



Permanent Mission
of the Republic of Poland
to the United Nations Office
at Geneva

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The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to transmit herewith the response to the communication sent by Mr. Diego Garcia-Sayán, Special Rapporteur on the independence of judges and lawyers to H.E. Mr. Jacek Czaputowicz, Minister of Foreign Affairs of the Republic of Poland on 23 May 2019.

The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 19 July 2019

Special Procedures Branch
Office of the High Commissioner for Human Rights
Geneva

In response to the letter of Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García-Sayán, addressed to the Minister of Foreign Affairs, Mr Jacek Czaputowicz, concerning the case of judge Alina Czubieniak

Ad. 1. Please provide any additional information and comments which you may have on the above mentioned allegations.

In Case No. ASD 10/2017, the Supreme Court and the Court of Appeal – the Disciplinary Court in Wrocław, having considered the evidence collected, established the following factual circumstances of the case of judge Alina Czubieniak:

On 8 May 1986 Alina Czubieniak was appointed to the position of a judge at the District Court in Gorzów Wielkopolski (*Sąd Rejonowy w Gorzowie Wielkopolskim*). Since 1992 she has been working at the Voivodship Court in Gorzów Wielkopolski (*Sąd Wojewódzki w Gorzowie Wielkopolskim*) and after the reorganisation of the judiciary system she is a judge of the Regional Court in Gorzów Wielkopolski (*Sąd Okręgowy w Gorzowie Wielkopolskim*). She works in the Fourth Appeal Criminal Division of this Court and since 15 February 2007 she has been the acting head of the division.

██████████ was arrested on 8 August 2016 at 8:25 p.m. on the suspicion of committing a crime contrary to Article 200(1) of the Polish Criminal Code. He was questioned as a suspect by a police officer on 9 August 2016 and on the following day he was questioned by the Międzyrzecze District Prosecutor. On 11 August 2016, the suspect was taken to the District Court in Międzyrzecze to be questioned before the court so that an interim order may be granted to have him remanded in custody. Following the request of the prosecutor attending the hearing, the District Court in Międzyrzecze appointed a public defender for ██████████ pursuant to Article 79(1)(4) of the Polish Code of Criminal Procedure (hereinafter referred as the CCP) read in conjunction with Article 81(1) of the CCP. The rationale for the decision was a doubt whether mental health of the suspect will allow him to attend proceedings and defend himself independently and reasonably. Furthermore, the court decided to apply a preventive measure of remand in custody for the period of 2 months. In the statement of grounds the Court specified that the specific facility in which the suspect was to be held on remand within the regime of psychiatric ward was to be decided by the prosecutor as the suspect remained at the disposal of this authority. The suspect was informed of the content of the decision by being provided with the true copy of the decision along with the notification of his rights.

The decision was appealed by the suspect's public defender before the Regional Court in Gorzów Wielkopolski, the Fourth Appeal Criminal Division and assigned to the judge Alina Czubieniak. A hearing on the interlocutory appeal against the pre-trial detention order against ██████████ was held on 29 August 2016. At the hearing, the prosecutor requested that the challenged decision be set aside and the case be remitted to the court for reconsideration. The Regional Court in Gorzów Wielkopolski with judge Alina Czubieniak as the presiding, acting pursuant to Article 437(2) of the CCP Procedure, read in connection with Article 439(1)(10) of the CCP, set aside the challenged decision and remitted the case to the District Court in Międzyrzecze for reconsideration. It was pointed out in the statement of grounds to the decision that according to the Regional Court, the absolute ground for appeal existed, as provided for in Article 439(1)(10) of the CCP as '[...] already in the course of preparatory proceedings, the public prosecutor had doubts regarding the state of sanity of ██████████. This, and the fact that the suspect cannot write or read, should result in the appointment of a public defender who should have attended both the questioning of the suspect during the preparatory proceedings and during the remand hearing'. As part of the enforcement of the decision of 29 August 2016, ██████████ was released from the Detention Centre in Szczecin (*Areszt Śledczy w Szczecinie*).

When reconsidering a remand into custody of ██████████, the District Court in Międzyrzecze decided on 14 September 2016, to order detention in a penitentiary facility with a

treatment ward specialising in psychiatry for the period of 2 months, namely from 14 September 2016, 2:55 p.m., to 13 November 2016, 2:55 p.m. The decision was appealed against by the defender of the suspect. The Regional Court in Gorzów Wielkopolski, by its decision of 28 September 2016, modified the challenged decision by changing the end date for the remand to 25 October 2016, 8:25 p.m., and upheld the challenged decision in its remaining part.

On 14 October 2016 the public prosecutor applied for the extension of the remand period for ██████████ to 25 November 2016. The District Court in Międzyrzecze by its decision of 21 October 2016 delivered in Case No. II Kp 284/16 did not grant the motion and stated that ██████████ had not obstructed the proceedings and while staying in isolation he became aware of the reprehensibility of his behaviour.

The public prosecutor appealed against this decision, but the Regional Court in Gorzów Wielkopolski, having examined the interlocutory appeal, upheld the challenged decision on 16 November 2016. As a consequence, ██████████ was released from the correctional facility on 25 October 2016.

During the preparatory proceedings against ██████████ an expert witnesses in psychiatry stated, that in the period when the alleged crime was committed the suspect, due to his intellectual disability, was entirely incapable of recognising the significance of his actions and controlling his conduct within the meaning of Article 31(1) of the Polish Criminal Code (hereinafter referred as the CC). Therefore, the prosecutor requested that the District Court discontinued the proceedings and ordered an interim measure ("środek zabezpieczający") against ██████████ consisting of electronic monitoring and therapy. Having considered the request, the District Court in Międzyrzecze, by its decision of 29 May 2017, Case No. II K 572/16, discontinued criminal proceedings against ██████████ and ordered that ██████████ visit regularly the Independent Public Psychiatric and Mental Health Hospital in Międzyrzecze to take part in the specialist psychosexual therapy. The Court did not grant the request in its remaining part.

Having considered the interlocutory appeal against the decision of the District Court, the Regional Court in Gorzów Wielkopolski, by its decision of 28 June 2017, Case No. IV Kz 179/17, modified the challenged decision in such a manner that apart from the interim measure consisting in the obligation to visit regularly the Independent Public Psychiatric and Mental Health Hospital in Międzyrzecze, electronic monitoring was ordered in respect of ██████████ pursuant to Article 93a(1)(1), Article 93b(1)(4) and Article 93e of the CC.

Judge Alina Czubieniak explained that the decision had been made to grant the request lodged by the prosecutor within interlocutory appeal proceedings, and in this particular it had been aimed at ensuring the suspect a real and not a fictional defence mental state of the suspect and his consequential inability to defend himself independently and reasonably led her into the conclusion that the decision to deprive a person who is ill of his liberty without providing him the possibility of real defence was blatantly unjust and contravened the Constitution of the Republic of Poland and the Convention.

Before the Disciplinary Court, the defendant upheld the explanations that were read out to her and added that only the interpretation of Article 249(3) of the CCP that she had proposed enabled the assumption of the article's compliance with the Constitution of the Republic of Poland. She also stated that the statement of grounds for pre-trial detention of ██████████ included in the decisions of adjudicating courts had proven inaccurate. As for the alleged crime, she argued that any blatant violation of law by her was out of question as this would be possible only if the effects of such violation were real or occurring, which was not the case. She requested for acquittal.

The Court of Appeal – the Disciplinary Court in Wrocław, by its judgment of 23 January 2018, Case No. ASD 10/2017 acquitted judge Alina Czubieniak of the disciplinary misconduct and ordered that the cost of disciplinary proceedings be paid by the State Treasury.

The Deputy Disciplinary Officer ([REDACTED]) in the Court of Appeal in Szczecin appealed against the judgment in its entirety to the disadvantage of judge Alina Czubieniak.

The judgment of the Court of Appeal – the Disciplinary Court in Wrocław was also appealed against in its entirety by the Minister of Justice to the disadvantage of the defendant.

Ad. 2. Please provide detailed information on the legal basis for the instituting disciplinary proceedings against Justice Czubieniak, and explain how they are compatible with existing international and regional standards relating to judicial independence.

Pursuant to Article 107(1) of the Act of 27 July 2001 Law on the System of Common Courts (hereinafter referred to as the Act on Common Courts) a judge shall face disciplinary liability for professional misconduct, including for an evident and blatant error in law and conduct against the dignity of the office (disciplinary misconduct).

Justice Alina Czubieniak was accused of an evident and blatant error in law, committed on 29 August 2016, contrary to Article 79(3), Article 249(3) and Article 439(1)(10) of the CCP due to the fact that when adjudicating on Case No. IV Kz 225/16 at the Regional Court in Gorzów Wielkopolski, initiated through an interlocutory appeal lodged by the defender of [REDACTED] against the decision of the District Court in Międzyrzecze of 11 August 2016, Case No. II Kp 217/16, being the remand order, she stated that the decision in question had been issued in the absence of the suspect's defender whose attendance was obligatory given the doubts concerning mental health of the suspect, and as a consequence of this position by means of the ruling issued pursuant to Article 439(1)(10) of the CC she set aside the decision (remand order) and remitted the case to be reconsidered by the District Court in Międzyrzecze, which in turn resulted in that, for the period of 15 days, namely until he was put in custody again, [REDACTED] stayed free, i.e. she was accused of the misconduct contrary to Article 107(1) of the Act on Common Courts.

The Act under which disciplinary proceedings were initiated against judge Alina Czubieniak is binding law in the Polish legal system. In the Polish law, a presupposition of the constitutionality of statutory acts exists, which is clearly emphasised in the case-law. The case-law states that *'presupposition of the compliance of the act with the Constitution may be rebutted only by the judgment of the Constitutional Tribunal and the judge is bound by the act until the act enjoys the status of an act remaining in effect* (cf. judgment of the Supreme Court of 25 August 1994, I PRN 53/94, OSNAPiUS 1994, vol. 11, item 179, judgment of the Supreme Administrative Court of 27 November 2000, II SA/KR 609/98, judgment of the Constitutional Tribunal of 31 January 2001, P 4/99). The Supreme Court is required to respect legal norms applicable in Poland and to exercise judicial power based on regulations derived from such norms.

The Supreme Court is a constitutional judicial body whose responsibility resulting from the separation and balance of powers is to exercise the administration of justice by means of applying laws enacted by other branches of power. At the same time it should be emphasised that under Article 188 of the Constitution of the Republic of Poland the Constitutional Tribunal has been granted the competence to assess the constitutionality of statutory acts. The Disciplinary Chamber of the Supreme Court, therefore, is not a competent body to adjudicate on the compliance of acts with the Constitution or the provisions of international law as this is a responsibility of other bodies.

Legal solutions shaping the disciplinary liability model that are currently in place in Poland guarantee the independence of the judiciary by ensuring normative, effective measures to deprive other branches of power of influence over the Supreme Court, including the Disciplinary Chamber, and they guarantee the independence of all the judges of that Court. The principle of the independence of judges requires that the judges be free from undue influence both from the outside

and from the inside of the judicial system. Internal independence of judges means that there is no pressure or instructions from other judges. The conditions of independence and impartiality as defined above are fully satisfied by the judges of the Supreme Court adjudicating within the Disciplinary Chamber and by the Disciplinary Chamber as such.

3. Please provide detailed information on the rationale for imposing a disciplinary sanction against Justice Czubieniak, and explain to what extent this sanction can be regarded as in line with existing international and regional standards relating to disciplinary proceedings against judges.

The list of disciplinary sanctions against common court judges and Supreme Court judges that is in place in Poland is fully compatible with the existing international standards and the Constitution of the Republic of Poland. Additionally, this list does not differ significantly from the lists of disciplinary sanctions provided for in the legal systems of other European countries. Above all, it cannot be said that it is more repressive in terms of penalising disciplinary misconducts.

The current list of disciplinary sanctions in Poland against common court judges and Supreme Court judges has been specified in Article 109 of the Act on Common Courts and in Article 75 of the Act of 8 December 2017 on the Supreme Court (hereinafter referred to as the Act on the Supreme Court).

In Article 109 of the Act on Common Courts, the legislator provided for the following list of sanctions that may be ordered for disciplinary misconducts of a judge:

- 1) admonition;
- 2) reprimand;
- 2a) reduction of basic remuneration by 5% to 50% for the period from six months to two years;
- 3) dismissal from the function held;
- 4) transfer to another post;
- 5) removal from the judge's office.

According to the wording of Article 75 of the Act on the Supreme Court, the legislator provides for the possibility of ordering the following sanctions against Supreme Court judges for disciplinary misconduct:

- 1) admonition;
- 2) reprimand;
- 3) reduction of basic remuneration by 5% to 50% for the period from six months to two years;
- 4) dismissal from the function held;
- 5) removal from the judge's office.

The currently applicable list of disciplinary sanctions is essentially parallel to the list of disciplinary sanctions specified in the previous Act on Common Courts and in the Act on the Supreme Court as earlier the acts in question provided also for: admonition, reprimand, dismissal from the function held and removal from the judge's office for disciplinary misconduct. The only *novelty* is a sanction consisting in the reduction of judge's basic remuneration.

At this point a list of disciplinary sanctions against judges in selected European countries should be noted.

In France, pursuant to Article 45 of the Organic Law, disciplinary sanctions that apply to judges include:

- ✓ reprimand recorded in personal files;
- ✓ transfer to another position,
- ✓ cancellation of certain functions,
- ✓ prohibition of being nominated or appointed to serve as a judge in one-judge panels for the period of five years,
- ✓ reducing the remuneration grade,
- ✓ temporary dismissal from the function for no longer than one year with full or partial suspension of remuneration,
- ✓ demotion,
- ✓ mandatory retirement or resignation from the office if a judge is not entitled to retirement benefit,
- ✓ removal from the office.

In Spain, pursuant to Article 420 of the Organic Law, disciplinary sanctions that may be ordered against judges for misconducts committed while exercising their professional duties include:

- ✓ warning,
- ✓ fine up to EUR 6,000,
- ✓ transfer to another court, situated at last 100 km from the previous court in which the judge adjudicated,
- ✓ suspension for the period of three years,
- ✓ removal from the office,

In England, the list of disciplinary sanctions that may be applied against judges for disciplinary misconducts committed is specified by Section 108 of the Constitutional Reform Act 2005 and includes:

- ✓ notice,
- ✓ warning,
- ✓ reprimand,
- ✓ suspension from a judicial office,
- ✓ removal from an office.

In Italy, disciplinary sanctions under Article 5 of the Act of 23 February 2006 are as follows:

- ✓ warning/notice,
- ✓ reprimand,
- ✓ loss of privileges resulting from seniority,
- ✓ temporary incapacity to run (be elected) for managerial functions, such as president, deputy president, head of prosecutor's office, deputy head of prosecutor's office,
- ✓ suspension from a function,
- ✓ removal from an office.

In Austria, according to § 104(1) of RStDG disciplinary sanctions include:

- ✓ reprimand,
- ✓ fine up to the equivalent of 5 monthly emoluments,
- ✓ transfer to another place of service without being entitled to reimbursements of costs related to resettlement
- ✓ removal from office.

In Germany, in turn, the only disciplinary measure available in administrative proceedings with respect to federal court judges is reprimand (§ 64(1) of DRiG). Within court proceedings, disciplinary measures such as reprimand, fine, or removal from office may be ordered (§ 64(2) of

DRiG). As for land court judges, the only disciplinary measure available in administrative proceedings is reprimand. Within court proceedings, disciplinary measures such as reprimand, fine, reduction of remuneration, transfer to another court with the reduction of remuneration and removal from office may be ordered (§ 5(1) of BDG).

In summary, it should be emphasised that a far-reaching similarity may be observed between the list of disciplinary sanctions existing in Poland and the lists of disciplinary sanctions existing in other European countries. For this reason, it is impossible to claim non-compliance with international standards of disciplinary sanctions that may be ordered against a judge for disciplinary misconduct committed.

The existing disciplinary case-law concerning judges formulated a number of principles to shape the dispositions of disciplinary sanctions. First and foremost, one of basic functions of disciplinary sanctions is justice and protection functions. This means that a disciplinary sanction should reflect the gravity of disciplinary misconduct and the degree of fault, but also serve preventive objectives, not only with respect to a judge who committed a misconduct, but also judges in general (cf. judgment of the Supreme Court of 7 December 2017, SNO 42/17, LEX No. 2408338; judgment of the Supreme Court of 26 April 2017, SNO 5/17, LEX No. 2297419).

In the case of disciplinary proceedings against judge Alina Czubieniak, the most lenient sanction, being an admonition, was ordered. In accordance with disciplinary case-law concerning judges, the sanction of admonition should be recognised as an element of the entire procedure of holding a judge accountable for disciplinary misconduct. This means that in the case of misconducts of minor importance, in the case of which the very disciplinary proceedings is inconvenient, it is enough for the purposes of the objectives of disciplinary functions to order an admonition (judgment of the Supreme Court of 19 July 2017, SNO 23/17, LEX No. 2347785; judgment of the Supreme Court of 26 February 2016, SNO 80/15, LEX No. 1997970). As it is stated in the legal doctrine: 'in such cases it is necessary for the adjudicating panel to believe that the disciplinary proceedings carried out brought the expected outcome, namely that it will make the judge observe the principles regulating the performance of his profession' (K. Szczucki, Act on the Supreme Court. Commentary, LEX 2018).

The Supreme Court established in the disciplinary case against judge Alina Czubieniak that *'in accordance with Article 53(1) of the CC, applied accordingly to disciplinary proceedings pursuant to Article 128 of the Act on Common Courts, when imposing a penalty the court should take into account formative and preventive objectives that are to be attained with respect to the convicted person, as well as the need to raise legal awareness among the public, and in this case also a specific professional group'*. The Supreme Court concluded that the sanction of admonition referred to in Article 109(1)(1) of the Act on Common Courts ordered against the defendant would allow to attain these objectives. The misconduct of the defendant and potential consequences for a minor victim require adequate disciplinary reaction. On the one hand, such sanction will be of appropriate formative and preventive value, and as such it will at least partially lead to achieving the objective of individual prevention, and on the other hand, it will be a proper response that will foster appropriate attitudes among judges.

The Supreme Court took into account that the defendant was well aware of the breach of legal regulations, her actions were intentional and they could result not only in blatant and evident breach of procedural law, but also in the violation of the minor victim's rights, the latter being perceived as an incriminating circumstance. As for the mitigating circumstances, the Supreme Court took into account the facts raised during the disciplinary proceedings by the defendant concerning the limited degree of danger posed by the suspect. The sanction is symbolic even though it was ordered in response to an intentional act. The Supreme Court ordered the sanction that is usually reserved for unintentional acts, such as minor road traffic offences resulting from the driver's absent-mindedness.

4. Please provide detailed information on the composition of the panel of the Disciplinary Chamber of the Supreme Court that adjudicated on the case of Justice Czubieniak, and explain to what extent the composition of new Disciplinary Chamber and the procedure for the appointment of its members can be regarded as being in line with international and regional standards on judicial independence.

Under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms everyone is entitled to a hearing by an independent and impartial tribunal established by law. At the same time, the right to a fair trial resulting from Article 6(1) of the Convention should be read also in the light of the preamble to the Convention which states that the rule of law is a common heritage of States. According to the case-law of the European Court of Human Rights [hereinafter referred to as the ECtHR], the right to a fair trial is a reflection of the principle of the rule of law underlying the European Convention of Human Rights (*De Cubber v. Belgium* of 26 October 1984, A. 86, § 30).

The Convention for the Protection of Human Rights and Fundamental Freedoms is, according to Article 87(1) of the Constitution of the Republic of Poland, a part of national legal order and should be applied directly pursuant to Article 91 of the Constitution of the Republic of Poland. The case-law of the Constitutional Tribunal states that: *[...] The Convention for the Protection of Human Rights and Fundamental Freedoms may constitute a model of review in the proceedings before the Constitutional Tribunal, and therefore the provisions thereof and the provisions of the Constitution jointly set the standard that must be satisfied by the legislator that establish norms relating to access to court* (judgment of the Constitutional Court of 12 March 2002, Case Law P 9/01, LEX No. 54048). Also in the case-law of the Supreme Court it is emphasised that the Convention is applied directly. In its judgment of 28 November 2008, the Supreme Court emphasised that *'the provisions of the Convention may constitute not only an interpretation guideline when interpreting the provisions of domestic law, but also a direct basis (...).'* At the same time, the legal doctrine indicates that the notion of the right to a fair trial (*prawo do rzetelnego procesu*) existing in the European legal order is expressed in Poland as the right to a court (*prawo do sądu*) (A. Zieliński, *Konstytucyjny standard instancyjności postępowania sądowego*, "Państwo i Prawo", 2005, vol. 11, p. 8).

Within the Polish legal system, the right to a fair trial is guaranteed *expressis verbis* by Article 45(1) of the Constitution of the Republic of Poland, pursuant to which *'everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court'*. The provision of Article 45 of the Constitution is fully compliant with Article 77(2) of the Constitution, according to which *'statutory acts shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights'* and the wording of Article 173 of the Constitution which established the principle of the independence of the judiciary.

Given the requirements established by the case-law of the ECtHR concerning the establishment of a court by law, it should be strongly emphasised that the adoption by the Parliament of the Act on the Supreme Court and the amendment of the Act on the National Council of the Judiciary cannot lead to a conclusion that the Supreme Court, and in particular its Disciplinary Chamber, is not a court established by law. On the contrary, the establishment of the Disciplinary Chamber satisfies European criteria concerning the establishment of judicial bodies imposed on the legislative authority. As a result, it should be therefore stated that the establishment of the Disciplinary Chamber by the Parliament pursuant to the Act on the Supreme Court and the specification of the procedure for selecting judges to this chamber constitutes a part of the right to a fair trial.

As far as the Supreme Court and its Disciplinary Chamber are concerned, the legislator decided to specify the procedure for appointing judges in Chapter 4 of the Act on the Supreme Court and in Article 27 it specified the scope of cases to be heard by the Chamber in question. In Article 29 of the same Act it is stated that a Supreme Court judge is appointed by the President of the Republic

of Poland on the request of the National Council of the Judiciary, which confirms a constitutional norm. Detailed conditions that must be satisfied by a person to be appointed as a Supreme Court judge are specified in Article 30 of the Act on the Supreme Court, while in Article 31 of the same Act the matters of the President's announcement of judicial vacancies and the procedure of proposing a candidate have been described. This matter was regulated accordingly for judges adjudicating in the Disciplinary Chamber of the Supreme Court, the difference being that the President of the Republic of Poland makes announcement of vacancies after consulting the President of the Supreme Court responsible for managing the Disciplinary Chamber.

First and foremost, it should be therefore clearly emphasised that in the light of the Constitution of the Republic of Poland and systemic statutory acts the appointment of judges is a competence of the President of the Republic of Poland. Article 179 of the Constitution of the Republic of Poland indicates explicitly that judges are appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary. Official acts by the President of the Republic of Poland relating to the appointment of judges do not require the signature of the President of the Council of Ministers to be valid. When considering the above in the context of statutory acts, it should be emphasised that pursuant to Article 55(1) of the Act on Common Courts, common courts judges are appointed to their offices by the President of the Republic on the request of the National Council of the Judiciary within one month after such request is received.

It should be pointed out that the Constitution of the Republic of Poland establishes a nomination-based system of judicial appointments. It is not, however, a system of discretionary choices made by the President of the Republic as a judge may be appointed by the President of the Republic only on the request of the National Council of the Judiciary, which has been indicated *explicite* in systemic statutory acts concerning the system of common courts and the Supreme Court. There is no doubt that the appointment of a judge is a process which is initiated by the announcement of judicial vacancies.

The nomination procedure in the case of a Supreme Court judge is initiated by the announcement issued by the President of the Republic of Poland in accordance with the norm set forth in Article 31(1) of the Act on the Supreme Court. The nomination procedure consists of two stages. It starts with a request from the National Council of the Judiciary for presentation of candidates for judges, the form and procedure of which, is specified in the act. The second stage is the act of appointment of a judge by the President of the Republic of Poland. It should be emphasised that such appointment is an independent act of systemic and constitutional nature, which is reserved to the President of the Republic of Poland. The case-law of the Constitutional Tribunal states that *'the acts of judicial nominations do not require countersigning, but the constitutional requirement of the request of the National Council of the Judiciary constitutes a significant limitation of the President of the Republic's discretion in this regard. The President cannot appoint any person satisfying the criteria applicable to candidates for judges, but only a person whose candidacy was considered and selected by the National Council of the Judiciary'* (judgment of the Constitutional Tribunal of 5 June 2012, Case No. K 18/09, Legalis No. 478579). In its decision of 3 June 2008, the Constitutional Tribunal stated that *'neither the Constitution, nor any ordinary statutory act specifies the procedure and scope of actions to be taken by the President in relation to the official act with respect to the appointment of judges. The only completion of the norm provided for in Article 179 of the Constitution is the inclusion of the President of the Republic's competence to appoint judges in the list of prerogatives set out in Article 144(3)(17) of the Constitution, which means that countersigning is not required. The official act of the President of the Republic is different in its substance from the assessment of a candidate carried out by the Council. This difference consists, first and foremost, in the effects caused by both acts. As long as the assessment of a candidate carried out by the National Council of the Judiciary is only one of the conditions leading to the Council's decision to lodge a request for the appointment of a judge, the official act of the President in practice either*

shapes the ultimate rights of the person who becomes a judge as a result and is vested with office, or otherwise if negative, fails to result in such legal effects and means that the person in question will not be appointed for a specific judicial office. This case does not concern the scope of acceptable action to be taken by the President of the Republic as part of performing his prerogative consisting in judicial appointments. The issue of whether the President of the Republic's competence to appoint judges includes, in the light of the previously quoted provisions of the Constitution, the right to refuse the appointment, is commented on in literature in various manners. The prevailing opinion, however, is that the discretion enjoyed by the President of the Republic in relation to the appointment of judges include also the right not to grant the Council's request, which is not binding' (decision of the Constitutional Court of 3 June 2008, Case No. Kpt 1/08, OTK-A 2008, No. 5, item 97).

In the context of a detailed analysis of the prerogatives of the President of the Republic relating to the appointment of judges, Article 179 of the Constitution of the Republic of Poland *'defines precisely the competence of both the President of the Republic and the National Council of the Judiciary'*. The National Council of the Judiciary lodges a request for the appointment of judges (indicating candidates for specific judicial posts). Only after the request is received, the President of the Republic may initiate actions aimed at the appointment of judges (judgment of the Constitutional Tribunal of 5 June 2012, Case No. K 18/09, LEX No. 1164527). There is no doubt, however, that *the President may take the action to appoint a judge only on the request of the National Council of the Judiciary. The official act of the President of the Republic relating the appointment of a judge does not require countersigning by the President of the Council of Ministers. There is no legal administrative relationship between the President of the Republic and the person selected to be appointed by the National Council of the Judiciary. The candidate is a party to legal relationship existing within the procedure preceding the filing of the request by the National Council of the Judiciary'* (decision of the Supreme Administrative Court of 7 December 2017, Case No. I OSK 857/17, LEX No. 2441401).

As mentioned earlier, Article 179 of the Constitution of the Republic of Poland clearly states that judges are appointed by the President of the Republic of Poland on the request of the National Council of the Judiciary for an indefinite period of time. In decision of 23 June 2008, Case No. Kpt 1/08, OTK-A 2008/5/97, the Constitutional Tribunal states that *'(...) in the light of Article 144(3)(17) of the Constitution, the President's competence specified in Article 179 of the Constitution of the Republic of Poland is treated as a personal right (prerogative) of the President of the Republic (and at the same time the sphere of his exclusive responsibility.'*

It should be noted that according to the judgment of the Constitutional Court of 5 June 2012 (Case No. K 18/09, LEX No. 1164527) *'the role of the President of the Republic in the nomination procedure is not limited to the role of the 'civil notary' who confirms decisions taken somewhere else (...), but the President of the Republic makes an independent assessment of candidates proposed to him and, as a result, he is entitled to refuse to grant the request of the National Council of the Judiciary. The President of the Republic should be given the right to refuse to grant the requests filed if in his opinion this would be contrary to the values he is supposed to safeguard according to the Constitution'*.

It is also clear from Article 179 of the Constitution of Poland that the legislator decided to entrust the process of judicial appointments to two constitutional bodies acting together. It is the National Council of the Judiciary which under Article 186(1) of the Constitution of the Republic of Poland is to safeguard the independence of courts and judges and the President of the Republic, being the supreme public authority in Poland. There is no doubt, however, that the competence to appoint a judge is only a personal right of the President of the Republic.

As far as the case-law is concerned, the opinion that the President of the Republic's competence specified in Article 179 of the Constitution is his exclusive prerogative is not questioned. The Constitutional Court in its decision of 23 June 2008 stated as follows: *'it is not insignificant for the manner in which the President of the Republic acts in this regard that in the light of Article 144(3)(17)*

of the Constitution, the President's competence specified in Article 179 of the Constitution is treated as the personal right (prerogative) of the President of the Republic (and at the same time the sphere of his exclusive discretion and responsibility) and that the President of the Republic is the »supreme authority in the Republic of Poland« (Article 126(1) of the Constitution). The systemic role of the President referred to in Article 126(1) of the Constitution is of significant importance for the assessment of legal nature and rank of actions consisting in the appointment of a judge. Furthermore, a significant fact is that the official action of the appointment of a judge is not described in statutory acts regulating the system of courts or the status of judges made subject to the appointment of the President of the Republic. The Constitutional form of "the decision of the President of the Republic of Poland, published in the Official Gazette, "Monitor Polski", results in that the external form of the President of the Republic's act does not entail stating grounds for the personal decision taken (Case No. Kpt 1/08, OTK-A 2008/5/97). Also in the judgment of 5 June 2012, the Constitutional Court pointed out: 'the competence to appoint judges is in the light of Article 144(3)(17) of the Constitution treated as the personal right of the President of the Republic (prerogative) (sphere of his exclusive discretion and responsibility), but also the constitutional systemic role of the President of the Republic as specified in Article 126(1) of the Constitution' (Case No. K 18/09, OTK-A 2012/6/63).

To summarise, the act of the appointment of a judge by the President of the Republic of Poland is of special legal nature. Firstly, it is not subject to any administrative court review as the President of the Republic exceeds in this action the sphere of public administration functioning by symbolising the majesty and sovereignty of the State (see decision of the Supreme Administrative Court of 7 December 2017, Case I OSK 858/17). Having regard to the above, it should be noted that any errors or mistakes in the procedure carried out by the National Council of the Judiciary, namely at the stage preceding the appointment by the President of the Republic of Poland, remains outside the scope of legal interest. This is because the appointment of a judge by the President of the Republic of Poland is an ultimate action which remedies any potential procedural errors in the procedure before the National Council of the Judiciary. Legal solutions shaping the disciplinary liability model that are currently in place in Poland guarantee the independence of the judiciary by ensuring normative, effective measures to deprive other branches of power of influence over the Supreme Court, including the Disciplinary Chamber, and by guaranteeing the necessary independence of all judges of that Court. The principle of the independence of judges require that specific judges be free from unjustified influence both from the outside and from the inside of the judicial system. Internal independence of judges means that there is no pressure or instructions from other judges. The conditions of the independence and impartiality as defined above are fully satisfied by the judges of the Supreme Court adjudicating within the Disciplinary Chamber and by the Disciplinary Chamber as such.

The executive and the legislative have no possibility whatsoever of influencing the adjudicating activity of the Supreme Court, while the relationship between them and the judiciary is specified by the law. The applicable norms do not provide for the possibility of depriving a judge, who is appointed for lifetime service, of his office by any other branch or interfering with the administration of justice. The Constitution, the provisions of international law and domestic law guarantee Supreme Court judges equal independence. The claim that any prior relations between the judges – provided it really existed and was not created by the media, might affect performance of professional duties by the judges – is completely unfounded. The same argument applies to judges who commence their service now as it did in the past. By giving the possibility to apply for judicial offices to the representatives of the academia or other legal professions, the legislator clearly expressed his confidence in their ability to distance themselves from their previous roles and gave credence to their independence after the acceptance of the judicial office. The current First President of the Supreme Court, who was a representative of another legal profession before she became a Supreme Court judge, is a good example of the matter discussed.

The fact that the Minister of Justice holds certain competences related to initiating disciplinary proceedings has no negative impact on the independence of the Disciplinary Chamber as a court and on the independence of judges adjudicating in the Disciplinary Chamber. It is the disciplinary officers acting as prosecutors in disciplinary proceedings, who play a crucial role in initiating disciplinary proceedings. Furthermore, a case is assigned to a disciplinary officer according to the order of receipt of cases and the alphabetical list of disciplinary officers. If a disciplinary officer decides to open disciplinary proceedings against a specific person, the defendant whose case is to be heard by a disciplinary court enjoys all procedural guarantees which, as a whole, constitute the right to a fair trial.

It should be therefore stated that the influence of the Minister of Justice on the initiation of disciplinary proceedings is marginal and limited to the possibility of challenging the decision to refuse to instigate disciplinary proceedings. However, the Minister of Justice has no influence on the outcome of the proceedings carried out by a disciplinary office, and even less so in case of proceedings before a disciplinary court. Neither the Minister of Justice, nor any other representative of the executive power adjudicates on disciplinary cases, and they cannot exert influence over the adjudicating activities of disciplinary courts or judges either. The Minister of Justice does not appoint the judges who sit on the adjudicating panel for disciplinary proceedings as judges, in accordance with Article 111 of the Act on Common Courts, are drawn from the list of all judges of a given court, which warrants full independence of the disciplinary panel. The Minister of Justice cannot provide any guidelines to the judges of disciplinary courts. The Minister is not entitled to gain insight into the activities of a disciplinary court and cannot re-assign a disciplinary case to another judge or dismiss a judge of a disciplinary court since the judges of common courts are entrusted with the responsibilities of disciplinary court judges for a six-year term of office which cannot be shortened.

Within disciplinary proceedings, the defendant is entitled to appoint a defender from among judges, prosecutors, advocates or attorneys-at-law, and if the accused cannot attend disciplinary proceedings for health reasons, they may be represented by a public defender (Article 113 of the Act on Common Courts). Disciplinary proceedings are open to the public (Article 116 of the Act on Common Courts). The open character of proceedings is not only a measure of social control over the actions of judicial bodies, but plays also an education role in terms of raising legal awareness among citizens.

In disciplinary proceedings the principle of the equality of arms is observed, proceedings as such are of adversarial nature and they bear no resemblance to an inquisitorial procedure. The constitutional principle of the presumption of innocence applies to the defendant. A judgment of the first-instance disciplinary court may be appealed against before the second-instance court. The judgment may be appealed against within 30 days of the receipt thereof. The *ne bis in idem* principle is also guaranteed in disciplinary proceedings.

The Disciplinary Chamber of the Supreme Court is a court acting in accordance with European standards on the basis of the Constitution of the Republic of Poland, the Act on the Supreme Court and other procedural and substantive statutory acts. It is a permanent court and its jurisdiction is mandatory. The Disciplinary Chamber of the Supreme Court is independent from other authorities or parties to proceedings (including Supreme Court judges) and judges sitting on this chamber are independent in the performance of duties in their purview.

As a result, the Disciplinary Chamber of the Supreme Court undoubtedly satisfies all the criteria that make it a body enabling the exercise of the individual's right to an effective legal remedy, be it a cassation, an appeal (interlocutory appeal) or the hearing of the case concerning a judge or a public prosecutor in the first instance or second instance court. The Supreme Court acts pursuant to and within the limits prescribed by the law and ensures that all participants of proceedings may exercise their rights granted to them by national and European regulations.

Judges of the Supreme Court are subject to the Constitution and statutory acts only, while the Disciplinary Chamber of the Supreme Court enjoys all guarantees of independence to the equal extent as other chambers of the Supreme Court. The judges of the Chamber perform their responsibilities autonomously, without any hierarchic dependence, without following any instructions, free from dispositions or guidelines from any source and they remain protected against intervention or pressure from the outside that could compromise their freedom of judgment by impacting the outcome of the case. Finally, judges of the Supreme Court enjoy the guarantee of their irremovability. Removal of a judge from office, suspension, transfer to another court or to another post without the judge's consent may happen only under a judgment delivered by the court and only in circumstances provided for by the law.

In this regard, the full chamber of the Supreme Court adopted a resolution on 10 April 2019 (that constitutes a legal principle), in which it stated that the presence in the composition of the court of a person who had been appointed by the President of the Republic of Poland to serve as a Supreme Court judge as a result of the procedure initiated by the announcement by the President of the Republic of Poland issued without the signature of the President of the Council of Ministers and on the request of the National Council of the Judiciary shaped following the election of its fifteen judicial members by the Sejm of the Republic of Poland, as provided for by the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3 as amended) did not violate the right to be heard by an independent and impartial tribunal established by law provided for in Article 6(1) of the Convention on the Protection of Human Rights and Fundamental Freedoms, and consequently the person in question was not a person unauthorised to adjudicate within the meaning of Article 349(1)(1) of the Code of Criminal Procedure, while the adjudicating panel of the court which the person is a part of was not illegitimately manned within the meaning of Article 439(1)(2) of the CCP. (Case No. II DSI 54/18).

5. Please provide detailed information on the new disciplinary proceedings initiated against Justice Czubeniak, and explain how they are compatible with existing international and regional standards relating to the judges' right to freedom of expression.

In accordance with Article 114(3) of the Act on Common Courts read in conjunction with Article 112(1)(2) of the Act on Common Courts, the bodies competent to initiate and carry out disciplinary proceedings (in its pre-trial phase) is a Disciplinary Officer for Common Court Judges for Common Court Judges, Deputy Disciplinary Officer for Common Court Judges, as well as deputy disciplinary officers at courts of appeal and deputy disciplinary officers at regional courts. These are bodies independent from the Minister of Justice and unrelated to the office of the Minister of Justice in terms of organisational or official aspects. According to Article 114(1) of the Act on Common Courts, the disciplinary officer (deputy disciplinary officer) may initiate an investigation activities (which precedes disciplinary proceedings) on its own initiative or on the request of the Minister of Justice, the president of the court of appeal or the president of the regional court, the board of the court of appeal or the board of the regional court, the National Council of the Judiciary.

The Minister of Justice did not request that the investigation activities be initiated against justice Alina Czubeniak in the matter of her press statements. A disciplinary officer and deputy disciplinary officer sends the Minister of Justice true copies of decisions to initiate disciplinary proceedings against judges. As of the time of drafting this paper, the Minister of Justice has not received the true copy of the decision to initiate another disciplinary proceedings against judge Alina Czubeniak. Therefore, the Ministry of Justice has no knowledge on whether such proceedings have been in fact initiated.