is placed on systemic threats to judicial independence, such as lack of existence of legal guarantees protecting against arbitrary removal. However, one cannot deny that in practice judicial independence may be threatened also by various forms of harassment of individual judges or groups of them. One can find many examples of such actions in Poland, where independent judges are being charged in disciplinary proceedings or suspended for, for example, actions aimed at verification of legality of appointment of other judges[7]. The problem is that in practice it can be often difficult to establish a sufficient link between harassment of a judge and a right of parties to proceedings to have their case heard by an independent court. This link would be clear if a pressure was exerted on a judge to directly influence judgment he is going to issue in a concrete case. However, situation may be more complicated if pressure was exerted on a judge outside of the context of a concrete case but with the aim of influencing the way he/she adjudicates generally. Similarly, it may be difficult to prove with sufficient certainty that independence of one judge was restricted because other judges were subjected to some forms of undue interferences or harassment. At the same time, in the HFHR opinion, the negative effect of such acts of harassment of individual judges on the whole judicial system in a given state could be very significant. Actions taken by, for example, organs of the executive or court presidents against independent judges may create a chilling effect dissuading other judges from taking actions which could seriously threaten their careers. If a right of judges to have their independence safeguarded and

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[6] Similarly: M. Leloup, *Who Safeguards...*, pp. 23-24

[7] See e.g. J. Kościerzyński, *Judges under pressure - report on the methods of harassment of independent judges by the authorities*, Iustitia 2019, available at: https://www.iustitia.pl/images/pliki/Judges_under_pressure_Raport_2019.pdf (accessed: 3 October 2021); Helsinki Foundation for Human Rights, *Amicus curiae* opinion in the case of *Żurek v. Poland*, 27 October 2020, https://www.hfhr.pl/wp-content/uploads/2020/11/amicu_curiae_zurek.pdf (accessed: 3 October 2021); M. Jałoszewski, *Ścigają sędziego Synakiewicza za stosowanie prawa UE, Gąciarka za konferencję u Bodnara*, "OKO.press", 23 September 2021, https://oko.press/scigaja-sedziego-synakiewicza-za-stosowanie-prawa-ue-gaciarka-za-konferencje-u-bodnara/ (accessed: 3 October 2021).

respected was derived from Article 6 § 1 of the Convention, judges who fell victims of such forms of harassment could apply for the protection to the Court themselves.

13. Therefore, recognition of a right of judges to have their independence safeguarded and respected would strengthen the protection of judges against undue interferences with their independence what in turn would contribute to improvement of protection of rights of individuals. The Court itself notes the link between protection of the rights of judges and their ability to fulfil their task of protection of the rights of individuals: "It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality" (*Bilgen v. Turkey*, § 79). And indeed, judicial independence if crucial for a proper implementation of the whole Convention. As M. Leloup aptly argues, in the light of the principle of subsidiarity, domestic courts are key players in the enforcement of the provisions of the Convention. However, they may fulfil that role only if they are truly independent and impartial[8]. In the HFHR opinion, this effect could be particularly worrisome, if disciplinary or quasi-disciplinary measures were imposed on judges who merely applied the Convention or acts of international law, what sometimes happens in Poland.

III. PROTECTION OF JUDGES AGAINST "INTERNAL" THREATS TO THE JUDICIAL INDEPENDENCE

14. Usually the notion of judicial independence is associated with the protection of judges against undue interferences of other branches of power, in particular – the executive. From that perspective it is connected to the principle of separation of powers which is one of the foundations of the contemporary concept of the rule of law. However, in the light of both the Polish constitutional standards, as well as the international law and recommendations, it is clear that the judicial independence implies the protection of judges not only against "external", but also "internal" threats, that is against excessive pressure exerted on them by organs and officials within the structure of the judiciary.

15. Article 173 of the Polish Constitution provides that "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power". This provision strengthens the general principle of separation of powers declared in Article 10 of the Constitution, and refers primarily to protection of the judicial power against interferences of other branches of power. This does not mean, however, that the Polish Constitution protects judges only against interferences coming from outside of the judiciary. It is worth to note that in the context of judges the Constitution uses two phrases: "niezależność", which refers to the independence of judiciary as a whole or court as an institution, and "niezawisłość" (see e.g. Article 45 section 1 and Article 178 section 1 of the Constitution), which refers to the independence of individual judges. According to the Constitutional Tribunal, "niezawisłość" (individual independence) has various aspects – it includes not only to the "independence from out-of-court bodies (institutions)" or "independence from the influence of political factors" but also "independence of a judge from the judicial authorities and other judicial bodies" (see e.g. judgment of the Constitutional Tribunal of 24 June 1998, ref. no. K 3/98).

[8] M. Leloup, *Who Safeguards...*, pp. 22-23.

16. The importance of protecting judicial independence against "internal" threats has been noted also in the international soft-law documents. For instance, according to the Universal Charter of the Judge: "The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary" (Article 2)[9]. In the same tone, Article 1.4 of the Bangalore Principles of Judicial Conduct provides that: "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently"[10]. Similarly, according to Article 9.1 of the Mount Scopus Standards of Judicial Independence: " In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors"[11].

17. Within the system of the Council of Europe, the necessity of protecting judicial independence against "internal threats" was underlined, among others, in the Recommendation CM/Rec(2010)12 of the Committee of Ministers[12]. In the point 22, the Committee of Ministers held that "In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence". Moreover, the Committee recommended that the superior courts should not give instructions to judges concerning the way they adjudicate concrete cases "except in preliminary rulings or when deciding on legal remedies according to the law". In the explanatory memorandum to the Recommendation, the Committee of Ministers emphasised the importance of internal independence of judges: "The judicial independence is not just freedom from improper external influence, but also improper influence from within the judicial system, either by other judges or judicial authorities. Each individual judges is subject only to the law. Therefore, judicial hierarchical interference in the exercise of judicial functions cannot be permitted". Also the Venice Commission noted the importance of "internal independence" of judges: "Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an «internal» aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts"[13].

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[9] The Universal Charter of the Judge, https://www.icj.org/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf (accessed: 3 October 2021).

[10] 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: https://www.refworld.org/docid/46c455ab0.html (accessed: 3 October 2021).

[11] International Project of Judicial Independence of the International Association of Judicial Independence and World Peace, Mount Scopus International Standards of Judicial Independence, approved March 19, 2008 consolidated 2015, https://12ca241e-b6b8-91e5-b777-949f9bfa986c.filesusr.com/ugd/a1a798_1ff8b15b7e4e471eb2c61226e4dc024d.pdf.

[12] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d (accessed: 3 October 2021).

[13] Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), CDL-AD(2007)003-e, § 61, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)003-e (accessed: 3 October 2021).

18. The significance of safeguarding of "internal independence" of judges has been recognised also in the case law of the Court[14]. In particular, in the judgment in the case of *Parlov-Tkalčić v. Croatia* the Court held: "judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court (...) The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified" (*Parlov-Tkalčić v. Croatia*, 22 December 2009, app. no. 24810/06, § 86). The Court found violation of the Convention in the context of damaging the "internal independence" of a judge, among others, in cases concerning instructions given by court presidents to individual judges on how given concrete case should be resolved (see e.g. *Khrykin v. Russia*, 19 April 2011, app. no. 33186/08; *Agrokompleks v. Ukraine*, 6 October 2011, app. no. 23465/03).

19. It is therefore clear, that the protection of independence of judges against "internal threats" such as undue pressure exerted by court presidents or other judicial authorities must be considered as a key elements of the rule of law standards. In the opinion of the HFHR, the necessity to protect "internal independence" of judges is even more clear in the light of the recent reforms of the model of appointment and removal of presidents of courts and election of judicial members of the National Council of Judiciary.

20. On 12 July 2017, the Sejm passed the Act amending the Law on the Organisation of Ordinary Courts[15], which changed, inter alia, rules for dismissing court presidents. Both before the amendment and after its entry into force, the competence to appoint presidents and vice presidents of circuit and appellate courts belongs to the Minister of Justice. According to the old provisions, however, the Minister of Justice could dismiss the presidents and vice-presidents of appellate and regional courts only in the case of "gross failure to perform official duties" and "when for other reasons continued performance of the function is incompatible with the good of the administration of justice". Moreover, before dismissing the president (or vice-president) of court the Minister of Justice had to consult the National Council of the Judiciary, and when it issued a negative decision, the Minister was bound by it. The procedure for dismissing presidents and vice presidents of district courts was similar, but the decisions in this regard were made not by the Minister of Justice, but by presidents of appellate courts. The law adopted in 2017 significantly changed these rules, granting more power to the Minister of Justice. First, the amendment removed the obligation of the Minister of Justice to seek the opinion of the assembly of judges before appointing a court president. Second, the Minister of Justice gained the power to dismiss also presidents and vice presidents of district courts. Third, two new grounds for dismissal of presidents and vice presidents were introduced: the resignation of the president and "particularly low effectiveness of activities in the field of

[14] See: J. Sillen, *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, European Constitutional Law Review 2019, vol. 15, issue 1, pp. 104-133, DOI: https://doi.org/10.1017/S1574019619000014.

[15] Act of 12 July 2017 amending the Law on the Organisation of Ordinary Courts, Journal of Laws 2017, item 1452.

administrative supervision or organization of work in a court or lower courts". Fourth, a negative opinion of the National Council of the Judiciary was to be binding on the Minister only if it was adopted by a majority of 2/3 votes. Fifth and finally, a transitional provision authorized the Minister of Justice to dismiss incumbent presidents and vice-presidents of courts within 6 months of entry into force of 2017 law without observing the abovementioned requirements. This allowed the Minister of Justice to introduce far reaching personal changes in the courts' management. The new provisions were negatively assessed, among others, by the Venice Commission. The Venice Commission criticised granting the Minister of Justice a competence to decide on dismissal of court presidents "single-handedly" and found it striking "that following the July amendments to the Act the judiciary has no participation whatsoever in the procedure of appointment of court presidents"[16]. It is also worth to note that arbitrary dismissal of court vice-presidents without providing them with access to court was found to be inconsistent with Article 6 § 1 of the Convention by the Court in the judgment in the case of *Broda and Bojara v. Poland.* All in all, as the HFHR pointed out in one of its reports: "the changes in the area of appointing court presidents and vice presidents, as well as the restriction on their competences, in practice aim to broaden political influence on the justice system. The appointment of court presidents by the Minister of justice without consultation with the judicial community deprives court presidents of their essential legitimacy to manage the courts, and additionally makes them dependent on the Ministry of Justice. A court president should have the support of their community, first of all so that they can introduce needed changes to how the court operates, and secondly to protect the court and its judges against political influence"[17].

21. As a sidenote it is worth to note that the growing impact of the Minister of Justice on the organisation of judiciary can be seen also in the sphere of disciplinary responsibility of judges. In particular, prior to 2018 disciplinary commissioner was appointed by the NCJ from among the candidates nominated by the general assemblies of appellate judges. Deputy commissioners were elected by collegia of appellate and circuit courts. The reform adopted by the Parliament in 2017[18] introduced the office of a Disciplinary Commissioner of Judges of Ordinary Courts appointed by the Minister of Justice. His deputies are appointed in the same manner. In addition, Disciplinary Commissioner of Judges of Ordinary Courts appoints deputy commissioners who work at appellate and circuit courts. Therefore, impact of Minister of Justice on disciplinary bodies increased.

22. The analysis of the abovementioned changes must be conducted also in the light of the reform of the personal composition of the National Council of Judiciary. Even though in the light of the Constitution the NCJ does not belong to the judicial power and moreover it does not constitute a form of judicial self-government, it has important competences with regards to the organisation of the system of justice. According to the Constitution,

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[16] Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017), §§ 100-103, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e (accessed: 3 October 2021).

[17] B. Grabowska-Moroz, M. Szuleka, *It Starts with the Personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018*, Warsaw 2018, p. 27, https://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf (accessed: 3 October 2021).

[18] Act of 8 December 2018 on the Supreme Court, Journal of Laws 2018, item 5.

the main task of the NCJ is safeguarding the independence of courts and judges. However, as a result of changes in the model of election of judicial members of the NCJ (moving a competence in this area from judges to the Sejm), that body lost its independent character. Consequently, it is no longer able to effectively protect independence of court and judges.

23. The consequence of this growing impact of the executive and legislative powers, and in particular – the Minister of Justice, on the sphere of organisation of judiciary, is that in the Polish reality the "internal" and "external" threats to the judicial independence are strongly intertwined. In the situation in which court presidents would be truly independent officials with support of judges of given court, their actions with regards to individual judges of that court could be perceived as exercise of judicial autonomy. Of course, this does not mean that independent court presidents could exercise their competences in an arbitrary manner and in a way which would threaten the internal judicial independence. Nevertheless, it may be argued that the principle of judicial independence would tolerate a wider margin of discretion in that case. However, when the independence of court presidents is restricted by extensive powers of the Minister of Justice, their interferences with individual judges, especially in the context suggesting intent to affect the way given judge adjudicates, may raise controversies as they may be perceived as inspired by the executive.

IV. CONCLUSIONS

24. To conclude, the HFHR believes that recognition of a subjective right of judges to have their independence safeguarded and respected would contribute to strengthening the protection of rights of individuals. The reason for that is that not all threats to judicial independence can be effectively addressed from the perspective of right of parties to proceedings to have their case heard by an independent tribunal. At the same time, exerting undue political pressure on individual judges or subjecting them to various forms of harassment may negatively influence the way they adjudicate and, consequently, their ability to effectively protect rights provided in the Convention.

25. Protection of judicial independence must extend also to protection against so-called "internal" threats, that is undue pressure exerted on individual judges by other judges, in particular their superiors such as court presidents. Importance of such protection had been recognised, among others, by the Polish Constitutional Tribunal, international soft-law documents and the case-law of the Court. In the specific context of Poland, protection of "internal independence" of judges is even more important taking into account the fact that in the recent years impact of the Minister of Justice upon appointment and dismissal of court presidents significantly increased.