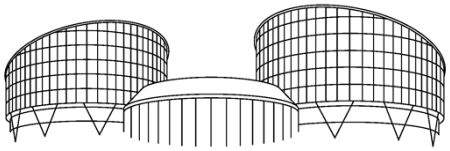

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ŻUREK v. POLAND

(Application no. 39650/18)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Lack of judicial review of premature termination *ex lege*, after legislative reform, of a serving regional court judge's mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson • Findings in *Grzęda v. Poland* [GC] applied: Art 6 § 1 applicable and very essence of right of access to court impaired
Art 10 • Freedom of expression • Measures taken against the applicant by the authorities for public statements made in his professional capacity as NCJ spokesperson concerning legislative reforms affecting the judiciary • Impugned measures to be seen in context of successive Polish reforms resulting in the weakening of judicial independence and having regard to the sequence of events in their entirety • General right to freedom of expression of judges to address matters as to the functioning of the justice system might be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values are threatened • Criticism in context of debate of great public interest, not containing attacks against the judiciary • Statements calling for high degree of protection • Accumulation of measures could be characterised as a strategy aimed at intimidating (or even silencing) the applicant • Impugned measures with chilling effect on judges' participation in public debate on legislative reforms affecting the judiciary and on its independence • Interference not "necessary in a democratic society"

STRASBOURG

16 June 2022

FINAL

10/10/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Żurek v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 39650/18) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Waldemar Żurek ("the applicant"), on 6 August 2018;

the decision to give notice to the Polish Government ("the Government") of the complaints under Article 6 § 1, Article 10 and Article 13;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the European Network of Councils for the Judiciary ("the ENCJ"), the Commissioner for Human Rights of the Republic of Poland, Amnesty International jointly with the International Commission of Jurists, the "Judges for Judges" Foundation (the Netherlands) jointly with Professor L. Pech, the Helsinki Foundation for Human Rights (Poland), the Judges' Association Themis and the Polish Judges' Association Iustitia, all having been granted leave to intervene by the President of the Section;

the Chamber's decision not to hold a hearing in the case;

Having deliberated in private on 10 May 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant alleged that he had been denied access to a court to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. He also complained of the measures taken by the authorities in connection with the views that he had expressed publicly in his professional capacity concerning legislative reforms affecting the judiciary. He relied on Article 6 § 1, Article 10 and Article 13 of the Convention.

THE FACTS

2. The applicant was born in 1970 and lives in Rzeplin. He was represented by Mr M. Pietrzak and Ms M. Mączka-Pacholak, lawyers practising in Warsaw.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

A. Background and context of the case

5. The broader domestic background to the present case was set out in the Grand Chamber judgment in the case of *Grzęda v. Poland* ([GC], no. 43572/18, §§ 14-28, 15 March 2022).

B. Termination of the applicant's term of office as a judicial member of the NCJ

6. In 1997 the applicant passed a judicial exam and was subsequently appointed as judge of the Cracow-Śródmieście District Court. On 19 January 2005 he was appointed as judge of the Cracow Regional Court. The applicant was also selected to be the spokesperson of the Regional Court.

7. In 2001 the applicant joined the Polish Judges' Association Iustitia. For some time, he served on its board and acted as its spokesperson. Since 2010 the applicant has been a member of the Judges' Association Themis.

8. On 15 March 2010 the applicant was elected by the Representatives of the General Assemblies of the Regional Court judges as a member of the National Council of the Judiciary (*Krajowa Rada Sądownictwa* – "the NCJ") for a four-year term. On 21 March 2010 he took up his duties in the NCJ.

9. The NCJ is a constitutional organ tasked with safeguarding the independence of courts and judges (see Article 186 § 1 of the Constitution). One of its principal functions is to evaluate and nominate candidates for appointment to judicial office for every level and type of court. The candidates proposed by the NCJ are submitted to the President of the Republic for appointment. The NCJ's composition is prescribed in Article 187 § 1 of the Constitution.

10. On 2 March 2014 the applicant was again elected as a member of the NCJ for another four-year term. This term began on 21 March 2014 and was due to come to an end on 21 March 2018.

11. On 6 March 2014 the applicant was appointed by the NCJ as its spokesperson. In this capacity, he frequently commented in the media on topical issues concerning the judiciary and participated in numerous debates on legal matters in various media. The applicant took an active part in legislative work and participated in meetings of parliamentary committees,

mainly the Justice and Human Rights Committee of the *Sejm* (the lower house of the Polish Parliament).

12. Starting in the autumn of 2015, after the parliamentary elections won by the Law and Justice party, public debate on matters concerning the functioning of the administration of justice intensified.

13. In November 2015 the government took a number of factual and legal measures in respect of the Constitutional Court. In December 2015 the *Sejm* elected three judges of the Constitutional Court (M.M., L.M. and H.C.) to seats that had been already filled (for a detailed account of the relevant facts, see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, §§ 4-63, 7 May 2021). These measures were criticised by various legal bodies and institutions. The NCJ adopted opinions critically assessing successive bills on the Constitutional Court. The applicant, in his capacity as the NCJ's spokesperson, actively participated in the public debate regarding the Constitutional Court.

14. In January 2017 the Government announced plans for a large-scale judicial reform of the NCJ, the Supreme Court and the ordinary courts. The Minister of Justice explained that a comprehensive reform was needed in order to, *inter alia*, increase the efficiency of the administration of justice and make the election of NCJ members more democratic.

15. In the first half of 2017 a billboard campaign "Just courts" (*Sprawiedliwe sądy*), presenting examples of alleged unethical or illegal activities of several judges, was launched across the country. It turned out later that it was organised by a foundation controlled by the Government and financed from public funds. According to the applicant, this campaign was aimed at undermining trust in judges and preparing the public for the forthcoming changes in the functioning of the courts.

16. On 14 March 2017 the Government introduced in the *Sejm* a bill, drafted by the Ministry of Justice, to amend the Act of 12 May 2011 on the National Council of the Judiciary (*ustawa z 12 maja 2011 r. o Krajowej Radzie Sądownictwa*; "the 2011 Act on the NCJ"). The bill proposed that the judicial members of the NCJ would be elected by the *Sejm* instead of by judicial assemblies and that the term of office of the sitting judicial members would be terminated. Two further bills concerning the Supreme Court and the Organisation of Ordinary Courts were introduced by deputies from the majority.

17. The bill amending the Act on the NCJ was critically assessed by the NCJ, the Supreme Administrative Court, the National Bar Association, the Commissioner for Human Rights and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), in their respective opinions of 30 and 31 January, 5 and 12 April and 5 May 2017. The opinions stated that the proposed amendments violated the Constitution in that they allowed the legislature to take control of the NCJ in contradiction with the principle of

the separation of powers. According to the same opinions, the amendments would also result in the unconstitutional termination of the constitutionally prescribed four-year term of office of the judicial members of the NCJ.

18. On 11 April 2017 the Prosecutor General, who is at the same time the Minister of Justice, according to the Act on the Public Prosecutor's Office of 28 January 2016, which merged these two offices, lodged an application with the Constitutional Court, challenging the constitutionality of certain provisions of the 2011 Act on the NCJ. The Prosecutor General alleged that as regards the election of judges to the NCJ the impugned provisions treated different groups of judges unequally depending on the level of jurisdiction, resulting in unequal representation of judges on the NCJ. He further challenged the provisions regulating the term of office of the elected judicial members of the NCJ, claiming that to treat their terms of office as individual in nature was contrary to the Constitution.

19. The Constitutional Court gave judgment on 20 June 2017 (no. K 5/17), its bench being composed of Judges M.W., G.J., L.M., M.M. (the rapporteur) and J.P.

20. In its general observations, the Constitutional Court noted that the NCJ was a constitutional body tasked with protecting the independence of courts and judges. It also noted that the NCJ was not a judicial authority, and thus the constitutional standards relevant for courts and tribunals were not applicable to the NCJ. Nor should the NCJ be regarded as part of judicial self-governance. The hybrid composition of the Council made it an organ which ensured a balance and cooperation between the different powers of government.

21. The Constitutional Court held that the provisions governing the procedure for electing members of the NCJ from among judges of the ordinary courts and of administrative courts[1] were incompatible with Article 187 § 1 (2) and § 4 in conjunction with Article 32 of the Constitution. The impugned provisions introduced an unjustified differentiation with regard to the election of judges to the NCJ from the respective levels of the ordinary and administrative courts and did not provide equal opportunities to stand for election to the NCJ. The Constitutional Court found that the impugned provisions treated unequally judges of district and regional courts in comparison with judges of courts of appeal, as well as judges of district courts in comparison with judges of the regional courts. The same was true for judges of the regional administrative courts in comparison with judges of the Supreme Administrative Court.

22. Secondly, the Constitutional Court held that section 13(3) of the 2011 Act on the NCJ, interpreted in the sense that the term of office of members of the NCJ elected from among judges of ordinary courts was individual in

[1] Section 11(3) and (4) in conjunction with section 13(1) and (2) as well as section 11(2) in conjunction with section 12(1) of the 2011 Act on the NCJ.

character, was incompatible with Article 187 § 3 of the Constitution. It noted that there had been an established interpretation by the NCJ that the term of office of judges elected as members of the NCJ was to be individually calculated for each of those members. However, the Constitutional Court disagreed with that interpretation on the ground that it was contrary to the linguistic, systemic and functional interpretation of Article 187 § 3 of the Constitution. It noted that that provision used the phrase "term of office" in the singular and related it to the phrase "elected members of the NCJ" in the plural. Accordingly, this meant that all elected members of the NCJ had a concurrent or joint term of office and this applied equally to judges, deputies and senators. To individualise the term of office for judicial members of the NCJ would result in an unjustified differentiation in status between judicial members on the one hand, and deputies and senators, on the other, all being categories of elected member of the Council. The Constitutional Court found that the correct interpretation of Article 187 § 3 of the Constitution required that the term of office of all elected members of the NCJ be of a joint character.

23. With regard to the election of judicial members of the NCJ, the Constitutional Court held, in so far as relevant:

> "The Constitutional Court in the current composition does not agree with the [Constitutional Court's] position adopted in the judgment [of 18 July 2007,] no. K 25/07 that the Constitution specifies that [judicial] members of the NCJ shall be elected by judges. Article 187 § 1 (2) of the Constitution only stipulates that these persons [judicial members of the NCJ] are elected from among judges. The Constitution did not specify who should elect those judges. Thus, it follows from the Constitution who can be elected as a member of the NCJ, but it is not specified how to elect judicial members of the Council. These matters were delegated to statutory regulation. There is no obstacle to the election of judges to the NCJ by judges. However, one cannot agree with the assertion that the right to elect [judicial members of the NCJ] is vested solely with assemblies of judges. While Article 187 § 1 (3) of the Constitution clearly indicates that deputies are elected to the NCJ by the *Sejm* and senators by the Senate, there are no constitutional guidelines in respect of judicial members of the NCJ. This means that the Constitution does not determine who may elect judges to the NCJ. For this reason, it should be noted that this question may be differently regulated within the limits of legislative discretion."

24. The Constitutional Court noted with regard to the principle of tenure that an elected judicial member of the NCJ was legally protected from removal; however, that protection was not absolute. It agreed with the position previously expressed by the Constitutional Court (judgment of 18 July 2007, no. K 25/07) that a breach of tenure could only be justified by extraordinary, constitutionally valid reasons. The Constitutional Court found that the Constitution did not lay down the principle of tenure for the NCJ. The fact that the majority of the NCJ's members were elected for a four-year term of office did not result in the Council being a tenured body. The tenure was linked not with the body as such, but with certain categories of members composing it. However, the Constitutional Court noted that the guarantee of

a four-year tenure for elected members of the NCJ was not absolute. The Constitution, having regard to Article 187 § 4 thereof, allowed statutory exceptions to the four-year tenure.

25. In July 2017 the enactment by Parliament of the three bills referred to above (see paragraph 16 above) sparked widespread public protests. On 31 July 2017 the President of the Republic vetoed the Act amending the Act on the NCJ and the Act on the Supreme Court. The Act of 12 July 2017 amending the Act on the Organisation of Ordinary Courts was signed and entered into force. This law conferred on the Minister of Justice competence to dismiss and appoint at his discretion presidents and vice-presidents of ordinary courts during the period of six months following the law's entry into force.

26. On 26 September 2017 the President of the Republic introduced in the *Sejm* his own bill amending the Act on the NCJ.

27. In the explanatory report it was noted that the bill granted the public, as well as judges, the right to nominate candidates to sit on the Council. The bill referred to the finding made in the Constitutional Court's judgment of 20 June 2017 (no. K 5/17) that the issue of how judicial members of the NCJ were to be elected was left to statutory regulation. In accordance with the bill, the final election from among the nominated candidates was to be carried out by the *Sejm* by a qualified majority of three-fifths of the votes. If election by qualified majority proved impossible, a supplementary election by means of a roll-call vote was to be carried out.

28. One of the aims of the bill was to depart from the principle whereby the members of the Council selected from among judges had individual terms of office. The explanatory report noted that the Constitutional Court had found this approach (individual terms) to be contrary to the Polish Constitution in the judgment of 20 June 2017, no. K 5/17. The bill provided that the judicial members of the NCJ were to be elected for a joint term of office. It further proposed that the terms of office of the NCJ's judicial members elected under the previous provisions be terminated. This was considered by the President to be proportionate to the systemic changes being pursued. The explanatory report noted that the major changes to the method for electing members of the NCJ were an expression of the "democratisation" of the election process and constituted a development of the principle of the rule of law. This "democratisation" was an important public interest and justified shortening the term of office of the NCJ members currently serving.

29. The President's bill was assessed negatively by the National Bar Association, the Supreme Court, the NCJ, the Commissioner for Human Rights and the National Council of Attorneys at Law in their respective opinions of 17, 23, 31 October and 12 November 2017.

30. The Act of 8 December 2017 Amending the Act on the National Council of the Judiciary (*ustawa z dnia 8 grudnia 2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* – "the 2017

Amending Act") was enacted by the *Sejm* and the Senate (the upper house of Parliament) on 8 and 15 December 2017 respectively. It was signed by the President of the Republic on 20 December 2017 and entered into force on 17 January 2018.

31. The 2017 Amending Act transferred to the *Sejm* the competence to elect judicial members of the NCJ (section 9a(1)). It provided in section 9a(3) that the joint term of office of new members of the NCJ was to begin on the day following that of their election. Section 6 of the 2017 Amending Act provided that the terms of office of the judicial members of the NCJ elected on the basis of the previous provisions would continue until the day preceding the beginning of the term of office of the new members of the NCJ.

32. Eighteen judges, out of about ten thousand, decided to stand for election to the new NCJ. None of the sitting members decided to stand. A candidate for election to the new NCJ had to be supported either by a group of 2,000 citizens or by 25 fellow judges.

33. On 6 March 2018 the *Sejm* elected, in a single vote, fifteen judges as new members of the NCJ by a three-fifths majority. On the same date, the applicant's term of office as member of the NCJ was terminated *ex lege* pursuant to section 6 of the 2017 Amending Act. As a result of that measure the applicant ceased to act as the NCJ's spokesperson.

34. Thirteen of the new judicial members of the NCJ were district court judges (first level of the ordinary courts), one was a regional court judge (second level of the ordinary courts) and one was a regional administrative court judge. There were no representatives of the courts of appeal, the Supreme Court or the military courts.

35. The applicant remains in office as a judge of the Cracow Regional Court.

36. On 17 September 2018 the General Assembly of the European Network of Councils for the Judiciary ("the ENCJ") suspended the NCJ's membership of the Network. The decision was motivated by the General Assembly's view that the new NCJ was no longer independent from the legislative and executive powers. On 28 October 2021 the General Assembly of the ENCJ expelled the NCJ from the Network.

37. On 2 November 2018 the NCJ, in its new composition, lodged an application with the Constitutional Court challenging several provisions of the 2011 Act on the NCJ (as amended in December 2017), *inter alia*, section 9a governing the new manner of electing the judicial members of the Council and the nature of their term of office. On 14 February 2019 a group of senators lodged an identical application. The Constitutional Court decided to examine the two applications jointly as case no. K 12/18. The Commissioner for Human Rights requested that the Constitutional Court discontinue the proceedings as inadmissible since the new NCJ was seeking to confirm the constitutionality of the law.

38. On 25 March 2019 the Constitutional Court gave judgment in the case. The bench was composed of Judges J.P. (the president), G.J., Z.J., J.Pi. (the rapporteur) and A.Z. Judge J.Pi. had been elected as judge of the Constitutional Court following the death of Judge L.M., one of the judges elected in December 2015 to a seat that had already been filled. The judgment was given after hearings held *in camera* on 14 and 25 March 2019.

39. The Constitutional Court held that section 9a of the 2011 Act on the NCJ (as amended), granting to the *Sejm* the competence to elect judicial members of the NCJ and providing that the joint term of office of new members of the NCJ would begin on the day following the date of their election, was compatible with Articles 187 § 1 (2) and § 4 in conjunction with Articles 2, 10 § 1 and 173 as well as with Article 186 § 1 of the Constitution. It essentially relied on the reasoning of the Constitutional Court's judgment of 20 June 2017 (no. K 5/17).

C. Selected public statements of the applicant in his capacity as NCJ spokesperson

40. The applicant publicly commented in various fora on the government's legislative proposals regarding the Constitutional Court, the NCJ, the Supreme Court and the ordinary courts. In his capacity as the NCJ's spokesperson, he pointed to threats to the rule of law and judicial independence stemming from the Government's proposals. The relevant period began in December 2015, marked by grave irregularities in the election of judges to the Constitutional Court and ended on 6 March 2018, when the applicant's term of office as a judicial member of the NCJ was terminated. In the public debate, the applicant was, together with the First President of the Supreme Court, Ms Małgorzata Gersdorf and presidents of the two associations of judges (Themis and Iustitia), one of the main critics of the changes concerning the judiciary initiated by the government.

41. On 6 May 2016, in relation to the proposed amendment to the Act on the NCJ, the applicant stated in an interview with the *Rzeczpospolita* newspaper:

> "The judges are to be appointed to the NCJ and not elected [by their peers] as at present. We will contest this project. The Constitution clearly speaks of full four years. However, the Minister argues that the terms of office end and begin unevenly, and he wants them to end and begin at the same time. If the Constitutional Court decides that the termination of positions [at the NCJ] is constitutional, I will recognise it. The NCJ must tackle the legislative and executive branches. ...
>
> The role of the NCJ is to give us [judges] guarantees that we will not be influenced by politicians. ... A strong Council which respects the Constitution is a thorn in every politician's side."

42. On 3 June 2016 the applicant published an article on the Internet portal *dziennik.pl* entitled "Is this about taking over the Supreme Court?" in reply to

an article "Second shock therapy. For courts" published earlier on the same portal. He stated, *inter alia*, as follows:

> "Unfortunately, in my opinion, it is no coincidence that a text which strongly criticises the NCJ, a constitutional body upholding the independence of courts and judges, appeared at the same time as the Government's draft amendment to the Act on the NCJ was released. Unfortunately, this draft contains several solutions which are incompatible with the Constitution. Shortening the constitutional term of office of judicial members of the Council, the obligation to submit two candidates for judges to the President ... – these provisions are intended to weaken the Council. And as soon as possible. ...
>
> Justice reforms must be introduced in an evolutionary and well thought-out way. The author apparently finds fault with the NCJ. Because there is a need for it. ... Maybe it's preparation for 'taking over' the Supreme Court? It would be enough to adapt the Hungarian model and already half of [judges of] the Supreme Court will retire. Then, in order to fill it with your people, you need to have a docile NCJ full of people willing to be promoted. Perhaps this is what the present battle is really about? ...
>
> You cannot prepare a huge reform without discussing it with the judges of the higher courts, with a global view of the complexity of the system and the procedures. It is necessary to calculate and foresee the consequences. The ministerial team is doing all this without any consultations with the NCJ, forgetting that the judicial members on the current council were elected by an overwhelming majority of delegates from all courts, including district ones. And they have the legitimacy to be consulted on such important bills. And the Minister of Justice – a member of the NCJ – has not appeared at the Council's meetings for a long time. When he was asked what the plans were, he replied: very fundamental. That is all. But that's why he's a member of the NCJ, which is a platform for debate ... That is what the legislature intended. ..."

43. On 13 September 2016 the applicant was interviewed by the portal *natemat.pl*. The text was entitled "The judges will not be defeated by power". He stated, *inter alia*:

> "The authorities are using the problems of the judiciary as a pretext to dismantle the justice system – says Waldemar Żurek, spokesman for the NCJ.
>
> Q: First Law and Justice party, despite protests from Europe and the opposition, started to dismantle the Constitutional Court, now J. Kaczyński says it is necessary to deal with the Supreme Court. How do you assess these events?
>
> A: This is a campaign of the authorities against the judiciary. Recently, judges met at the Extraordinary Congress of Polish Judges. We hoped for the presence of representatives of the legislative and executive powers, but they did not accept the invitation. After the congress, the attacks on the judiciary by the authorities intensified. ...
>
> Q: The ruling party says judges are privileged.
>
> A: Judicial independence is not a privilege. It protects judges from [political] party pressures. It gives them independence, so they are not like weathercocks. It allows them to be guided solely by the law and not by the interests of one [political] party or another. Judicial immunity is a safeguard for the State when the legislative and executive branches break the law. And as far as judges are concerned, we are one of the few professions where disciplinary proceedings are public.

Q: Law and Justice is dismantling the Constitutional Court, now it's taking on the Supreme Court. When will it be the turn of the NCJ?

A: There is a bill pending in the *Sejm* which dismantles the NCJ. It is supposed to terminate only the terms of office of judicial members of the NCJ. Surprisingly, this termination does not apply to the terms of office of politicians, who are also members of the Council. This is reminiscent of the Hungarian scenario in which Orbán changed the retirement age for judges so that they would leave office earlier."

44. The applicant presented the opinions of the NCJ on its official YouTube channel. On 31 January 2017 he commented on the NCJ's opinion of 30 January 2017 on the Government's bill amending the 2011 Act on the NCJ. He stated, *inter alia*, as follows:

"Today I would like to tell you about the bills concerning the judiciary. The bills have been widely discussed, presented by the Minister of Justice in the media and submitted to the NCJ for its opinion. These are fundamental bills, which may lead to a change in the system, to a change in the system of the separation of powers. I would like to tell you about several fundamental flaws of these bills, which in the opinion of the NCJ are contrary to the Constitution. First of all, the fact that the judges – this judicial part in the NCJ, because, as we know, the Council consists of politicians: senators, deputies to the *Sejm*, the Minister of Justice, the President's representative, [and] a dozen or so judges elected by the judges. Here, in this bill, there is a fundamental change to this solution. Today it is politicians who will be able to elect all the judges – members of the National Council – and they have a fundamental influence on who becomes a judge in Poland, who is promoted to a higher level [of the judiciary]. The Council is also the guardian of judicial independence, the guardian of the independence of a given court. So if politicians take over the Council, because there will always be people in this group of judges who will listen to their orders, then the courts will become politicised. A judge who will have to reckon with pressure from a politician, if a special chamber is also set up at the Supreme Court that can remove him or her disciplinarily - well, unfortunately he or she will be subjected to serious pressure...

The Minister also wants to extinguish the term of office of the judicial members of the NCJ. Despite the fact that the Constitution speaks of a four-year term, the Minister wants to do this by an ordinary law, so clearly [there will be] a direct violation of the Constitution. ..."

45. On 2 March 2017 the Internet portal *dziennik.pl* published the article "Judge Waldemar Żurek: we are not afraid, we will not be intimidated or bought" which reported on the applicant's statements in the television programme "Dot over the i".

"The application is purely PR-like. It is an artillery preparation to destroy the Supreme Court. 'We have all seen it in the case of the Constitutional Court, and we can see it in the case of the NCJ', the NCJ spokesman said in 'Dot over the i', commenting on the application of fifty Law and Justice deputies to the Constitutional Court to examine the resolution on appointing Małgorzata Gersdorf, the First President of the Supreme Court. In his view, the media favourable to the authorities would slander her personally and try to destroy her authority. Ms Gersdorf was on the side of the separation of powers, so she needs to be slandered. ...

Waldemar Żurek in turn assured that despite this pressure the judicial community will not give up. You become a judge for difficult times, because it is easy to give even the most difficult judgments when there is no political pressure, when there is no violation

of the Constitution. 'We are just at the threshold of destroying the rule of law and the separation of powers', he said. 'I may be dismissed from my job, but I will not break my oath as a judge', he concluded."

46. On 7 March 2017 the applicant was interviewed by the editor-in-chief of *Newsweek Polska*.

"Q: You are no longer a spokesperson for the NCJ, but a spokesperson for saving the independence of Polish courts.

A: I did not expect that every statement in defence of the law would be perceived as political. The NCJ spokesman reminds us that the role of a judge is to warn when something bad is happening, which is how he perceives the current situation around the judiciary. ...

Q: Do you collect text messages?

A: I started because I see how the Internet works. I get messages and it hurts me the most when they say: 'you Stalinist bastard, secret police bastard or bandit in a robe'. My phone number is public. The institution's spokesman must reach out to the media and the public. ..."

47. On 21 June 2017 the applicant commented, on the TVN24 television news channel, about the judgment of the Constitutional Court of 20 June 2017 (see paragraphs 19-24 above):

"The Constitutional Court has given a judgment on the provisions of the 2011 Act on the NCJ regarding the rules for the election of judges to the NCJ, declaring them unconstitutional. The ruling of the Constitutional Court will allow the politicians of the Law and Justice Party to introduce changes in the judiciary leading, among others, to the termination of the terms of office of judges – current members of the NCJ.

– First, we have to ask whether it was really a judgment – said Waldemar Żurek when asked to comment on the judgment. The doctrine of law says that if a constitutional body includes a person who is not entitled to adjudicate, then we are dealing with a non-existent judgment – he stressed.

Waldemar Żurek was also asked about changes in the judiciary introduced by the Law and Justice party.

– I do not want to use the word 'reform', because in my opinion it is a deconstruction of the legal system. It will lead to the politicisation of the courts, to a complete take-over of the courts by politics. We have not yet had such a situation since we regained independence – he said."

D. Audit by the CBA of the applicant's financial declarations

48. The applicant submitted that the authorities had become interested in him since his increased involvement, in his capacity as the NCJ's spokesperson, in the debate concerning judicial reforms and related threats to the independence of the judiciary.

49. The Government stated that in 2016 the unit of the Central Anti-corruption Bureau (*Centralne Biuro Antykorupcyjne* – "the CBA") responsible for auditing financial declarations submitted by judges had carried out a systematic examination of those declarations. As a result of that

examination, a number of judges, including the applicant, had been subjected to advanced scrutiny due to irregularities in their declarations. The CBA initiated an inspection of the applicant's assets and financial declarations (*oświadczenia majątkowe*).

50. It appears that on an unspecified date in November 2016 the CBA's Department of Oversight Procedures requested the President of the Cracow Court of Appeal to provide copies of the applicant's financial declarations for the period 2010-2015 as well as information about the length of his service and posts occupied by him. The requested information was provided to the CBA on 1 December 2016.

51. In a letter of 15 December 2016 the President of the Cracow Court of Appeal informed the applicant about the CBA's request.

52. In connection with the above-mentioned letter, on 23 December 2016 the applicant requested the CBA to inform him whether the audit procedure carried out by the Bureau was of a routine nature or related to any proceedings concerning him. He wished to know the legal and factual basis for the CBA's actions, noting that he was a sitting judge and member of the NCJ, a constitutional body.

53. In a letter of an unspecified date in January or February 2017, the Deputy Director of the CBA's Department of Oversight Procedures requested the President of the Cracow Regional Court to promptly transmit the applicant's financial declaration for the year 2016. He referred in that letter to "the routine activities of the CBA's Department of Oversight Procedures and analytical actions" in respect of the applicant.

54. On 16 February 2017 the applicant asked that Department for information as to when the CBA had begun its above-mentioned activities. He further requested information on who had ordered the CBA's activities in his case, whether there were any internal procedures setting time-limits for termination of such activities and when the activities concerning him were expected to end.

55. The applicant has submitted copies of media reports from 12 April 2017 in which the CBA's spokesperson stated that since the end of November of 2016 it had been analysing his financial declarations and that as a result of this the CBA's officers had commenced an audit of his declarations.

56. On 18 April 2017 the applicant's lawyer, in connection with earlier telephone communications, informed the Warsaw Branch of the CBA by letter and facsimile that the applicant was ready to appear before it when summoned. However, due to his professional obligations he would not be available before 27 April 2017. Should the CBA consider his appearance necessary, the applicant's lawyer requested that a formal summons indicating the legal basis and the procedure to be followed be addressed to him.

57. On 19 April 2017 the CBA officers entered the NCJ's premises in order to serve on the applicant a decision authorising the audit of his financial declarations. The decision dated 13 April 2017 stated that three CBA officers

were authorised by the Head of the CBA to carry out the audit of the applicant's financial declarations on the basis of section 13(1)(2) of the Act on the CBA. The audit concerned the accuracy and veracity of his financial declarations made in the years 2012-2017. The audit was to commence on 19 April 2017 and end three months later. It appears that it was subsequently prolonged until January 2018.

58. At the same time the tax authorities began a fiscal audit in respect of the applicant, the CBA extended its audit to his wife and the prosecution service questioned the applicant's parents. The applicant submitted that the audit of his wife's financial situation had been carried out at the time when she was in advanced pregnancy, thus having a negative effect on her health and causing her serious stress. The applicant's elderly parents had been distressed in connection with their questioning.

59. On 11 May 2017 the President of the NCJ addressed letters to the Prime Minister and the Chairman of the *Sejm* Committee on Secret Services requesting an explanation as to the appropriateness of the actions taken by the CBA officers on 19 April 2017 at the NCJ's seat. Those letters remained unanswered.

60. In connection with the media reports concerning the auditing of the applicant's financial declaration, on 2 May 2017 the *Panoptykon* Foundation asked the CBA to disclose, *inter alia*, how many such audits were carried out in 2017 and the practice as to the place of service of authorisations to carry out such audits, pursuant to the Act on Access to Public Information. On 16 May 2017 the CBA replied that in 2017 it had carried out 37 audits of the accuracy of financial declarations. As regards the question about the practice, the CBA stated that they had not kept statistics regarding the place of service of the authorisation; however, it indicated that audits often commenced at the place of work or service of the person concerned.

61. On 9 August 2017 the applicant's lawyer notified the CBA's Department of Oversight Procedures that the applicant had still not received a reply to his letter of 16 February 2017. Furthermore, on a few occasions the applicant was summoned to the CBA in order to provide explanations despite the fact that he had informed it about his holidays and his professional obligations as a judge and member of the NCJ. Lastly, the applicant expressed serious doubts as to whether the CBA's officers had appropriately exercised their statutory competences in view of the failure to provide him with the requested information, the performance of procedural acts without taking account of his availability and numerous statements to the media on the subject-matter of the pending proceedings.

62. On 29 December 2017 the applicant and his wife were notified by the CBA, pursuant to section 23(9) of the CBA Act, that the Warsaw Regional Court had authorised the CBA to obtain information and data concerning them from nearly 300 banks and financial institutions in Poland.

63. It appears that at the end of 2017 the CBA officers visited the applicant's accountant in her office, asking for information about the applicant's tax returns. The applicant submitted that according to his accountant, such a visit was very surprising and unusual. The officers questioned the accountant in an informal manner and did not draw up a record of this questioning.

64. The applicant further submitted that during the audit proceedings carried out by the CBA in his case, it had taken numerous other extraordinary measures. For example, its officers had personally questioned a man residing in south-east Poland who had bought a tractor from the applicant many years earlier. They had also investigated a purchase of land in a rural town in south-east Poland where the applicant owned his holiday home. That purchase had taken place twenty-two years prior to the CBA audit.

65. The applicant submitted that in 2017 and 2018 he had been questioned on several occasions by CBA officers and had provided written statements. On 12 January 2018 the applicant's lawyer was served with an audit report (*protokół kontroli*) prepared by the CBA. He made certain objections to it, which were not upheld by the CBA. The applicant refused to sign the report. In a press interview he stated that he had refused to do so because he contested the grounds for the audit and its length.

66. The Government submitted that the results of the audit, based on official documents received from Government bodies as well as from financial institutions, constituted the basis for a report concerning the established irregularities that had been submitted to the Cracow Regional Prosecutor's Office for the purpose of criminal law assessment.

67. The applicant maintained that he had not been informed about any further actions taken by the CBA after the audit report had been prepared in his case. According to the media reports and statements of the CBA press unit, in April 2018 the audit report was transmitted to the Cracow Regional Prosecutor's Office. The applicant maintained that the report was not a criminal complaint, but had been submitted in order to be forwarded to the competent tax authority. In his view, the report should have been directly transmitted to the tax authority. The applicant had never been informed about any investigation by a prosecutor into his financial or tax affairs.

68. The Government submitted that audit activities consisting in the collection of statements had also been carried out in relation to other persons from the applicant's social and professional circle; however, they had not taken the form of interrogations but voluntary statements of knowledge about the applicant's property matters. The officers had verified the data that the applicant and his wife had included in their financial declarations and therefore the competent authorities and national financial institutions had been contacted during the audit. It was a standard procedure resulting from the purpose of the audit.

69. The applicant was also summoned to appear a few times before the prosecution service, which is answerable to the Minister of Justice – Prosecutor General; however, he was not informed of his status in that connection.

E. Inspection of the applicant's work ordered by the Ministry of Justice

70. The applicant submitted a copy of an anonymous letter addressed to the Minister of Justice and received on 28 April 2017. The letter stated, *inter alia*:

> "Dear Minister,
>
> I am keeping my fingers crossed for the reform you are implementing! I am wholeheartedly behind you and those who work with you. We need to put in order in Poland all those ... anti-development interest groups. ...
>
> ... I am outraged by the attitude and the aggressive statements of this judge [the applicant], all the more so because he is the face of the 'extraordinary caste'. I am very curious to know how Judge Żurek's involvement in the fight against you affects his primary duty, which is to judge. I am curious whether he really spends as much time in the courtroom as his fellow judges. How can he reasonably pass fair judgments on behalf of the Republic of Poland if he spends more time at the TVN [private TV channel] than reading files. As a taxpayer I would like to know how much time Judge Żurek spends in court on substantive work and adjudication, and how much time he spends doing politics. ...
>
> ... I think you need to know, Minister, that there are rumours in Cracow that it is practically impossible to meet Judge Żurek in the courtroom, and that the reasons [for his judgments] are written for him by his assistants, of which he apparently has two! Please check it."

71. On 29 April 2017, one day after it had received the letter, the Ministry of Justice sent a request for information to the Vice-President of the Cracow Court of Appeal "in connection with the information received on 28 April 2017 about irregularities in performing judicial duties by Judge Waldemar Żurek in the Cracow Regional Court". The Ministry wished to be informed whether the applicant had decided cases in accordance with the established schedule and whether there were complaints about the efficiency of proceedings in his cases. It also asked for statistical information on the number of sessions conducted by the applicant (hearings and *in camera* sessions), and the number of cases assigned to and terminated by him against the average in his division in the years 2015-2017.

72. The Ministry further inquired whether the applicant had used the support of legal assistants and what had been the rules for assigning assistants to him and to other judges of the Cracow Regional Court. It transmitted a copy of the letter of 28 April 2017.

73. On 11 May 2017 the President of the Cracow Court of Appeal informed the Ministry of Justice that he had verified the performance of

judicial duties by the applicant in the light of elements indicated by the Ministry. He also established that there had been no complaints regarding the efficiency of proceedings in the applicant's cases. On that basis, he determined that "there were no alleged irregularities in the performance of judicial duties by Judge Waldemar Żurek in the Cracow Regional Court".

74. The President of the Cracow Court of Appeal further stated that the work of the Cracow Regional Court was subject to on-going supervision of the President of that court. Such supervision was also carried out by the Head of the Division in which the applicant worked. That supervision had not provided any grounds for initiating supervisory measures with regard to the applicant.

75. The President of the Cracow Court of Appeal also expressed doubts about the basis for taking actions to verify the alleged irregularities in the performance of judicial duties by the applicant. He noted that, leaving aside the fact that the basis for such actions had been an anonymous letter whose content was offensive to the judges, the impugned letter had not given rise to doubts as to the existence of alleged irregularities.

76. On 13 May 2017 the Ministry asked the President of the Cracow Court of Appeal to provide supplementary information about the applicant's assistants and the statistical data as requested before.

77. On 19 May 2017 the President of the Cracow Court of Appeal informed the Ministry about the support of a legal assistant allocated to the applicant and the rules applicable in this respect at the Cracow Regional Court. He further replied that it was not possible to provide the statistical data on the applicant's workload in comparison to the average workload of other judges of that court as there was no comparative group of judges performing their judicial duties to the same extent as the applicant.

F. Applicant's dismissal from his position as spokesperson of the Cracow Regional Court

78. In November 2017 the Minister of Justice dismissed Judge B.M. from her post as President of the Cracow Regional Court. This decision was taken on the basis of the Act of 12 July 2017 amending the Act on the Organisation of Ordinary Courts, which conferred on the Minister competence to dismiss and appoint at his discretion presidents of ordinary courts during the period of six months following the law's entry into force (see paragraph 25 above; for more details, see also *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, § 33, 29 June 2021; in this judgment the Court found that the applicants, two court vice-presidents, had been deprived of the right of access to a court, in violation of Article 6 § 1, in relation to the Minister's decisions removing them from their posts before the expiry of their respective terms of office pursuant to the above-mentioned Act of 12 July 2017). On 9 January 2018 the Minister of Justice appointed Ms D.P.-W. as new President of the

Cracow Regional Court on the basis of the same transitional provisions. On 6 March 2018 the *Sejm* elected Ms D.P.-W. as one of the judicial members of the new NCJ.

79. By a letter dated 15 January 2018 the President of the Cracow Regional Court informed the applicant that she had dismissed him from the position of spokesperson of that court, after obtaining a favourable opinion of the Board (*Kolegium*) of the Cracow Regional Court.

80. The applicant submitted that during the meeting of the Board on 15 January 2018 its members had not given an opinion on his dismissal from the position of spokesperson of that court. At the end of the meeting, the President of the Cracow Regional Court had informally notified the members of the Board that she was considering dismissing the applicant from that position, and only one member of the Board, Judge J.K. objected to the dismissal; none of the other members of the Board expressed their view on that matter. Although the request for an opinion on the applicant's dismissal had not been included in the Board's agenda or put to a vote on that day, the information that the Board had given a favourable opinion was included in the minutes of the Board's meeting. Those events, among others, were later the basis of a lawsuit brought by the applicant against the Cracow Regional Court for breach of the principle of equal treatment in employment. The case is pending before the Katowice Regional Court (case no. IX P 63/19).

81. On 18 January 2018, the new spokesperson of the Cracow Regional Court published a press release on the court's website stating that the President of the Cracow Regional Court had dismissed the applicant from the position of spokesperson after obtaining a favourable opinion of the Board. In the applicant's view, this press release was published in order to inform the public that his work had allegedly been negatively assessed by a larger group of judges.

82. On 22 January 2018 the members of the Board requested the President of the Cracow Regional Court to call a meeting of the Board on 29 January 2018. The President of the Cracow Regional Court did not react to this request.

83. On 29 January 2018, six out of eight members of the Board of the Cracow Regional Court resigned from their seats on the Board. On 30 January 2018 they published a statement explaining that their decision had been motivated by the lack of possibility of further cooperation with the President of the Cracow Regional Court, acting by law as Chairperson of the Board. They noted that it had not been appropriate to state in the minutes of the Board's meeting of 15 January 2018 that the Board had given a favourable opinion as regards the applicant's dismissal from the position of spokesperson of the court. Further, it had not been appropriate to state in the minutes that the Board had given its consent to the applicant's dismissal, since the Board could only have given an opinion on this matter. In addition, this matter had not been put to a vote.

84. On 26 February 2018 the Assembly of Judges of the Cracow Regional Court adopted a resolution which read, in so far as relevant:

"1. The Assembly ... expresses its thanks to Judge Waldemar Żurek of the Cracow Regional Court for his many years of service as spokesperson of the Cracow Regional Court, as well as member and at the same time spokesperson of the NCJ. Judge Waldemar Żurek consistently and at the same time professionally defended the independence of the courts and judges, which – at a time when the executive and legislative authorities, violating the principles arising from the Constitution, took a number of actions with a view to subordinating the judiciary to the political considerations – was an extremely difficult and courageous act. Quoting the Chapter of the Golden Paragraphs Award granted to Judge Waldemar Żurek in 2016, he was 'always there, where it was necessary to defend the foundations of the democratic rule-of-law State'. The fully dedicated and committed attitude of Judge Waldemar Żurek has made him 'the face of the Polish judiciary', deserving the highest respect and recognition.

2. The Assembly ... draws attention to the fact that in relation to Judge Waldemar Żurek the law enforcement agencies subordinated to the political actors for about two years, and recently also the newly appointed President of the [Regional] Court, have taken repressive actions manifesting themselves in, among other things:

– five interrogations by the prosecutor's office and the CBA in the course of unfounded proceedings concerning the auditing of [the applicant's] financial declaration[s], which have in fact already lasted almost one and a half years, while, contrary to the law, the proceedings have been conducted for six months without formal initiation and without informing him about this fact;

– unlawful intrusion of the CBA officers into the restricted area of the seat of a constitutional organ of the Republic of Poland, i.e. the NCJ, in order to serve a summons [on the applicant], which could also have been served by post;

– questioning, having features of harassment, of the seventy-plus-year-old parents of Judge Waldemar Żurek;

– the officers of the CBA pestering without justification some neighbours of Judge Waldemar Żurek or the person who administers his taxes;

– the smear campaign in the public media against Judge Waldemar Żurek, which has resulted in a wave of hate speech directed at him in the form of numerous telephone calls and texts, including threats;

– unjustified auditing of the financial situation of Judge Waldemar Żurek's wife, who is currently six months pregnant;

– the inspection of cases examined by Judge Waldemar Żurek ordered by the Minister of Justice on the basis of an anonymous letter;

– the dismissal, having features of harassment, of Judge Waldemar Żurek from the position of court spokesperson, despite the absence of the requisite opinion of the court's Board, and then the harassment of one of the persons who opposed this type of operation – Judge E. Ł., who was dismissed from the position of President of the Wieliczka District Court;

– attempts to persuade persons cooperating with Judge Waldemar Żurek to make negative statements about his work.

> Taking into account the timing and context of the actions against [the applicant] described above, it is fully justified to conclude that they are aimed at pressuring and intimidating him in connection with his activities defending the independence of the courts and judges. These actions, which we all consider groundless and unlawful, recall the persecution of political opponents by the authorities during the Polish People's Republic. The above-described actions are reminiscent of the systems of control of citizens and individual repression used by the secret services in authoritarian systems, which led to many violations of human rights in the past. The Assembly strongly condemns this type of action taken against a judge, who is at the same time a member and spokesperson of a constitutional organ of the Republic of Poland, namely the NCJ."

G. Declassification of the applicant's financial declaration

85. On 17 May 2018 the applicant requested the President of the Cracow Court of Appeal to grant his financial declaration, which was otherwise to be made public on the Internet, confidential status. He invoked concerns for his and his family's safety owing to threats received by email and telephone. On 24 May 2018 the President of the Court of Appeal granted the applicant's request. On 16 June 2018 the Minister of Justice, without providing any reasons, reversed the decision of the President of the Court of Appeal and decided to declassify the financial declaration of the applicant. The Minister's decision was not amenable to any review.

H. Pending disciplinary proceedings against the applicant

86. In order to present comprehensive information about his current situation, the applicant submitted that at least five sets of disciplinary proceedings had been initiated against him. Two of those sets of proceedings are pending before the Disciplinary Court at the Katowice Court of Appeal and the remaining ones are pending before the Disciplinary Chamber of the Supreme Court.

87. In the first case pending before the Disciplinary Court at the Katowice Court of Appeal (no. ASD 1/19) the applicant was charged on 2 March 2019 with the disciplinary offence of undermining the dignity of the office of judge in that he had refused to perform judicial duties in the period from 1 September to 15 October 2018 in the I Civil Division (first-instance division) of the Cracow Regional Court. The applicant had been transferred to that Division against his will by the President of the Cracow Regional Court, Ms D.P.-W. on 27 August 2018. In his submission, this transfer from the appeals division hearing civil cases at second instance to the first-instance division constituted an additional repressive measure against him. On 10 September 2018 the applicant lodged an appeal against that decision. In the proceedings initiated by his appeal, the Supreme Court made a reference for preliminary ruling to the CJEU. The latter delivered its judgment on 6 October 2021 (C-487/19, EU:C:2021:798; see *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, §§ 144-149 and 216, 3 February 2022).

88. In the second case pending before the Disciplinary Court at the Katowice Court of Appeal (no. ASD 4/19) the applicant was charged on 21 October 2019 with the same disciplinary offence in that he had delivered a political manifesto in a press interview where he had stated his views on the functioning of the constitutional organs of the State, namely the Constitutional Court and the new NCJ and also questioned the legality of K.Z.'s appointment to the post of judge of the Supreme Court.

89. On 22 November 2018 Judge M.L., the Deputy Disciplinary Officer for Ordinary Court Judges (*Zastępca Rzecznika Dyscyplinarnego Sędziów Sądów Powszechnych*) charged the applicant with two disciplinary offences. The first charge concerned the applicant's failure to file a sales tax return on the sale of a John Deere 440 Skider tractor and the second one related to the failure to pay tax on civil-law transactions concerning the sale of the tractor. These proceedings appear to be the consequence of the auditing by the CBA of the applicant's financial declarations.

90. On 28 May 2020 Judge P.W.R., the Deputy Disciplinary Officer for Ordinary Court Judges charged the applicant with the disciplinary offence of undermining the dignity of the office of judge by, *inter alia*, challenging the effectiveness of K.Z.'s appointment to the post of judge of the Supreme Court and questioning his status as the acting First President of the Supreme Court. This set of disciplinary proceedings constituted a reaction to the lawsuit brought by the applicant before the Supreme Court's Chamber of Labour and Social Security in which he had been seeking to establish the non-existence of the official status of K.Z., who had been appointed as a Supreme Court judge with the participation of the new NCJ. In those proceedings the Supreme Court decided to submit a request for a preliminary ruling to the CJEU. A more detailed description of the appointment procedure concerning Judge K.Z. can be found in the Court's judgment in *Advance Pharma sp. z o.o v. Poland,* no. 1469/20, of 3 February 2022, in which the Court held that the judicial formation of the Civil Chamber of the Supreme Court including Judge K.Z. was not a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention and that it lacked the independence and impartiality required by this provision (see §§ 26-27, 34-35, 44-52, 93 and 349-353).

I. Other material

91. In 2019 Amnesty International published a report entitled "Poland: Free Courts, Free People. Judges Standing for Their Independence". The report contained the following passage:

> "3. **Impact on judges**
>
> ...
>
> In the early stages of the 'reform' of the judiciary, the authorities and pro-government media targeted a small number of individual judges who publicly spoke out against it.

Waldemar Żurek, a judge of the Regional Court in Cracow who was an NCJ spokesperson until March 2018, had suffered several years of intimidation and harassment.

Serving as the spokesperson of the NCJ, Judge Żurek has voiced public criticism via the media since 2016 when the government first attempted to interfere with the independence of the judiciary by targeting the Constitutional Tribunal. In response, various authorities subjected Judge Żurek and his family members to investigations and disciplinary proceedings. Judge Żurek was also targeted by a negative campaign by pro-government media, including national television [footnote omitted], during which he received hate mail and abusive and threatening text messages [footnote omitted]. For several months in 2016 and 2017, the Central Anticorruption Bureau (CBA) carried out an investigation of Judge Żurek's finances. The Assembly of Judges of the Regional Court in Cracow raised concerns over procedural irregularities in the investigation as it 'has been pursued without a formal decision and without a proper announcement for a period of [the first] 6 months [footnote omitted]'. Judge Żurek reported intrusions by CBA officials into his home and office [footnote omitted]. The CBA investigation eventually concluded in January 2018 that Judge Żurek was not involved in any major breaches of the law beyond inconsistent reporting on *per diem* received.

Judge Żurek also faced several disciplinary proceedings, including an investigation for his participation in July 2017 protests in defence of the independence of the judiciary. In 2017, the pro-government newspaper *Gazeta Polska* called for such proceedings after Judge Żurek spoke at a protest on 16 July 2017 in Warsaw. However, the disciplinary prosecutor at the Appeal Court in Cracow concluded in August 2017 that there were no grounds for such a move [footnote omitted]."

92. In 2020 judges from the Polish Judges' Association Iustitia and a prosecutor from the Lex Super Omnia Association of Prosecutors published a report entitled "Justice Under Pressure". The report stated, in so far as relevant:

"29. Waldemar ŻUREK – Judge of the Regional Court in Cracow

Judge Waldemar Żurek was a member of the NCJ for two terms of office, and until March 2018 he was a spokesman for the Council. The Judge is a member of the board of the 'Themis' Association of Judges and has repeatedly spoken in public debate on the state of the rule of law in Poland, and in his statements he has always boldly defended the independence of the courts, the independence of judges and the principles of a democratic State under the rule of law, openly criticising the unconstitutional changes introduced in the area of justice by those currently in power. In January 2018, Judge Waldemar Żurek was dismissed from the position of [spokesperson] of the Regional Court in Kraków. In July 2018, Judge Waldemar Żurek was transferred from the 2nd Civil Appeal Division to the 1st Civil Division (1st instance), which was criticised by the Association of Judges 'Themis' and the Association of Polish Judges 'Iustitia', which described this decision as politically motivated harassment of this judge and as an attempt to intimidate judges who openly act against actions aimed at political subordination to justice. Judge Waldemar Żurek took part in meetings with citizens, where current changes concerning the justice system, including the independence of courts and the independence of judges, were discussed. Judge Waldemar Zurek's civic activity was met with the reaction of the disciplinary prosecutor, who, among other things, began to scrutinise the professional work of the judge in order to find a reason to initiate disciplinary proceedings."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. MATERIAL RELEVANT TO THE ARTICLE 6 § 1 COMPLAINT

93. The domestic, international and EU law relevant to the applicant's complaint concerning the premature termination of his term of office as a judicial member of the NCJ was set out in *Grzęda v. Poland* ([GC], no. 43572/18, §§ 64-169, 15 March 2022).

II. MATERIAL RELEVANT TO THE ARTICLE 10 COMPLAINT

A. Domestic law

1. *The Act of 9 June 2006 on the Central Anti-corruption Bureau (Ustawa z dnia 9 czerwca 2006 o Centralnym Biurze Antykorupcyjnym - "the CBA Act")*

94. The Central Anti-corruption Bureau was established as a special service to combat corruption, in particular in the State and local government institutions, as well as to combat activities detrimental to the economic interests of the State (section 1 of the CBA Act).

95. In accordance with section 2(1)(5) of the CBA Act, its competences include the verification of the accuracy and veracity of financial declarations submitted by persons holding public office. Under section 23(1) and (4) of the CBA Act, it can obtain, subject to a court's approval, information from banks and other financial institutions concerning a person whose financial declaration is under examination.

96. Section 33(1) of the CBA Act provides that an audit can be carried out in accordance with the audit programme authorised by the Head of the CBA or its deputy. Under section 33(3) of the Act an audit is carried out by the CBA officers on the basis of their service card and a personal authorisation issued by the Head of the CBA.

2. *Financial declarations of judges*

97. In accordance with section 87(1) of the Act on the Organisation of Ordinary Courts (*Ustawa o ustroju sądów powszechnych*), in its version applicable at the relevant time, judges are required to submit a financial declaration which concerns their personal property and property covered by a joint matrimonial regime to a competent President of the Court of Appeal. The declaration should include, *inter alia*, information about cash holdings, real estate, movable property of a value exceeding PLN 10,000, stocks, shares and financial instruments held by a judge.

98. Under section 87(6) of the Act on the Organisation of Ordinary Courts the information contained in the financial declaration is public with the

exception of the address of the person concerned and the location of the real estate. The same provision stipulates that at the request of the judge, the person authorised to collect the declaration may decide to classify the information contained in the declaration, if the disclosure of this information could pose a threat to the person submitting the declaration or to his or her relatives. However, the Minister of Justice is entitled to declassify such declarations of judges.

99. The financial declarations are published in the Public Information Bulletin no later than 30 June each year (section 87(6a)).

3. Court spokesperson

100. In accordance with Article 33 § 1 of the Regulation of the Minister of Justice on the Rules of operation of the ordinary courts, 23 December 2015, tasks related to cooperation between a court and the media are carried out by the president or vice-president of the court. In the Court of Appeal and the Regional Court the president of the relevant court may appoint a spokesperson to carry out those tasks (Article 33 § 2). The spokesperson reports directly to the president of that court (Article 33 § 3).

101. Under section 31(1)(1) of the Act on the Organisation of Ordinary Courts, the Board of the Regional Court expresses an opinion on the appointment of a spokesperson and on any dismissal from that position.

B. International material

1. The United Nations

(a) The Basic Principles on the Independence of the Judiciary

102. The Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985. They were endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The relevant point reads as follows:

> "8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

(b) The UN Special Rapporteur on the independence of judges and lawyers

103. On 24 June 2019 the UN Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán submitted his Report on freedom of expression, association and peaceful assembly of judges and prosecutors to the Human Rights Council. He made the following recommendations, in so far as relevant:

"101. In exercising their freedom of expression, judges and prosecutors should bear in mind their responsibilities and duties as civil servants, and exercise restraint in expressing their views and opinions in any circumstance when, in the eyes of a reasonable observer, their statement could objectively compromise their office or their independence or impartiality.

102. As a general principle, judges and prosecutors should not be involved in public controversies. However, in limited circumstances they may express their views and opinions on issues that are politically sensitive, for example when they participate in public debates concerning legislation and policies that may affect the judiciary or the prosecution service. In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy."

2. The Council of Europe

(a) The Committee of Ministers

104. The relevant extracts from the appendix to Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, provide:

"*Chapter II – External independence*

...

19. Judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence. The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media.

...

21. Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence."

(b) The Parliamentary Assembly of the Council of Europe

105. The report of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 6 January 2020 entitled "The functioning of democratic institutions in Poland" (doc. 15025) stated, in so far as relevant:

"**4. Disciplinary proceedings against judges**

95. As we outlined in the previous sections, a main objective of the reform started after the 2015 legislative elections has been to bring the judiciary firmly under the control of the ruling majority. In that context, the reports of disciplinary proceedings against, and harassment of, judges and prosecutors who are seen as acting against the interests of the ruling majority, or who have been openly critical of the reforms, is extremely concerning. This is all the more the case since recent disclosures that

a campaign of harassment of judges was orchestrated with the involvement of leading personalities in the Ministry of Justice and High Council of Justice closely connected to the current ruling majority. ...

...

98. According to the Polish Constitution, judges cannot be members of political parties or engage in activities that would be incompatible with the principle of the independence of the courts and judiciary. While judges should refrain from political activities, the law does not clearly define what amounts to political activity and what is protected under the right to freedom of speech [footnote omitted]. While we concur with the prohibition of party-political activities for judges, this cannot have the effect of forbidding judges from being able to express an opinion on the legal system and changes to it that would affect them directly."

106. The report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 5 January 2021 entitled "Judges in Poland and in the Republic of Moldova must remain independent" (doc. 15204) stated, in so far as relevant:

"**4. Changes in the functioning of the judiciary in Poland**

...

36. According to the authors of the motion for a resolution, 'in Poland, courts remain the last resort for numerous prosecuted civil rights activists' and 'disobedient judges, such as Igor Tuleya, Wojciech Łączewski, Dominik Czeszkiewicz and Waldemar Żurek face disciplinary consequences from court newly appointed presidents'. ...

4.5. The ordinary courts

...

66. Several judges have even been threatened. Judge Waldemar Żurek, for example, has been receiving hate messages since 2016 and has been the subject of at least five sets of disciplinary or 'explanatory' proceedings. ...

4.7. Latest developments

...

79. Judge Waldemar Żurek, a member of the former NCJ, who was known to have criticised its reform, is the subject of disciplinary proceedings brought under the law of 20 December 2019, for having questioned the validity of the appointment of a judge to the S[upreme] C[ourt] (Mr K.Z.)."

(c) The Council of Europe Commissioner for Human Rights

107. The Commissioner for Human Rights, Ms Dunja Mijatović carried out a visit to Poland from 11 to 15 March 2019. The report from her visit, published on 28 June 2019, reads in so far as relevant:

"**1.5 Mass dismissals and disciplinary proceedings affecting judges and prosecutors**

...

49. The Commissioner recalls that judges and prosecutors have the right to express their views on matters of public interest, including on reforms of the judiciary and the

prosecution service, in a proportionate way, and their freedom to do so must be safeguarded. ...

50. The Commissioner considers that, beyond the persons directly affected, disciplinary proceedings are likely to have a chilling effect on other judges and prosecutors who wish to participate in the public debate on issues related to the administration of justice and the judiciary, which according to the European Court of Human Rights works to the detriment of society as a whole [footnote omitted]. She observes that members of the judiciary and the prosecution service in Poland who publicly express their views on the reform relating to their professions incur a very real risk to their careers. The manner in which some disciplinary proceedings are being conducted, as relayed to the Commissioner by various interlocutors in Poland – including from the judicial and prosecutorial professions – and as described in media reports, has understandably been perceived as intimidating and/or as an attempt to silence outspoken or critical judges and prosecutors. The Commissioner urges the authorities to ensure that disciplinary proceedings are not instrumentalised and to secure the right to a fair trial of any person subjected to them."

(d) The European Commission for Democracy through Law (Venice Commission)

108. The Venice Commission, in its report on the Freedom of Expression of Judges, adopted at its 103rd Plenary Session (Venice, 19-20 June 2015, CDL-AD(2015)018) observed, in so far as relevant:

"80. European legislative and constitutional provisions and relevant case-law show that the guarantees of the freedom of expression extend also to civil servants, including judges. But, the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restrictions on the freedom of expression, association and assembly of judges including their political activities."

(e) The Consultative Council of European Judges ("the CCJE")

109. Opinion no. 3 of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality adopted on 19 November 2002 reads, in so far as relevant:

"**b. Impartiality and extra-judicial conduct of judges**

27. Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

28. However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

...

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike."

110. The Magna Carta of Judges (Fundamental Principles) was adopted in November 2010. The relevant part reads as follows:

"**Judicial independence**

...

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

...

Guarantees of independence

...

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)."

111. Opinion no. 18 of the CCJE on the position of the judiciary and its relation with the other powers of state in a modern democracy adopted on 16 October 2015 reads, in so far as relevant:

"**VII. The need for restraint in the relations between the three powers**

...

A. "Judicial restraint"

...

41. In its dealings with the other two powers of state, the judiciary must seek to avoid being seen as guarding only its own interests and so overstating its particular concerns. Rather, the judiciary must take responsibility for the society it serves. The judiciary must show understanding and responsibility towards the needs of the public and the exigencies of the public purse. The judiciary can provide their insights on the possible effect of proposed legislation or executive decisions on the ability of the judiciary to fulfil its constitutional role. Judiciaries must also take care not to oppose all proposed changes in the judicial system by labelling it an attack on judicial independence. But, if judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must defend its position fearlessly.

Examples of decisions which might come into those categories are massive reductions in legal aid or the closure of courts for economic or political reasons.

42. If it is necessary to criticise another power of the state or a particular member of it in the course of a judgment in a dispute or when it is necessary in the interests of the public, that must be done. For example, therefore, courts may criticise legislation or the failure of the legislative to introduce what the court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect. Judges, like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature. In their professional and private relations with the representatives of the other powers, judges must avoid any conflict of interest and avoid any behaviour that might create a perception that judicial independence and impartiality and the dignity of the judiciary in general is impugned. As long as criticism is undertaken in a climate of mutual respect, it can be beneficial to society as a whole. However, it cannot be too often emphasised that it is not acceptable that reasonable critical comments from the judiciary towards the other powers of the state should be answered by removals from judicial office or other reprisals [footnote omitted]. The CCJE also emphasizes that inadmissible behaviour by representatives of the legislative and executive powers and by politicians may occur in the form of connivance and, in certain cases, support for aggression or even radical, violent and unlawful actions against the judiciary [footnote omitted]. Direct or indirect support for such actions against the judiciary is totally unacceptable. Not only are such actions a direct attack on judicial independence, they also stifle legitimate public debate by judges."

3. Other material

112. The Sofia Declaration adopted by the General Assembly of the ENCJ on 7 June 2013 reads in so far as relevant:

"(vii) The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

113. The applicant complained that he had been denied access to a court in order to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the NCJ. He had been elected as a member of this body for a four-year term, as provided for in Article 187 § 3 of the Constitution, and had the right to remain in office for the duration of that term, thus until 21 March 2018. He relied on Article 6 § 1 of the Convention, of which the relevant part reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. Applicability of Article 6

(a) The Government's submissions

114. The Government contested the applicability of Article 6 § 1 of the Convention to the present case. They claimed that under Polish law there was no right to exercise public authority, including the right of a judge to be elected to the NCJ or to remain in that office. Moreover, in the present case there was no genuine and serious "dispute" concerning the existence of the alleged civil right of the applicant to remain a member of the NCJ.

115. The Government referred to the Constitutional Court's judgment of 20 June 2017 (no. K 5/17), in which certain provisions of the 2011 Act on the NCJ had been found unconstitutional. In order to implement the above-mentioned Constitutional Court judgment, the authorities had prepared a bill amending the Act on the NCJ. The bill, subsequently enacted into law as the 2017 Amending Act, departed from the principle of the individual character of the term of office for judicial members of the NCJ and changed the manner of their election. The Government maintained that the decision to terminate the applicant's term of office as a judicial member of the NCJ had been legitimate. That decision had concerned solely his position as a member of the NCJ and did not touch upon his status as a judge. Its rationale was to implement the Constitutional Court's judgment in so far as the nature of the term of office of the NCJ's judicial members was concerned. It thus constituted a merely technical measure aimed at the establishment of a new term of office consonant with the relevant constitutional provisions.

116. They submitted that the applicant's membership of the NCJ did not constitute "employment" or any other comparable legal relationship. The fact of being a member of the NCJ could not be regarded as a right either under domestic law or under the Convention, but pertained to the exercise of public authority.

117. As regards the first condition of the *Eskelinen* test, the Government maintained that under Polish law the applicant had been excluded from the right of access to a court in so far as his seat on the NCJ was concerned. This exclusion had been in place already on the date of his election to the NCJ and thus the 2017 Amending Act had not affected this. They noted that the Act on the NCJ had never provided for any form of appeal or remedy in connection with the expiry, termination or renunciation of office for the members of this body. Matters pertaining to participation in the NCJ did not constitute a "case" (*sprawa*) within the meaning of Article 45 § 1 of the Constitution and as such were excluded from the right to a court *ratione materiae*. The Government concluded that national law "excluded access to a court" for an individual claim based on the alleged unlawfulness

of the termination of the term of office. The first condition of the *Eskelinen* test had therefore been met.

118. As regards the second condition of the *Eskelinen* test, the Government submitted that the subject-matter of the applicant's complaint related exclusively to the exercise of State power. In their view, the amendments in the 2017 Amending Act had been proportionate since the aim had been to adjust the election rules to the relevant provisions of the Constitution, as interpreted by the Constitutional Court in its judgment of 20 June 2017 (no. K 5/17). The Government maintained that in the Constitutional Court's case-law the protection of the term of office of the NCJ's judicial members was not regarded as absolute. In their view, the cohesion of the changes which made it possible for the NCJ to operate in compliance with the Constitution justified the termination of the terms of office of the NCJ's judicial members who had been elected on the basis of the previous provisions. Furthermore, the "democratisation" of the NCJ election procedure constituted an important public interest which justified in turn the early termination of the term of office of the NCJ's judicial members. In this context, the Government submitted that under the 2017 Amending Act judicial members of the NCJ were to be elected by the *Sejm* from among the judges who obtained adequate support from other judges or from citizens. The Government concluded that the applicant's exclusion from access to a court was justified on objective grounds in the State's interest. The second condition of the *Eskelinen* test had therefore been met as well.

119. In the present case, since both conditions of the *Eskelinen* test had been fulfilled, the applicant's complaint under Article 6 § 1 should be considered incompatible *ratione materiae*.

(b) The applicant's submissions

120. The applicant maintained that Article 6 § 1 under its civil head was applicable to his case. He asserted that the Polish Constitution guaranteed to a judge elected to the NCJ the right to serve a full four-year term of office. This conclusion stemmed from Article 60 read in conjunction with Article 187 § 3 of the Constitution. Therefore, the early termination of his term of office in the NCJ had to be seen as an interference with his individual right of access to public service, not as a deprivation of the exercise of public power. The latter was exercised by the NCJ as a collective body, not by its individual members.

121. The applicant submitted that the stability of tenure of the NCJ's members was fundamental to ensuring the proper functioning of that body. The Constitutional Court had underlined in its judgment of 18 July 2007 (no. K 25/07) that only extraordinary circumstances could warrant a breach of the tenure of the NCJ's members. The applicant submitted that the Government's argument that there had been no alternative to the shortening of his term of office in connection with the introduction of the new system of

electing the NCJ's judicial members could not be accepted as proportionate or legitimate.

122. As regards the first condition of the *Eskelinen* test, the applicant argued that the domestic law had never explicitly excluded access to a court for judicial members of the NCJ whose term of office had been prematurely terminated. The premature termination in his case had been unprecedented. The Act on the NCJ in force at the time of his election to the Council did not provide for such termination, except in the situations provided for in section 14 of the Act. The termination at issue had resulted from the *ad hoc* application of statute law and lacked the characteristics of abstract legal norms. It could not be concluded that the national law "expressly excluded access to a court" for a claim based on the alleged unlawfulness of the measure at issue.

123. As regards the second condition of the *Eskelinen* test, even assuming that domestic law excluded access to a court in his case, the applicant argued that the exclusion was not based on objective grounds in the State's interest. Firstly, the exclusion had a significant impact on his status as judge since he had been elected to the NCJ in his capacity as a judge of an ordinary court, not as an ordinary citizen. His election to the NCJ had been aimed at ensuring the proper operation of the NCJ, a body responsible for safeguarding judicial independence.

124. Secondly, the applicant maintained that the Constitutional Court's judgment of 20 June 2017 (no. K 5/17) had to be seen as a false pretext justifying the introduction of changes to the NCJ's composition at the time when the legislative procedure, initiated by the Ministry of Justice, had been pending in Parliament. Moreover, the impugned judgment was invalid and contrary to the Constitution owing to the participation of Judges M.M. and L.M. in the adjudicating panel.

125. Thirdly, the exclusion of the right of access to a court was incompatible with the rule of law. The shortening of the applicant's term of office could not be regarded as a merely technical measure. Rather, it constituted a serious violation of Article 187 § 3 of the Constitution and interference with the right of access to public service under Article 60 of the Constitution.

(c) Submissions of third-party interveners

126. The European Network of Councils for the Judiciary, Amnesty International jointly with the International Commission of Jurists, the Helsinki Foundation for Human Rights, the Polish Judges' Association Iustitia, the Judges for Judges Foundation jointly with Professor L. Pech and the Commissioner for Human Rights of the Republic of Poland submitted their written comments on the case, similar to those made earlier in the case of *Grzęda v. Poland*. Their submissions were summarised in the *Grzęda*

judgment (cited above, §§ 205-239). The submissions received pertain both to the admissibility and merits of the complaint under Article 6 § 1.

127. The Judges' Association Themis, which did not intervene in *Grzęda*, submitted comments in the present case. With regard to the stability of tenure of judicial members of the NCJ, the intervener supported the view of the Commissioner that the judicial members were entitled to protection as regards their irremovability, analogous to that afforded to judges performing judicial functions. It considered that in this context the Court should have regard to the relevant jurisprudence of the CJEU. The intervener noted that the change of procedure for electing judicial members of the NCJ rendered that procedure politicised. It also resulted in a situation where the NCJ ceased to fulfil its constitutional role as guardian of judicial independence.

(d) The Court's assessment

(i) General principles

128. The general principles regarding the applicability of Article 6 § 1 in its "civil" limb were recently summarised in *Grzęda v. Poland* ([GC], no. 43572/18, §§ 257-264, 15 March 2022).

(ii) Application of the general principles to the present case

129. The Court notes that the applicant is a judge of the Cracow Regional Court. On 2 March 2014 he was re-elected to the NCJ for a period of four years by the Representatives of the General Assemblies of Regional Court judges, in accordance with the relevant provisions of the Constitution and the applicable legislation. His second term of office on the NCJ began on 21 March 2014 and was due to come to an end on 21 March 2018.

130. In *Grzęda v. Poland* the Grand Chamber of the Court examined the question of applicability of Article 6 § 1 to a dispute arising out of the premature termination of that applicant's term of office as a judicial member of the NCJ, while he still remained a serving judge (ibid., § 265). The same question arises in the present case.

131. As regards the existence of a right, the Court found in *Grzęda* that, having regard to the terms of Article 187 § 3 of the Constitution, there was in domestic law an arguable right for a judge elected to the NCJ to serve a full term of office, save for the exhaustively enumerated statutory exceptions in section 14(1) of the 2011 Act on the NCJ (ibid., § 282). The Court further held in *Grzęda* that there was a genuine and serious dispute over the "right" to serve a full term of four years as a judicial member of the NCJ (ibid., § 286).

132. Next the Court examined in that case whether the "right" claimed by the applicant was a "civil" one within the autonomous meaning of Article 6 § 1 in the light of the criteria developed in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II). As regards the first

condition of the *Eskelinen* test, namely whether the domestic law expressly excluded access to a court, the Court held that the first condition could be regarded as fulfilled where, even without an express provision to such effect, it had been clearly shown that domestic law excluded access to a court for the type of dispute concerned (*Grzęda*, cited above, § 292). However, it left open the question of compliance with the first condition of the *Eskelinen* test, noting the opposing views of the parties in this respect and having regard to its conclusion as to the second condition of the test (ibid., § 294).

133. As regards the second condition of the *Eskelinen* test, namely whether the applicant's exclusion from access to a court was justified on objective grounds in the State's interest, the Court held that it had not been met (ibid., § 325). It found in this context that the applicant's position as an elected judicial member of the NCJ, the body with constitutional responsibility for safeguarding judicial independence, had been prematurely terminated by operation of the law in the absence of any judicial oversight of the legality of this measure. The exclusion of the applicant from a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence could not be regarded as being in the interest of a State governed by the rule of law (ibid., § 326). Accordingly, the Court found in *Grzęda* that Article 6 § 1 in its civil limb was applicable in the applicant's case.

134. In the present case, for the same reasons as those set out in *Grzęda* (ibid., 266-329), the Court finds that Article 6 § 1 is applicable. It thus rejects the Government's objection in this regard.

2. Victim status

135. The Government argued that membership of the NCJ pertained to the sphere of exercise of public authority and that as such was not an individual right protected by the Convention. The mere fact that an individual was removed from an office entailing the exercise of public power should not be regarded as an interference with human rights. Therefore, the applicant could not claim to be a victim of a violation of human rights protected by the Convention and his application was inadmissible owing to a lack of victim status.

136. The applicant contested the Government's assertion.

137. The Court notes that the Government's objection on the grounds of a lack of victim status is based on the same arguments as those raised in respect of the applicability of Article 6 to the present case, which it has dismissed above (see paragraphs 114-117 above). As the Court has already decided that the dispute arising out of the premature termination of the applicant's term of office as a judicial member of the NCJ pertained to a "civil right" within the meaning of Article 6 § 1 of the Convention, it finds that the Government's objection alleging a lack of victim status must be dismissed.

3. Objection based on a lack of significant disadvantage

(a) The parties' submissions

138. The Government further submitted that the application was inadmissible on account of a lack of significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. In their view, the applicant had not sustained any disadvantage of a pecuniary or non-pecuniary nature in connection with the termination of his term of office as a member of the NCJ. In support of this contention, they referred to their earlier arguments on the applicability of Article 6 § 1.

139. The applicant argued that his case could not be rejected under Article 35 § 3 (b) as he had suffered a significant disadvantage in the form of non-pecuniary damage related to the distress caused by the violation of his Convention rights. Furthermore, respect for human rights as defined in the Convention required the examination of his case on the merits since it pertained to the relationship between the principles of the separation of powers and the effective protection of human rights. Lastly, his case had not been duly examined by a domestic court. In fact, he had been deprived of the possibility of challenging the premature termination of his term of office before a court.

(b) The Court's assessment

140. The Court considers that the objection based on Article 35 § 3 (b) cannot be accepted. The present application concerns similar issues to those which arose in *Grzęda*, where it was considered that they raised serious questions affecting the interpretation of the Convention or the Protocols thereto and the case had therefore been relinquished to the Grand Chamber under Article 30 of the Convention. The Court is thus of the view that the conditions set forth in Article 35 § 3 (b) are not met, since respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination of the application on the merits (see *Grzęda*, cited above, § 332).

141. The Government's objection under Article 35 § 3 (b) of the Convention must accordingly be dismissed.

4. Overall conclusion on admissibility

142. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

143. The applicant argued that he had not had access to a court for the determination of his civil rights in accordance with Article 6 § 1 of the Convention.

2. The Government's submissions

144. The Government maintained that there had been no violation of Article 6 § 1 of the Convention. They reiterated their arguments as to the inapplicability of this provision to the present case.

3. The Court's assessment

(a) General principles

145. The applicable general principles concerning the right of access to a court were recently summarised in *Grzęda* (cited above, §§ 342-343).

(b) Application of the general principles to the present case

146. The Court would point out that it has left open the question whether the first condition of the *Eskelinen* test has been fulfilled, taking account of the opposing views of the parties on that issue and since, in any event, it has concluded that the second condition has not been met (see paragraph 132 above). However, the Court reiterates that the Government have consistently argued that for the purposes of Article 6 of the Convention the applicant's access to a court was excluded at all times under national law, both before his term of office as a judicial member of the NCJ was terminated by the 2017 Amending Act, as well as after that termination (see paragraph 117 above). Therefore, the Court is now called upon to assess whether the applicant's lack of access to the domestic courts, in order to have examined the genuine and serious dispute over his arguable right to serve a full term of four years as a judicial member of the NCJ (see paragraph 131 above), was justified in conformity with the general principles emanating from the Court's case-law.

147. Referring to its analysis with regard to the issue of the applicability of Article 6 § 1, in particular the importance of the NCJ's mandate to safeguard judicial independence and the link between the integrity of the judicial appointment process and the requirement of judicial independence (see *Grzęda*, cited above, §§ 300-303), the Court considers that similar procedural safeguards to those that should be available in cases of dismissal or removal of judges should likewise be available where, as in the present case, a judicial member of the NCJ has been removed from his or her position (ibid., § 345).

148. The Court further emphasises the need to protect a judicial council's autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary. In assessing any justification for excluding access to a court with regard to membership of judicial governance bodies, the Court considers it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law. It also has regard to the overall context of the various reforms undertaken by the Polish Government which have resulted in the weakening of judicial independence and adherence to rule-of-law standards (ibid., § 346).

149. In the instant case the Government have not provided any reasons justifying the absence of judicial review, but have simply reiterated their arguments as to the inapplicability of Article 6 to the case.

150. Having regard to the foregoing, the Court finds that on account of the lack of judicial review in this case the respondent State impaired the very essence of the applicant's right of access to a court (ibid., § 349).

151. Accordingly, the Court finds that there has been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

152. The applicant complained under Article 13 of the Convention that he had been deprived of an effective domestic remedy in respect of the premature termination of his term of office as judicial member of the NCJ. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

153. The Court notes that the complaint under Article 13 is essentially the same as that under Article 6 § 1. It reiterates that the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13 (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI, and *Baka*, cited above, § 181).

154. Consequently, the Court finds that it is not necessary to examine separately the admissibility and merits of the complaint under Article 13 of the Convention (see *Grzęda*, cited above, § 353).

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

155. The applicant complained about the termination of his position as the NCJ's spokesperson, resulting from the termination of his term of office as a judicial member of the NCJ, and the earlier dismissal from his position as

the Cracow Regional Court's spokesperson. He further complained about the actions taken, *inter alia*, by the CBA, the tax authorities and the prosecution service with regard to him and his family members and about the declassification of his financial declaration by the Minister of Justice. The applicant alleged that those measures had been taken in response to his critical public statements on legislative changes affecting the judiciary and entailed a violation of his right to freedom of expression. He relied on Article 10 of the Convention, of which the relevant part provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

156. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

157. The applicant averred that both the decision to remove him from his position as Cracow Regional Court's spokesperson and the measures taken, *inter alia*, by the CBA, the tax authorities and the prosecution service with regard to him and his family members, in themselves and by the manner in which they had been carried out, had constituted an interference with his freedom of expression. In this connection, the applicant also referred to the premature termination of his term of office as a judicial member of the NCJ which had brought to an end his duties as the NCJ's spokesperson. He had taken an active part in the public debate concerning the reorganisation of the judiciary primarily in his capacity as the NCJ's spokesperson.

158. The applicant submitted that in order to answer the question whether there had been an interference with his freedom of expression, the scope of the measure had to be determined by putting it in the context of the facts of the case and of the relevant legislation. He disagreed that only formal disciplinary proceedings or typical sanctions could constitute an interference within the meaning of Article 10. In any event, several sets of disciplinary proceedings had been instituted against him, including for his statements in

the public debate, but since they were pending they were not subject to the Court's assessment in the present case (see paragraphs 86-90 above).

159. The applicant maintained that he was a symbolic figure of the Polish judicial community and one of the judges most engaged in the public debate concerning the independence of the judiciary in recent years. At the same time, he was one of the most "targeted" judges and had been subjected to, more or less formal, repressive measures by the authorities over the past few years. His case had been mentioned, *inter alia*, in a report by the Polish Judges' Association Iustitia and by the Lex Super Omnia Association of Prosecutors, "Justice Under Pressure", published in 2020.

160. For many years and in a consistent manner the applicant had defended the rule of law and the independence of the courts and openly criticised the unconstitutional changes in the judiciary brought about by the current majority. He argued that all the measures taken by the authorities in response to the multiple statements he had made in the public debate had amounted to an interference with his freedom of expression. Those measures clearly constituted a "restriction" within the meaning of *Wille v. Liechtenstein* ([GC], no. 28396/95, ECHR 1999-VII).

161. As regards the CBA officers' entry into the NCJ's premises on 19 April 2017, the applicant maintained that they had interrupted his confidential meeting with the President, Vice-President and the other spokesperson of the NCJ. The officers had introduced themselves and stated that they were going to serve the audit authorisation on the applicant. The applicant did not acknowledge receipt of the authorisation and the officers left the NCJ's building. The authorisation was only a two-page formal document and contained no substantive content. The applicant observed that it could have been sent to him by post or served during his appearance before the CBA. He submitted that such action had been aimed at drawing the attention of public opinion and other judges to his supposed legal problems.

162. The applicant pointed out that the Government, while admitting that the CBA had selected the financial declarations of six judges for auditing, had not provided any information on the frequency or time-scale of those audits. He argued that the manner of auditing his financial declarations had gone far beyond the CBA's routine activities and had shown that the real intention of the authorities was to draw public attention to possible inaccuracies in his financial declarations.

163. Both the timing and accumulation of the measures taken in relation to the applicant and his family showed that even if there were formal grounds for taking those measures, they had all been used instrumentally or even *ultra vires* in order to intimidate him. No measures targeting the applicant had been taken before the current majority came to power in the 2015 general election despite the fact that the applicant had been acting as the NCJ's spokesperson and the Cracow Regional Court's spokesperson for several

years already. Although the CBA's audit of his financial declarations covered the years 2012-2017, the audit had been initiated in late 2016, at a time when the applicant was frequently criticising the reforms of the judiciary implemented by the governing majority. In addition, the manner in which the public officials had informed the media about the measures taken with regard to the applicant and his family clearly demonstrated that they had intended to raise suspicions as to his credibility in public opinion and therefore to have a "chilling effect" on him.

164. The applicant maintained that when putting all the impugned measures in the context of the facts of the case, including the broader context of the rule of law crisis in Poland, it was obvious that those measures had been taken in direct response to the views and criticisms that he had expressed in his professional capacity.

165. The applicant submitted that the interference at issue had not been "prescribed by law". He referred to the controversy concerning his removal from the position of spokesperson of the Cracow Regional Court. As regards the measures taken by the CBA and other authorities, he underlined that although those measures had at first glance been taken on formal grounds, they were intended to intimidate him and discourage him from criticising the government's reforms of the judiciary. The use of those measures should be regarded as an abuse of power or as *ultra vires*.

166. In the applicant's view, the interference at issue did not pursue a legitimate aim. In fact, it was impossible to see any such aim in the punitive restrictions imposed on him for fulfilling his legal duty to provide opinions on the reforms of the judiciary in Poland in his capacity as the NCJ's spokesperson. The applicant had not formulated his statements in a courtroom while adjudicating upon cases, but in the course of the intensive public debate in the media in his capacity as spokesperson. He had warned public opinion about the threats to the independence of the judiciary resulting from the reforms.

167. Lastly, the interference at issue was not necessary in a democratic society in the light of the Court's case-law. The Government and its agencies had not recognised the need for special protection of the applicant's freedom of expression when he had expressed views in his official capacity on matters of public interest concerning the independence of the judiciary. The measures taken by the authorities had been intended to cause a "chilling effect" not only on the applicant, but also on other judges, so they would refrain from participating in public debate on those issues. In this context, it was noteworthy that the audits carried out by the CBA had been extended to six judges, including the applicant, out of a total of some ten thousand judges in Poland. The Government had not provided any details about the other judges subjected to audits. The purpose of actions targeting the applicant was undoubtedly to break his steadfastness with a view to facilitating the hostile takeover of the judiciary. Referring to the number of cases decided or pending

before the Court in relation to the reforms of the Polish judiciary, the applicant argued that the impugned measures taken by the authorities could not be regarded as necessary in a democratic society.

2. The Government's submissions

168. The Government disagreed that the measures taken with regard to the applicant and his family had been the consequence of the criticism he had expressed in his professional capacity. They maintained that there had been no interference with the applicant's freedom of expression within the meaning of Article 10.

169. As regards the applicant's dismissal from his position as spokesperson of the Cracow Regional Court, the Government argued that the impugned measure could not have had any impact on his freedom of expression. The tasks related to the cooperation of the court with the media were carried out by the president or vice-president of the court. However, in the court of appeal or the regional court the president of that court could appoint a spokesperson to carry out those tasks. The spokesperson reported directly to the president of the court. For these reasons, dismissal from the position of spokesperson of a court could not be equated with a restriction on freedom of expression because an individual's opinion could not be fully expressed in performing the function of spokesperson. Therefore, the Government maintained that the applicant's dismissal from the position of spokesperson of the court would, at the most, limit his ability to represent that institution publicly, which was not a right guaranteed in Article 10.

170. They stressed that the applicant was able to continue to express his views in the public debate on judicial reform in Poland at the meetings of judicial associations of which he was an active member and by participating in the Judges' Cooperation Forum. The applicant had participated in numerous debates in various fora concerning the judiciary. The Government maintained that the applicant had been actively exercising his rights guaranteed by Article 10, as exemplified by his interviews, statements and other activities in the public debate after he had been removed from the position of spokesperson of the Cracow Regional Court. Moreover, the assessment of sanctions allegedly affecting the applicant for his criticism of the reforms of the judiciary was problematic. The Government stressed in this respect that the applicant had not referred to any disciplinary proceedings against him or any penalty imposed on him.

171. The Government submitted that contrary to the case of *Kudeshkina v. Russia* (no. 29492/05, 26 February 2009) the applicant had not been dismissed from his judicial office as a result of disciplinary proceedings, but only removed from the position of spokesperson of the court. That latter decision was legitimate and did not touch upon his judicial functions. They also noted that the present case was not comparable to the case of *Baka v. Hungary* (cited above).

172. As regards the measures taken by the CBA, the Government admitted that in 2016 the CBA's unit responsible for the auditing of financial declarations had carried out a systematic examination of such declarations by judges. The unit had selected a group of six judges, which included the applicant, whose financial declarations had been subjected to advanced scrutiny due to existing irregularities. The selection of six judges had been based on a two-stage analysis of the declarations and prompted by uncertainties relating to their correctness. The CBA had initiated an audit of the applicant's assets and his financial declarations. The Government stressed that the audit carried out in the applicant's case had been one of a routine nature and had not differed from those carried out in relation to members of parliament, other judges and prosecutors.

173. The Government maintained that the applicant had had the right to participate in the audit procedure, which had been transparent and based on the provisions of the CBA Act. Section 33 of this Act concerning the relevant procedure of the CBA required that, in order to conduct the audit, the officer should present to the person concerned an official ID card and an authorisation issued by the Head of the CBA. For this reason, it had been impossible to initiate an audit without a meeting of the CBA officer and the applicant.

174. The Government argued that the CBA officers had made numerous attempts to arrange a meeting with the applicant, both at his place of residence and at the court where he served as a judge. However, owing to the applicant's persistent avoidance of the meeting, thus obstructing the initiation of the audit procedure, the CBA had taken the decision to serve the authorisation at the seat of the NCJ. On 19 April 2017 the CBA officers had entered the NCJ's premises. In the Government's submission, the applicant had been asked to leave a room so the officers could serve on him a decision authorising the auditing of his financial declarations, but he had refused, thus preventing the officers from carrying out their statutory tasks. Therefore, the officers had walked into the room and interrupted the applicant's meeting with other members of the NCJ in order to serve the authorisation on him.

175. The Government maintained that the basic element of the audit procedure was the verification of the accuracy of the individual's financial declaration against the relevant records of the State, bank account history and participation in investment funds. The competent authorities and the national financial institutions had been contacted during the audit. The only auditing activities that had been applied to the applicant's family members consisted in obtaining the court's permission for access to data covered by banking secrecy relating to the applicant's and his family's bank accounts. These actions were necessary since the applicant had remained under the regime of joint matrimonial property with his wife during the period covered by the audit. The applicant's wife had been informed of these actions, which had been carried out in accordance with section 23(9) of the CBA Act.

176. The Government submitted that the results of the audit, based on official documents received from government bodies and financial institutions, had constituted the basis for a report concerning the established irregularities which had been submitted to the Cracow Regional Prosecutor's Office for the purpose of criminal law assessment. In the Government's view, the actions conducted by the CBA officers against the applicant had exclusively been aimed at assessing the accuracy and veracity of his financial declarations. All activities undertaken by the officers had been based on the provisions of the CBA Act regulating the audit procedure. The audit procedures concerning the financial declarations of judges and prosecutors complied with the guidelines of the Group of States against Corruption of the Council of Europe (GRECO).

177. As regards the declassification of the applicant's financial declaration, the Government submitted that judges were required to submit such declarations pursuant to section 87(1) of the Act on the Organisation of Ordinary Courts. The declaration concerned personal property and property covered by a joint matrimonial regime. It had to contain, *inter alia*, information on cash holdings, real estate, movable property of a value exceeding PLN 10,000, stocks, shares and financial instruments held by a judge. The information contained in the financial declaration was public with the exception of the address of the person concerned and the location of the real estate. The financial declarations were published in the Public Information Bulletin no later than 30 June each year (section 87(6a)). The Government stressed that the rules on disclosing the financial status of judges were analogous to those applicable to prosecutors and persons holding elected office.

178. The Government maintained that the main objective of the amendment to section 87 of the Act on the Organisation of Ordinary Courts, which made the judges' financial declarations public, had been to implement the recommendation included in the report on the fourth evaluation round of GRECO. The legislature's intention was to ensure the transparency of those financial declarations in order to strengthen public trust in the courts and judges. The audit procedures carried out by the authorities with regard to financial declarations of judges were conducted in accordance with the GRECO guidelines concerning the fight against corruption. For those reasons, it could not be assumed that the declassification of the applicant's financial declaration constituted a "sanction" specifically directed at the applicant (as the transparency of declarations concerned all judges).

179. In the light of the above, the Government averred that the measures taken by the CBA and the tax authorities with regard to the applicant and his family members, together with the declassification of his financial declaration, had been in accordance with the domestic law aimed at implementation of the Council of Europe standards.

180. In sum, the Government submitted that in the applicant's case there had been no interference with his freedom of expression within the meaning of Article 10 § 1 of the Convention. In any event, the Government argued that there had been no violation of Article 10 in the present case.

3. Submissions of third-party interveners

(a) The Commissioner for Human Rights of the Republic of Poland

181. The Commissioner submitted that freedom of expression, constituting an essential foundation of a democratic society, applied to members of the judiciary. However, the Polish authorities, in an attempt to silence criticism, frequently claimed that judges expressing critical opinions on changes in the judiciary were politically involved. In the Commissioner's view, this argument had to be rejected.

182. To be sure, judges should not participate in political life. The Polish Constitution prohibited them from joining a political party or carrying out public activities that would compromise the independence of the judiciary (Article 178 § 3). However, Polish judges who criticised the changes in the judiciary were pointing above all to the threats to judicial independence as well as to the dismantling of the separation of powers and the rule of law which those changes entailed. Judges were not only entitled, but in fact obliged to defend their independence. That obligation especially concerned the judge who was acting as the court's spokesperson and the spokesperson of the NCJ – the constitutional guardian of independence.

183. The intervener noted that the issues of judicial independence and the functioning of the judiciary were naturally matters of constitutional law and inevitably had political implications. However, this element alone should not prevent judges from making statements on such matters. Since comments made by judges on changes in the judiciary impacting on the right to a fair trial were not only acceptable, but also desirable, the authorities should neither prevent nor discourage judges from expressing their opinions.

184. Having regard to the Court's case-law, the intervener submitted that the concurrence of actions taken by several State bodies against a judge, at a time when he was critically commenting on issues relating to judicial independence and changes in the functioning of the judiciary, substantiated the claim that these actions were coordinated and aimed at limiting the judge's activity. Taking account of the entirety of the situation, rather than separate incidents, there could be prima facie evidence of a causal link between the judge's exercise of the freedom of expression and the measures undertaken by various State bodies. Once there was such evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government.

(b) The Judges' Association Themis

185. The intervener submitted that in the years 2016-2018, when the Polish Government was engaging in numerous measures aimed at the subordination of the Constitutional Court, the NCJ and the Supreme Court, the applicant had become the voice of the independent Polish judiciary. His numerous appearances in the media in defence of the rule of law had resulted in a wave of persecution against him. Currently, the applicant was one of the most persecuted Polish judges; there were five sets of disciplinary proceedings pending against him and two sets of preliminary disciplinary proceedings. He had also experienced a prolonged audit by the CBA, administrative means of harassment applied by the newly appointed President of the Cracow Regional Court, Ms D.P.-W. and attacks from State-owned media outlets.

186. The intervener maintained that the actions taken against the applicant were part of the general approach of the ruling majority aimed at depriving the representatives of the judicial community of the right to speak in public. This was evidenced by the adoption of changes to the Act on the Organisation of the Ordinary Courts on the basis of the so-called "Muzzle Act", which prohibited bodies of judicial self-government from adopting resolutions criticising the reform of the judiciary. The same Act had introduced the prohibition of critical statements and actions in this regard by individual judges under the threat of disciplinary liability. One of the sets of disciplinary proceedings against the applicant was the very first to be initiated on the basis of the "Muzzle Act".

(c) The Helsinki Foundation for Human Rights

187. The Helsinki Foundation for Human Rights submitted that the Convention standards regarding the protection of the freedom of expression of judges were similar to those provided for in various international documents and recommendations. It referred to the UN Basic Principles on the Independence of the Judiciary, the Universal Charter of the Judge, the Bangalore Principles of Judicial Conduct as well as the report of the UN Special Rapporteur on the Independence of Judges and Lawyers and the Venice Commission's report on the freedom of expression of judges. In its view, there was a consensus that judges, as all other individuals, had the right to freedom of expression. Due to the specificity of their profession and the necessity of maintaining public trust in the judiciary, the freedom of expression of judges could be subject to various restrictions. However, such restrictions should not prevent judges from taking part in debates of public importance, in particular on topics related to the independence of the judiciary.

188. The intervener underlined, echoing the report of the UN Special Rapporteur, that in times of a rule-of-law crisis judges had to be able to speak

freely about threats to the independence of the judiciary. In this context, first, the judges' criticism of controversial reforms of the judicial system could discourage politicians from pursuing them or at least oblige them to explain their motivation to the public and, second, the opinion of judges could be of great informative value to citizens. Moreover, every instance of the alleged violation of the rules concerning the limits of the judges' freedom of expression should be reviewed by an independent disciplinary body in fair proceedings. It would be completely unacceptable to harass judges through imposition of sanctions, dismissals, transfers or initiation of various criminal or disciplinary proceedings against them under the false pretext of *de facto* punishment for the exercise of their freedom of expression.

189. The Helsinki Foundation maintained that persecution of judges who exercised their freedom of expression to protest against reforms inconsistent with the rule-of-law standards ultimately threatened not only the rights of judges but also the right to a fair hearing of every individual. Such persecution could produce a "chilling effect" which could discourage judges not only from expressing their views on matters of public importance, but also from issuing rulings which would be unfavourable to the politicians.

190. The intervener stated that since the parliamentary elections in the autumn of 2015, the Government had taken a series of measures aimed at undermining judicial independence. Those legislative and other measures raised serious controversies and led to numerous proceedings before the CJEU and the Court. In addition to the legislative changes, the independence of the judiciary had been undermined by different actions of the Minister of Justice and disciplinary officers appointed by him following the changes to the rules of disciplinary liability of judges. The intervener referred to important changes in this context introduced by the so-called "Muzzle Act" of December 2019.

191. There were different forms of harassment of judges *via* disciplinary proceedings which could be divided into two categories. First, some judges were questioned by the disciplinary officers or even charged before the Disciplinary Chamber of the Supreme Court for alleged transgression of freedom of expression, usually in connection with their critical statements about the actions of the government. Many examples of such proceedings were described in the report "Justice under pressure" published in 2019 by the Iustitia Polish Judges' Association. The report had focused on instances of misuse of disciplinary proceedings to harass judges who opposed unconstitutional reforms implemented by the government. The second category of cases concerned judges who were subjected to disciplinary proceedings in connection with their rulings. This type of disciplinary proceedings had been initiated in particular against judges who had questioned the status of judges appointed by the President of the Republic upon the recommendation of the new NCJ. In addition, in some cases the

authorities had applied to the Disciplinary Chamber to waive the immunity of judges in contexts which could suggest political motivation.

192. While analysing various forms of harassment of judges in Poland, the role of the public media, which carried out regular "smear campaigns" against judges, could not be ignored. According to the private media some officials of the Ministry of Justice and some newly-elected judicial members of the NCJ had allegedly coordinated online smear campaign against judges. The intervener submitted that all these actions could be perceived as a form of pressure on the judges. Although so far disciplinary sanctions had been imposed on judges in a relatively small number of cases, the potential "chilling effect" produced by the mere fact of initiating disciplinary, or even more so, criminal proceedings against a judge, could not be ignored.

(d) Amnesty International and the International Commission of Jurists

193. The interveners submitted that judges had the right and duty to speak out in defence of the rule of law. Any assessment of the necessity and proportionality of restrictions on the right to freedom of expression of judges had to be seen in light of the role of the judiciary under the principle of separation of powers and the judiciary's "mission to guarantee the very existence of the rule of law". They noted that international standards recognised that each judge was "responsible for promoting and protecting judicial independence". As the maintenance of judicial independence could on occasion require a judge to exercise his or her right to freedom of expression, the possibility of effectively exercising this right in the light of a correlated duty had to be guaranteed. If judges feared that they would face sanctions for speaking in defence of judicial independence, the threat of sanction would inevitably have a "chilling effect" that would stand in direct contradiction to the duties and responsibilities of judges to uphold judicial independence. In any assessment of whether an interference with a judge's freedom of expression was necessary in a democratic society and proportionate to a legitimate aim, the responsibility of the judge to uphold judicial independence should be a significant consideration.

194. The possible scope for limitations on the right to freedom of expression had to, when applied to judges, be interpreted in the light of the specific role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law. Any restriction on the right to freedom of expression must not impair the right and duty of the judges to protect and enforce, without fear or favour, their independence. This right became an imperative when judges spoke from a position where they had a duty to voice certain concerns, such as where they were designated as a representative or spokesperson for a judicial institution. Provided that the dignity of judicial office was upheld and the appearance of independence and impartiality of the judiciary was not undermined, the executive had to respect and protect the right and duty of judges to express

their opinions, particularly on matters concerning the administration of justice and the protection of judicial independence and the rule of law.

(e) Judges for Judges Foundation and Professor L. Pech

195. The interveners submitted that under EU law freedom of expression was a fundamental but not absolute right; limitations on its exercise had to be provided for by law, while respecting the essence of that right and the principle of proportionality.

196. In their view, it was well-established that judges were under a professional duty to speak up in defence of the rule of law, with reference to the 2013 Sofia Declaration of the ENCJ. They further referred to the recently revised Compendium of the Judiciary's Ethical Obligations of the French High Council for the Judiciary, which made it clear that judges were under a duty to "defend the independence of the judicial authority". They submitted that limitations on judges' freedom of expression should be subjected to the strictest scrutiny when these limitations sought to formally prevent or informally intimidate judges from speaking up in a situation where the independence and/or quality of their national judicial systems was undermined by legislative changes.

197. The interveners maintained that account should be taken of the judgment of 5 October 2015 of the Inter-American Court of Human Rights in *López Lone et al. v. Honduras*, where that court had stated that "at times of grave democratic crises ... the norms that ordinarily restrict the right of judges to participate in politics [were] not applicable to their actions in defence of the democratic order. Thus, it would be contrary to the independence inherent in the branches of State ... that judges could not speak out against a coup d'état".

198. In a context where legislative changes had led to the activation of exceptional monitoring mechanisms such as the EU's Article 7 TEU procedure and the Council of Europe's full monitoring procedure due to concerns about the existence of a systemic threat to the rule of law in Poland, any limitation on judges' freedom of expression had to be presumed to violate this fundamental right where judges spoke out on matters that affected the judiciary. At the same time, judges had to be considered to be under a professional duty to state clearly their opposition to any measure undermining judicial independence or targeting judges for their defence of the rule of law.

199. The interveners referred to the European Parliament's resolution of 17 September 2020, in which that body had denounced "the smear campaign against Polish judges and the involvement of public officials therein". One particularly disturbing aspect of the smear campaign, which had been ongoing for many years, was the secret establishment of a "troll farm" hosted within the Ministry of Justice. The large-scale propaganda against the

judiciary in Poland had also been criticised by the UN Special Rapporteur on the independence of judges and lawyers.

(f) Polish Judges' Association Iustitia

200. The intervener maintained that the measures taken by the authorities with regard to the applicant had been aimed at creating a chilling effect on him and other judges who expressed criticism of the Government's legislative reforms and had been prompted by the applicant's public activity.

4. The Court's assessment

(a) Whether there has been an interference

(i) General principles

201. The Court has recognised in its case-law the applicability of Article 10 to civil servants in general (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323, and *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008), and members of the judiciary (see, among many others, *Wille*, cited above, §§ 41-42; *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004-VI ("*Harabin* (dec.), 2004"); and *Baka*, cited above, § 140). In cases concerning disciplinary proceedings against judges or their removal or appointment, the Court has had to ascertain first whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether the impugned measure merely affected the exercise of the right to hold a public post in the administration of justice, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see *Wille*, cited above, §§ 42-43; *Harabin* (dec.), 2004, cited above; *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, §§ 77-79, 13 November 2008; *Kudeshkina*, cited above, § 79; *Poyraz v. Turkey*, no. 15966/06, §§ 55-57, 7 December 2010; *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; *Baka*, cited above, § 140; and *Miroslava Todorova v. Bulgaria*, no. 40072/13, § 153, 19 October 2021).

202. Where the Court has found that the measures complained of were exclusively or principally the result of the exercise by an applicant of his or her freedom of expression, it has taken the view that there was an interference with the right under Article 10 of the Convention (see *Baka*, cited above, § 151; *Kayasu*, cited above, § 80; *Kudeshkina*, cited above, §§ 79-80; and *Cimperšek v. Slovenia*, no. 58512/16, § 58, 30 June 2020). In cases where it has, by contrast, considered that the measures were mainly related to the applicant's capacity to perform his or her duties, it found that there had been no interference under Article 10 (see *Harabin*, judgment cited above, § 151; *Köseoğlu v. Turkey* (dec.), no. 24067/05, §§ 25-26, 10 April 2018;

Simić v. Bosnia-Herzegovina (dec.), no. 75255/10, § 35, 15 November 2016; *Harabin* (dec.) 2004, cited above; and *Miroslava Todorova*, cited above, § 154).

203. To that end the Court takes account of the reasons relied upon by the authorities to justify the measures in question (see, for example, *Harabin* (dec.), 2004, cited above; *Kövesi v. Romania*, no. 3594/19, §§ 184-187, 5 May 2020; and *Goryaynova v. Ukraine*, no. 41752/09, § 54, 8 October 2020) together with, if appropriate, any arguments submitted in the context of subsequent appeal proceedings (see *Kudeshkina*, cited above, § 79; *Köseoğlu*, cited above, § 25; and, *mutatis mutandis*, *Nenkova-Lalova v. Bulgaria*, no. 35745/05, § 51, 11 December 2012). It must nevertheless carry out an independent assessment of all the evidence, including any inferences to be drawn from the facts as a whole and from the parties' submissions (see *Baka*, cited above, § 143). It must in particular take account of the sequence of relevant events in their entirety, rather than as separate and distinct incidents (ibid., § 148; see also *Kövesi*, § 188 and *Miroslava Todorova*, § 155, both cited above).

204. Moreover, in so far as there is any prima facie evidence supporting the version of events submitted by the applicant and indicating the existence of a causal link between the measures complained of and freedom of expression, it will be for the Government to prove that the measures at issue were taken for other reasons (see *Baka*, §§ 149-151; *Kövesi*, § 189; and *Miroslava Todorova*, § 156, all cited above).

(ii) Application of the general principles to the present case

205. As stated above, in order to ascertain whether the measures complained of amounted to an interference with the applicant's exercise of freedom of expression, the scope of those measures must be determined by placing them in the context of the facts of the case and of the relevant legislation (see *Wille*, cited above, § 43, and *Baka*, cited above, § 143).

206. The Court notes that the applicant, in his professional capacity as the NCJ's spokesperson, in the period between December 2015 and March 2018, publicly expressed his views or commented in the media on various legislative reforms affecting the Constitutional Court, the NCJ, the Supreme Court and ordinary courts. He criticised those various proposals for their incompatibility with the Constitution and pointed to threats to the rule of law and judicial independence stemming from them (see paragraphs 41-47 above).

207. The applicant alleged that a set of measures taken against him by the authorities in response to his critical statements on the Government's reorganisation of the judiciary amounted to an interference with his freedom of expression (see paragraph 155 above; compare and contrast earlier cases where a single measure constituted such interference, for example, *Baka* (the premature termination of the applicant's term of office as President of

the Supreme Court), *Kövesi* (the applicant's removal from her position as chief prosecutor) and *Miroslava Todorova* (disciplinary proceedings and sanctions against the President of the judges' association)).

208. Among the measures constitutive of interference in his case, the applicant referred to the audit of his financial declarations carried out by the CBA between November 2016 and April 2018 (see paragraphs 48-69 above), the inspection of his work at the Cracow Regional Court ordered by the Ministry of Justice in April 2017 (see paragraphs 70-77 above), his dismissal from his position as spokesperson of the Cracow Regional Court in January 2018 (see paragraphs 78-83 above) and the declassification of his financial declaration ordered by the Minister of Justice on June 2018 (see paragraph 85 above). The Court notes at this juncture that the fact of being dismissed from the position of court spokesperson does not in itself entail an interference with freedom of expression as there is no right to hold such a position. However, this fact is part of the sequence of events and needs to be seen in the context of the accumulation of all the above-mentioned measures taken in respect of the applicant (see paragraph 211 below).

209. The applicant further referred to the premature termination of his term of office as a judicial member of the NCJ on the basis of the 2017 Amending Act, as a result of which he had ceased to act as the NCJ's spokesperson. With regard to this measure, the Court observes that the 2017 Amending Act terminated the terms of office of all fifteen elected judicial members of the NCJ and did not concern solely the applicant. It has already found that the main objective of the 2017 Amending Act was for the legislative and the executive powers to achieve a decisive influence on the composition of the NCJ which, in turn, enabled those powers to interfere directly or indirectly in the judicial appointment procedure (see *Advance Pharma sp. z o.o.*, § 344, and *Grzęda*, § 322, both cited above). In the light of the objective pursued by the authorities in the 2017 Amending Act, the Court considers that the termination of the applicant's term of office as a judicial member of the NCJ entailing the loss of his position as the spokesperson of that body was to some extent connected with the exercise of his freedom of expression, but it was not primarily motivated by that factor. For those reasons, when analysing whether the authorities' actions amounted to an interference with the exercise of the applicant's freedom of expression, the Court will focus on the measures referred to in paragraph 208 above.

210. The impugned measures have to be seen in the context of the facts of the case. In *Grzęda*, the Court noted that the whole sequence of events in Poland vividly demonstrated that successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting-up of new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline

(see *Grzęda*, cited above, § 348). The Grand Chamber went on to observe that as a result of the successive reforms, the judiciary – an autonomous branch of State power – was exposed to interference by the executive and legislative powers and thus substantially weakened (ibid.).

211. Taking account of the above-mentioned context and having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, the Court considers that there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the impugned measures taken by the authorities in his case (see paragraph 208 above). To begin with, all those measures followed the applicant's successive statements. The audit began in November 2016, following a series of interviews given by the applicant and an article published in May-September 2016 in which he consistently and in strong terms referred to various perceived defects in the proposed reform of the NCJ and the judiciary (see paragraphs 41-43 above). The inspection of the applicant's work as a judge was initiated in April 2017, shortly after his further critical comments on the reform published on the NCJ's YouTube channel and in other media in January-March 2017 (see paragraphs 44-46 above). The two remaining measures, i.e. the dismissal from his position as spokesperson of the Cracow Regional Court in January 2018 and the declassification of his financial declaration in June 2018 were also taken subsequently to his publicly expressed criticism of the Government's contemplated policies in respect of the judiciary.

Secondly, the impugned measures were taken by the CBA, a governmental agency, the Minister of Justice or the president of the court appointed by the latter on the basis of transitional powers (see paragraph 78 above), i.e. authorities controlled or appointed by the executive.

Thirdly, those measures, in particular the audit of the applicant's financial declarations by the CBA and the immediate inspection of his work ordered by the Ministry of Justice on the basis of an anonymous letter (see paragraphs 70-72 above), do not appear to have been triggered by any substantiated specific irregularity on the applicant's part. In contrast, the anonymous letter – which prompted the inspection of the applicant's work in the Cracow Regional Court, merely one day after its receipt at the Ministry, was clearly and directly related to the applicant's public statements concerning the reform of the judiciary and his activity in the media, implying that this in itself was sufficient to compromise his performance as a judge (see also paragraph 226 below).

The above conclusion is further corroborated by the numerous documents submitted by the applicant which refer to the widespread perception that such a causal link existed. These include not only articles published in the Polish press, but also the reports adopted by the Monitoring Committee and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (see paragraphs 105-106 above), as well

as the report of the Council of Europe Commissioner for Human Rights following her visit to Poland (see paragraph 107 above). The Court would also refer to the report of Amnesty International (see paragraph 91 above) and the report of the Polish Judges' Association Iustitia (see paragraph 92 above). In this connection, it further attaches importance to the resolution adopted on 26 February 2018 by the Assembly of Judges of the Cracow Regional Court (see paragraph 84 above).

212. The Government argued that the impugned measures were unconnected with the applicant's exercise of freedom of expression or constituted neutral measures that were applied to all judges (see paragraphs 172 and 176-177 above). However, having regard to the entire context of the case, the Court does not find those reasons convincing or supported by specific evidence. Accordingly, it agrees with the applicant that the impugned measures referred to in paragraph 208 above were prompted by the views and criticisms that he had publicly expressed in his professional capacity.

213. In view of the above, the Court concludes that the impugned measures constituted an interference with the exercise of the applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention (see, *mutatis mutandis*, *Wille*, § 51; *Kudeshkina*, § 80; and *Baka*, § 152, all cited above). It remains therefore to be examined whether the interference was justified under Article 10 § 2.

(b) Whether the interference was justified

(i) "Prescribed by law"

214. The applicant pointed to the controversy surrounding his removal from the position of spokesperson of the Cracow Regional Court. With regard to the measures taken by the CBA and other authorities, he argued that they should be regarded as abusive, even though they had had some formal basis (see paragraph 165 above). The Government maintained that the impugned measures had been in accordance with the domestic law (see paragraphs 176 and 179 above).

215. The Court notes that the CBA's audit of the applicant's financial declarations, the inspection of his work and the declassification of his financial declaration seem to have been provided for by the domestic law. On the other hand, it appears that the relevant rules were not duly respected as regards the decision of the President of the Cracow Regional Court to dismiss the applicant from the position of spokesperson of that court. However, the Court will proceed on the assumption that the interference was "prescribed by law" for the purposes of paragraph 2 of Article 10, as the impugned interference breaches Article 10 for other reasons (see paragraph 228 below).

(ii) Legitimate aim

216. The applicant maintained that the interference at issue had not pursued any legitimate aim within the meaning of Article 10 § 2 of the Convention (see paragraph 166 above). The Government did not put forward any arguments on this point.

217. Having regard to the overall context of the present case, the Court has serious doubts as to whether the interference complained of pursued any of the legitimate aims provided for in Article 10 § 2. However, it is not required to reach a final conclusion on this question since, in view of the reasons stated below (see paragraphs 220-228 below), the impugned interference cannot in any event be considered to have been "necessary in a democratic society" for the purposes of this provision (see *Döner and Others v. Turkey*, no. 29994/02, § 95, 7 March 2017).

(iii) "Necessary in a democratic society"

(α) General principles on freedom of expression

218. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court, were restated, *inter alia*, in *Baka* (ibid., § 158-61).

(β) General principles on freedom of expression of judges

219. The general principles concerning the freedom of expression of judges were summarised by the Court in its judgment in *Baka* (ibid., §§ 163-167) as follows:

> "163. Given the prominent place among State organs that the judiciary occupies in a democratic society, the Court reiterates that this approach also applies in the event of restrictions on the freedom of expression of a judge in connection with the performance of his or her functions, albeit [that] the judiciary is not part of the ordinary civil service ...
>
> 164. The Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question ...The dissemination of even accurate information must be carried out with moderation and propriety ... The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties ... It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges ...
>
> 165. At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court ... Furthermore, questions concerning the functioning of the justice

system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 ... Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter ... Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate ...

166. In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made ... It must look at the impugned interference in the light of the case as a whole ..., attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

167. Finally, [one must not overlook the] 'chilling effect' that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary ... This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed ..."

(γ) Application of those principles to the present case

220. The Court reiterates its finding (see paragraph 213 above) that the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in exercising his right to freedom of expression. It observes in this regard that the applicant expressed his views on the legislative reforms in issue in his professional capacity as a judicial member of the NCJ and the spokesperson of this body. It notes that the NCJ is constitutionally mandated to safeguard the independence of the courts and judges (Article 186 § 1 of the Constitution; see *Grzęda*, cited above, § 304), so it is evident that the applicant, acting as its spokesperson, had the right and duty to express his opinions on legislative reform affecting the judiciary.

221. The Court attaches particular importance to the office held by the applicant, whose functions and duties included expressing his views on the legislative reforms which were to have an impact on the judiciary and its independence. It notes also the extensive scope of the reforms which affected practically every segment of the judiciary (see paragraph 210 above). It refers in this connection to the Council of Europe instruments which recognise that each judge is responsible for promoting and protecting judicial independence (see paragraph 3 of the Magna Carta of Judges) and that judges and the judiciary should be consulted and involved in the preparation of legislation concerning their status and, more generally, the functioning of the judicial system (see paragraph 34 of Opinion no. 3 (2002) of the CCJE and paragraph 9 of the Magna Carta of Judges, cited above, paragraphs 109-110 above).

222. In the present case, the Court is assessing the situation of an applicant who was not only a judge, but also a member of a judicial council and its spokesperson. However, the Court would note that a similar approach would be applicable to any judge who exercises his freedom of expression – in

conformity with the principles referred to in paragraph 219 above – with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.

Furthermore, the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat. This duty has been recognised, *inter alia*, by the CCJE (see paragraph 41 of its Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, cited in paragraph 111 above), the UN Special Rapporteur on the independence of judges and lawyers (see paragraph 102 of his 2019 Report on freedom of expression, association and peaceful assembly of judges, cited in paragraph 103 above) and the General Assembly of the ENCJ (see paragraph (vii) of its 2013 Sofia Declaration, cited in paragraph 112 above).

223. The present case should also be distinguished from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks (see *Di Giovanni*, § 81, and *Kudeshkina*, § 86, both cited above). The views and statements publicly expressed by the applicant did not contain any attacks against other members of the judiciary (compare *Di Giovanni*, cited above); nor did they concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings (see *Kudeshkina*, cited above, § 94).

224. On the contrary, the applicant expressed his views and criticisms on legislative reforms related to the functioning of the judicial system, the status of the NCJ, the independence and irremovability of judges, and the lowering of the retirement age for judges, all of which are questions of public interest (see, *Baka*, cited above, § 171). His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State (ibid.).

It reiterates in this regard that given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references), the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial

independence and autonomy (see *Bilgen v. Turkey*, no. 1571/07, § 58, 9 March 2021, and *Grzęda*, cited above, § 302).

225. In this connection, the Court must scrutinise the measures taken by the authorities in the applicant's case. As regards the auditing of his financial declarations carried out by the CBA between November 2016 and April 2018, the Government submitted that it had been prompted by uncertainty as to their accuracy and had been of a routine nature. However, the Court notes that the impugned audit, which was triggered by some unspecified irregularity and lasted for a considerable period of time, i.e. seventeen months, appears not to have yielded any concrete results. According to the Government, the CBA submitted to the prosecuting authorities a report on irregularities that had been established in the applicant's declarations. Nonetheless, they did not inform the Court about the nature of those irregularities, which in any event led to no further action on the part of the authorities. Furthermore, the Court has certain doubts about the legality of the CBA officers' action in entering the premises of the NCJ in order to serve on the applicant a decision authorising an audit of his declarations, as the Government have not indicated a specific legal provision which required that the initiation of an audit required the relevant decision to be served on the person concerned by CBA officers.

226. With regard to the inspection of the applicant's work at the Cracow Regional Court ordered by the Ministry of Justice, the Court observes that, as noted above, this inspection was initiated merely one day after receipt of the anonymous letter, which mostly concerned the applicant's critical comments on the reform of the judiciary and his presence in the media, rather than any alleged misconduct on his part or his ability to exercise judicial functions (see paragraphs 70-72 and 211 above). The Court thus finds it striking that the Ministry should resort, in those circumstances, to initiating an inquiry into the discharge of the applicant's judicial duties.

As regards the applicant's dismissal from his position as spokesperson of the Cracow Regional Court, the Court notes that, while it was in a court president's power, at any time, to appoint or dismiss a spokesperson, the decision of the President of the Cracow Regional Court was taken without obtaining an opinion of the Board of that court, as required under section 31(1)(1) of the Act on the Organisation of Ordinary Courts (see paragraphs 80, 83-84 and 101 above). It further observes that the President of the Cracow Regional Court, Ms D.P.-W. took this decision merely six days after her appointment to this position by the Minister of Justice.

Lastly, with regard to the applicant's financial declaration, the Court observes that the Minister of Justice reversed, without providing any reasons, the earlier decision of the President of the Court of Appeal to grant confidential status to that declaration (see paragraph 85 above).

227. Against this background and having regard to the accumulation of measures taken by the authorities, it appears that they could be characterised

as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence. On the material before it, the Court finds that no other plausible motive for the impugned measures has been advanced or can be discerned. It notes that the applicant is one of the most emblematic representatives of the judicial community in Poland who has steadily defended the rule of law and independence of the judiciary. The Court considers that the impugned measures undoubtedly had a "chilling effect" in that they must have discouraged not only him but also other judges from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary (see *Baka*, § 173, and *Kövesi*, § 209, both cited above).

228. On the basis of the above arguments, and keeping in mind the paramount importance of freedom of expression on matters of general interest, the Court is of the opinion that the impugned measures taken against the applicant were not "necessary in a democratic society" within the meaning of that provision.

229. Accordingly, the Court concludes that there has been a violation of Article 10 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

230. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

231. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage for suffering and distress caused by the violation of his rights. He referred to the early termination of his office and the lack of any possibility of having that measure judicially reviewed. The applicant regarded the early termination of his term of office as a form of political repression and as preventing him from fulfilling his obligations related to the protection of judicial independence arising from his seat on the NCJ.

232. The applicant further claimed to have suffered significant distress owing to, and in the course of, the actions taken against him by the State authorities, including the CBA, tax authorities and the prosecution service. Those actions of the authorities had been widely commented upon by public officials and the applicant regarded this as a deliberate encroachment into his private life. He argued that the measures complained of had completely disrupted his family and professional life. The number of controls,

investigations, inquiries, press comments, disciplinary proceedings and attacks on his good name had forced him to devote a great amount of his time and resources to defending himself. The applicant was apprehensive of another possible "attack" by the authorities under any trivial pretext.

233. The authorities' actions targeting the applicant had taken their toll on his wife who had been forced to undergo therapy as well as on the applicant, who suffered from mental and physical ailments. In addition, it was painful for the applicant to encounter supporters of the ruling majority, who repeated allegations against him which were relayed as part of the smear campaign against him carried out by the public media. As a result, he had received numerous threats and insults of which he submitted a sample.

234. The Government asked the Court to reject the applicant's claims, since in their opinion the application was inadmissible and, in any event, no violation of the Convention had occurred. Furthermore, the sum claimed was extremely exorbitant and unjustified in the light of the Court's case-law. Were the Court to award any compensation to the applicant, the Government submitted that it should be reasonable and in line with the case-law in similar cases against Poland or other countries enjoying a similar economic level.

235. Making an assessment on an equitable basis and having regard to its finding of a violation of Article 10 of the Convention, the Court considers it reasonable to award the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

236. The applicant also claimed EUR 20,000, inclusive of VAT, for the costs and expenses incurred before the Court. He submitted a copy of the legal services agreement between him and the Pietrzak Sidor and Partners Law Firm of 31 July 2018 together with a pro-forma invoice of 29 January 2021.

237. The Government argued that the amount claimed did not meet the requirements of adequacy and necessity.

238. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000 covering costs and expenses for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

239. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the complaint under Article 6 § 1 of the Convention admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention;

4. *Declares*, unanimously, the complaint under Article 10 of the Convention admissible;

5. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

M.B.
R.D.

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the majority's view that Article 6 is applicable in the instant case and that it has been violated. At the same time, I have reservations concerning the approach adopted under Article 10.

2. In my view, the applicant's claim that he had a subjective right does not reach the threshold of arguability for the purposes of Article 6. I have explained in detail the content of the domestic law on this question in my dissenting opinion appended to the judgment in the case of *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

3. My reservations in respect of the reasoning under Article 10 concern the following points: (i) the scope of applicability of Article 10, (ii) the precise nature of the interference with the applicant's freedom of expression, (iii) the way the reasoning articulates the questions of legitimate aim and proportionality, as well as (iv) the differentiation of protection under Article 10 for different categories of persons and views.

3.1. The judgment expresses the following view in paragraph 220 (emphasis added):

> "[The Court] observes in this regard that the applicant expressed his views on the legislative reforms in issue **in his professional capacity as a judicial member of the NCJ and the spokesperson of this body** [see also paragraph 206]."

I have explained my position concerning the correct interpretation of Article 10 in the separate opinions appended to the cases of *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, and *Szanyi v. Hungary*, no. 35493/13, 8 November 2016. In my view, Article 10 does not apply to official speech of public office holders, it applies to utterances expressing the personal views of individuals. Official speech may be a matter of very broad discretionary power but does not constitute an exercise of a fundamental freedom.

The reasoning refers to "**his** [i.e. the applicant's] **views** ... in his **professional capacity as a judicial member of the NCJ and the spokesperson of this body**". I see here a contradiction. The applicant could either express his personal views (while speaking in his private capacity) or – when speaking in his professional capacity as spokesperson of the NCJ – had the obligation to present not his views but the position of this State organ on the legislative reforms in issue.

The judgment lists a certain number of the applicant's utterances in paragraphs 40-47. In my view, some of these utterances belong to the category of official speech (presenting the position of the NCJ) and are not covered by Article 10, some belong to the category of non-official speech (expressing the applicant's personal views), clearly protected by Article 10,

whereas the status of some utterances may be debated. Drawing a precise line of demarcation between the two types of utterances is not always an easy task. In any event, the application concerns in particular a set of utterances presenting the applicant's personal views, expressed in his capacity as citizen, so I have no doubt that Article 10 applies nonetheless in the instant case.

I further note, in this context, another contradiction. On the one hand, the reasoning considers that the applicant exercised his freedom of expression (see, in particular, paragraph 220 *in principio*), while on the other, it emphasises the judges' obligation to speak on certain issues and to express certain views (see paragraph 222). Freedom of speech means *inter alia* freedom from any obligation to speak. Where an obligation to speak and to express certain views begins, the freedom of speech ends (see my separate opinion in *Baka v. Hungary*, cited above, point 7).

3.2. The judgment lists, in paragraph 208, a certain number of measures which – taken together – constitute an interference with the applicant's freedom of speech (see also paragraph 209 *in fine*). The reasoning further states the following in paragraph 208 *in fine*:

> "The Court notes at this juncture that the fact of being dismissed from the position of court spokesperson does not in itself entail an interference with freedom of expression as there is no right to hold such a position. However, this fact is part of the sequence of events and needs to be seen in the context of the accumulation of all the above-mentioned measures taken in respect of the applicant (see paragraph 211 below)."

In my view, the precise perimeter of the relevant interference with freedom of speech in the instant case should be delineated in a somewhat narrower manner. I note that, under the Polish law, contacts with the press belong to the duties of court presidents, but a president of a court of appeal or a president of a regional court may decide to appoint a spokesman, who acts under the supervision of the court president. The appointment as court spokesman may be revoked at any time, provided that the board of the court expresses its (non-binding) opinion. Revocation from the function of court spokesman is a discretionary power of the court president and, in my view, should not be seen as an element of the interference with the spokesman's freedom of speech (compare my dissenting opinion appended to the judgment in the case of *Baka v. Hungary*, cited above).

Under these circumstances, in the instant case, the interference with the applicant's freedom of speech consists in the following three elements: the audit of his financial declaration, the inspection of his work and the declassification of his financial declaration.

3.3. The judgment states the following in paragraph 217:

> "Having regard to the overall context of the present case, the Court has serious doubts as to whether the interference complained of pursued any of the legitimate aims provided for in Article 10 § 2. However, it is not required to reach a final conclusion on this question since, in view of the reasons stated below (see paragraphs 220-228 below), the impugned interference cannot in any event be considered to have been "necessary

> in a democratic society" for the purposes of this provision (see *Döner and Others v. Turkey*, no. 29994/02, § 95, 7 March 2017)."

The necessity or proportionality test requires a balancing of the values protected and the values which are sacrificed. It presupposes a clear identification of the aim pursued and of the values protected. An analysis of necessity in a democratic society or proportionality does not make sense if it has not been ascertained that the measure in question actually pursues a legitimate aim (compare my dissenting opinion in the case of *Baka v. Hungary*, cited above, point 11). In my view, the arguments developed in the reasoning (see, in particular, paragraph 227) constitute a sufficient basis on which to conclude that the existence of the legitimate aim has not been shown, by the respondent, and to stop the analysis already at this stage.

3.4. The reasoning states the following in paragraph 222:

> "In the present case, the Court is assessing the situation of an applicant who was not only a judge, but also a member of a judicial council and its spokesperson. However, the Court would note that a similar approach would be applicable to any judge who exercises his freedom of expression – in conformity with the principles referred to in paragraph 219 above – with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened."

The reasoning expressly differentiates the level of protection for different categories of persons. I have already expressed doubts about the idea that some categories of public persons should enjoy a better protected freedom of speech than other citizens (see, in particular, my separate opinions in the cases of *Makraduli v. the former Yugoslav Republic of Macedonia*, nos. 64659/11 and 24133/13, 19 July 2018, points 8 and 9, and *Monica Macovei v. Romania*, no. 53028/14, 28 July 2020, point 4). In my view, "a similar approach" to the one in the instant case would be applicable to any person who exercises his freedom expression, presenting views on any issues of general interest. Equality *vis-à-vis* freedom of speech is a fundamental Convention value.

The judgment further differentiates protection according to the content of the speech. The reasoning suggests that the protection of judicial speech should focus on speech "defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest". Apparently, judges' speech expressing different views would not enjoy the same level of protection. Thus there are views which deserve a stronger protection and views which call for a lower level of protection. Once again, the approach adopted is problematic.

4. Finally, I have to concede here that the reasoning – when addressing the key issue of causal link between speech and the impugned interference – relies upon the principle of formal truth, which weakens the impact of the judgment. The Court applies a presumption in favour of the applicant (see paragraphs 204 and 212) and relies on the fact that this presumption has not

been rebutted by the respondent Government (paragraphs 212 and 227). In my view, in the instant case, the Court had no choice under Article 10 and had to rely on formal truth. At the same time, I note that this problem could have been partly avoided had the case been approached under Article 8, taking into account the fact that the audit of the applicant's financial declaration and the declassification of that declaration also constituted an interference with his private life.

5. To sum up: the extension of the scope of applicability of Article 10 to official speech of public power holders entails certain contradictions. Moreover, the approach adopted, suggesting the need for a special protection under Article 10 for judges, and an even stronger protection for judges belonging to judicial councils or professional associations, may trigger criticism from the perspective of the principle of equality.

That being said, I agree that Article 10 has been violated in the instant case.