

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL POL 3/2019

23 May 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **Justice Alina Czubieniak**, who has recently been subject to disciplinary proceedings as a consequence of a decision she took in the legitimate exercise of her judicial functions.

According to the information received:

Justice Alina Czubieniak is a judge with 33 years of professional experience. Since 2007, she has been the president of the criminal appeals department of the Regional Court in Gorzów Wielkopolski.

On 29 August 2016, Justice Czubieniak adjudicated on a complaint against a decision to remand on pre-trial detention a 19-year-old man accused of having sex with a minor under 15 years of age. The complaint, filed by the ex-officio defence counsel of the accused, provided various elements that cast doubts on the mental health of the accused.

Justice Czubieniak quashed the decision of the first-instance court, and referred the case back to the district court for re-examination. She held that the absence of defendant's lawyer during the court session on pre-trial detention constituted a violation of article 439, para. 1 (10), of the Code of Criminal Procedure, which regulates the invalidity of court proceedings in cases when a person entitled to mandatory defence have not been assisted by a defence counsel. The accused was released from detention on the same day.

On 14 September 2016, the accused was apprehended again. When arrested for the second time, he was assisted by a lawyer. The prosecution filed for the pre-trial detention. The District Court in Gorzów decided to place the accused in pre-trial detention in facility equipped with a psychiatry ward.

In December 2017, the deputy disciplinary officer of the Appellate Court brought disciplinary charges against Justice Czubieniak before the Disciplinary Court of the Appellate Court (the disciplinary court of first instance).

According to the allegations, her decision to refer the case back to the district court amounted to "an obvious and gross violation" of articles 79, para. 3, 249,

para. 3, and 439, para. 1 (10), of the Code of Criminal Procedure. These provisions regulate the presence of a defence counsel in cases where there are doubts as to the mental health of the accused.

In particular, the deputy disciplinary officer held that court's session concerning pre-trial detention did not constitute "a court proceeding", and therefore Justice Czubieniak had no legal grounds to lift the decision.

At a hearing before the disciplinary court of first instance, Justice Czubieniak explained that her decision was justified by the need to ensure the respect of the fair trial guarantees of the defendant. In her view, the defendant was unable to defend himself effectively during his interrogation because of his mental health conditions, and had therefore the right to be assisted by a lawyer.

On 23 January 2018, the disciplinary court of first instance acquitted Justice Czubieniak from the charge. The three-judge panel agreed with the explanations provided by the judge that the proceeding before the court of the first instance were unfair and amounted to a violation of the defendant's right to effective defence.

The deputy disciplinary officer of the Appellate Court and the Minister of Justice, who according to national legislation is also the Prosecutor-General, appealed against the decision of the disciplinary court of first instance before the Disciplinary Chamber of the Supreme Court.

On 22 March 2019, the newly-established Disciplinary Chamber of the Supreme Court delivered its first-ever judgment on the disciplinary case against Justice Czubieniak. The bench that adjudicated on this case included two professional judges and a lay judge elected by the Senate. Allegedly, the lay judge who participated in the adjudication did not have any previous experience in criminal law or criminal procedure.

The Disciplinary Chamber reversed the decision of the disciplinary court of first instance, and sentenced Justice Czubieniak to admonition, considering that the release of the defendant from the pre-trial detention constituted a "gross violation of the code of criminal procedure".

The Disciplinary Chamber shared the view of the deputy disciplinary officer that article 439, para. 1 (10) of the Code of Criminal Procedure regulates only the invalidity of the court proceedings, and not that of court sessions during the investigation phase. Consequently, Justice Czubieniak did not have any legal grounds to quash the decision of the first-instance court.

In reaching this conclusion, the Disciplinary Chamber of the Supreme Court referred to an explanation provided by Justice Czubieniak in the proceeding before the disciplinary court of the first instance, where she conceded that from the formal point of view the absence of a lawyer during the court's session

concerning the pre-trial detention did not constitute a breach of the Code of Criminal Procedure.

The Disciplinary Chamber of the Supreme Court also considered that Justice Czubieniak did not take into account the best interests of the minor who had been allegedly raped. In the opinion of the Court, releasing the defendant from the pre-trial detention exposed the minor victim to the risk of being contacted by the defendant again.

According to the information received, Justice Czubieniak has the right to appeal against this decision before a different bench of the Disciplinary Chamber. The deadline for submitting the appeal is 23 May 2019.

Justice Czubieniak made critical remarks on the decision of the Disciplinary Chamber in a press interview. She allegedly said that “the proceedings before the Disciplinary Chamber were a tragicomedy” and “the most embarrassing event in [her] professional career”, and that the decision of the Disciplinary Chamber of the Supreme Court was “a hoax”.

On 25 March 2019, the disciplinary commissioner initiated new disciplinary proceedings against Justice Czubieniak. The rationale for the new proceedings is that the judge could have undermined the dignity of her office by criticising the decision of the Supreme Court’s disciplinary body on the press. The disciplinary proceedings are still on-going.

Without prejudging the accuracy of the information received, concern is expressed at the disciplinary sanctions imposed on Justice Czubieniak as a consequence of a decision she adopted in the legitimate exercise of her judicial functions. Concern is also expressed at the new disciplinary proceedings initiated against the judge following the exercise of her freedom of expression.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law**, attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

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

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

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Poland is a party, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. The country's adherence to these treaties means that it must, *inter alia*, adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.

As a member State of the European Union, Poland is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (art. 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is binding on Poland, reflects fair trial requirements relating to an independent and impartial tribunal previously established by law.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to discipline, suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

The Special Rapporteur stressed on a number of occasions that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence. Outside these cases, the only remedy for “wrong decisions” adopted by judges is the overruling or modification of their decisions through the appeal process.

In a recent report on national judicial councils (A/HRC/38/38), the Special Rapporteur on the independence of judges and lawyers highlighted the essential role that judicial councils play in guaranteeing the independence and the autonomy of the judiciary, and included a number of recommendations relating to the establishment, composition and functions of judicial councils aimed at ensuring the independence of such bodies and their effectiveness in the discharge of their functions as guarantors of judicial independence.

In relation to the selection and appointment of judges, the Special Rapporteur recommended that decisions on the appointment and promotion of judges should be taken through a transparent process by a judicial council or an equivalent body independent of the legislative and executive branches of powers (para. 97), and warned against the involvement of the legislative or executive branches of power in judicial appointments, which may lead to the politicization of judicial appointments (para. 99). In cases in which judges are formally appointed by the Government, the appointment should be made on the basis of the recommendation of the judicial council that the relevant appointing authorities follow in practice.

Finally, the Special Rapporteur considers that the responsibility for disciplinary proceedings against judges should be vested in an independent authority composed primarily of judges, such as a judicial council or a court (para. 101).

In his report on Poland (A/HRC/38/38/Add.1), the Special Rapporteur noted with concern that the Disciplinary Chamber, established pursuant to the new Act on the Supreme Court of April 2018, is composed of judges by the President of the Republic upon recommendation of the newly constituted National Council of the Judiciary, which is now allegedly dominated by political appointees of the current ruling majority.

He noted that the President of the Republic would be able to determine almost completely the composition of the new Disciplinary Chamber, so as to ensure that it is wholly or mainly composed of newly appointed judges, with the risk that the whole judicial system “will be dominated by these new judges, elected with the decisive influence of the ruling majority” (para. 60).

The Special Rapporteur also expressed concern at the participation of lay members, elected directly by the Senate for a four-year term, in disciplinary proceedings before the Disciplinary Chamber of the Supreme Court. Both the Venice Commission and OSCE/ODIHR have observed that the involvement of lay members/jurors in the highest court of a country is unprecedented, taking into account that those instances adjudicate on questions of law, for which specialist knowledge is generally required. Furthermore, the

method of their selection raises serious concerns from the point of view of judicial independence, since their election by the Senate risks politicizing the selection process and could also potentially endanger their impartiality (para. 61).