

INDEPENDENCE AND IMPARTIALITY TEST OF A JUDGE. NEW LEGAL INSTRUMENT

Beata Stępień-Załużcka¹

University of Rzeszów

DOI: <https://doi.org//10.62140/BSZ162024>

Abstract: The independence and impartiality of a judge are qualities required for a modern fair trial. There are several instruments in procedural law that are intended to guarantee this independence and impartiality. They guarantee the parties that their trial will meet the standards required by law. The palette of these solutions is wide, and one of the most recent legislative developments is the so-called 'independence and impartiality test of the judge', which was recently introduced into the Polish law. The purpose of this contribution is to present this legal instrument and its basic problems.

KEYWORDS: independence, impartiality, judge, polish law, independence and impartiality test of the judge

1. Introduction

Problems concerning the independence and impartiality of judges have been known for a long time.² Contemporary legal regulations, including those of a constitutional nature, create a separation of the judiciary from other authorities, providing in acts of constitutional rank for a number of related guarantees in the context of the autonomy of the judiciary and the independence and impartiality of judges.³ Also, the provisions of the various statutory acts regulating individual judicial procedures, including criminal, civil or administrative procedures, provide for various procedural guarantees related to this. Without their existence, it is difficult to imagine the judiciary at all in a democratic state under the rule of

¹ Prof. Beata Stępień-Załużcka, University of Rzeszów, Poland (beata@kpmz.pl). ORCID: 0000-0003-1802-680X.

² Cf. Ewa Szuber-Bednarz, 'The right to a fair trial in the ECHR judicature' (2021) 10 *Studia Administracji i Bezpieczeństwa* 17.

³ Yaelle Cacho Sánchez, 'La independencia de los jueces internacionales: análisis y valoración de las reformas adoptadas en el marco del Tribunal Europeo de Derechos Humanos' (2021) 12 *Revista Electronica de Estudios Internacionales* 1.

law, effectively realising the principles of social justice, in which the principle of the tripartite division of power is realised, as well as all human and civil rights and freedoms.⁴

In recent years, regulations of an international nature, most often stemming from regional systems (conventions) for the protection of human rights, providing for the so-called right to a fair trial, have also become important. The jurisprudence of international tribunals has significantly developed the doctrine of judicial independence, independence and impartiality of judges. Today, national legislation is burdened with numerous international law standards, the violation of which may result in a finding of a human rights violation.⁵

The most common instruments for implementing the principle of independence and impartiality of judges⁶ in the individual countries are, first and foremost, the instruments encountered in individual court procedures for requesting or requesting the exclusion (recusal) of a judge or the designation of another equivalent court to decide a case, which have the character of so-called preventive control.⁷ Thus, the provisions provide for e.g. the necessity to exclude a judge from the composition of a court by operation of law (*index inhabilis*), for example when he or she is in such a legal relationship with one of the parties that the outcome of the case affects his or her rights or obligations, as well as the possibility to request his or her recusal (*index suspectus*) when there is a circumstance of such a kind that it could give rise to a justified doubt as to the impartiality of the judge in a given case. There are also solutions whereby a court may transfer a case to another equivalent court for adjudication if the interests of justice so require, in particular in the interests of public perception of the court as an impartial body.⁸ There are also instruments of post-trial control, connected with the recognition, by way of appeal proceedings against judgments of first instance courts, by second instance courts with allegations as to shortcomings in the court's composition which, if the allegation of inadequate composition of the court is upheld, most often lead to the nullity of the proceedings before the court and, therefore, to the necessity

⁴ William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 264 ff.

⁵ Nuria Magaldi Mendaña, 'La garantía de independencia del juez europeo: Una revolución encubierta del TJUE' (2022) 70 Estudios de Deusto 81.

⁶ Cf. Beata Stępień-Zalucka, 'Niezawisłość sądownictwa a niezależność sądów i niezawisłość sędziów' (2011) 85 Przegląd Prawa i Administracji 135.

⁷ Matthew Chuks Okpaluba and Tumo Charles Maloka, 'The Fundamental Principles of Recusal of a Judge At Common Law: Recent Developments' (2022) 43 Obiter 88.

⁸ Cf. Ewa Kruk, 'Judge's Recusal as One of the Guarantees of Fair Criminal Trial. A few Remarks in the Context of Articles 40 and 41 of the Polish Penal Code' (2023) 16 Teka Komisji Prawniczej PAN Oddział w Lublinie 139.

of its repetition. All these instruments, regardless of their content or nature, essentially serve to preserve the guarantees of a fair trial.⁹

Recently, another instrument has appeared in Polish legislation with the aim of broadening the guarantees of a fair trial for the parties to that trial. This is because the so-called “independence and impartiality test of a judge” was introduced into the legislation there. A review of this solution will be the purpose of this contribution.

2. A new solution

The analysis of the new instrument must begin by pointing out that, by the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts,¹⁰ a procedure called the “independence and impartiality test of a judge” was introduced into the legal acts regulating the system of common courts, military courts, administrative courts and the Supreme Court itself in Poland.

The procedure is intended to allow for an examination of a judge's fulfilment of the requirements of independence and impartiality, taking into account the circumstances surrounding his or her appointment and the judge's conduct after appointment, if, in the circumstances of a particular case, doubts are raised as to a breach of the standard of independence or impartiality affecting the outcome of the case.¹¹

The purpose of this institution is to provide litigants with procedural guarantees that there are no doubts about the impartiality and independence of the judge deciding the case.¹²

It should be emphasised here that the doctrine commonly attributes the categories of judicial independence and impartiality to the nature of so-called stagnant concepts, and that their content is in fact a conglomerate of many precepts and prohibitions. Independence boils down to the necessity of guaranteeing the judge the feeling that he or she is guided solely by the law and his or her own conscience (internal aspect) and, at the same time, creating such adjudicatory conditions in which an external observer will be convinced of the judge's independence and impartiality (external aspect). Impartiality, on the other hand, which is in

⁹ Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021) passim.

¹⁰ *Act of 9.06.2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws 2022, item 1259), hereinafter the Act of 9.06.2022,*

¹¹ Konrad Lipiński, ‘Ustawowy test niezawisłości i bezstronności sędziego w sprawach karnych’ (2022) 10 *Palestra* 33.

¹² Wojciech Chróścielewski, ‘Głosa do uchwały NSA z 3 kwietnia 2023, I FPS 3/22’ (2024) 1 *Orzecznictwo Sądów Polskich* 146.

close relation to independence, is synonymous with objectivity, lack of prejudice and neutrality towards the parties, as well as not being guided in deciding a case by considerations other than those of a substantive nature.¹³

3. General principles

The amended provisions of the law set out in detail the time limits for filing a relevant motion to examine the independence and impartiality of a judge, the catalogue of those entitled to file a motion, the formal conditions of the motion and the consequences of failing to comply with them, as well as the procedure for examining the motion and the appeal procedure. The application procedure is a two-instance procedure.

The application shall be submitted through the court hearing the case. The application should meet the requirements provided for pleadings. The application should contain a request to establish the circumstances concerning the infringement of the requirements of independence and impartiality by the judge, as well as a statement of the circumstances justifying the application and their substantiation. An application which does not meet the above formal requirements or which is submitted after the deadline or which is inadmissible for other reasons shall be rejected.¹⁴

In the case of an application or appeal pending before the Supreme Court and the Supreme Administrative Court, provision is made for the application of the institution of compulsory advocacy. The application shall be heard by the court designated by law within a short period of time, in closed session, after hearing the judge to whom the application relates. Significantly, until the application has been considered, the judge concerned may not take any further action in the case, unless it concerns an urgent action.¹⁵

Finding that there are circumstances concerning a breach of the requirements of independence or impartiality by a judge, the court excludes the judge from hearing the case. This has identical effects to those associated with the traditional instrument of exclusion of a judge.

The Act also provides for an appeal procedure against the order on the application. A copy of the order and its grounds shall be served on the applicant and the judge concerned. The

¹³ Andrzej Grabowski and Bogumił Naleziński, 'Konstytucyjne prawo do niezawisłego i bezstronnego sądu w państwie pozornie praworządnym' (2020) 10 Państwo i Prawo 25.

¹⁴ Jakub Grzegorz Firlus, 'Test niezawisłości i bezstronności sędziego sądu administracyjnego – aspekt procesowy' (2023) 5 Przegląd Sądowy 5.

¹⁵ *ibid.*

applicant and the judge concerned may appeal against the order to the court designated by the Act. The time limit for lodging an appeal is one week from the date of service of the order with the statement of reasons.¹⁶

4. Specific solutions – rationales being examined

In practice, once the case begins, the court having jurisdiction over the case is required to notify the parties of the composition of the court hearing the case. After the notification, the entitled party has the right to submit a request for an examination of the judge's fulfilment of the requirements of independence and impartiality. The request shall be submitted within one week from the date of notification to the entitled party of the composition of the court dealing with the case. After the expiry of this period, the right to make the request shall lapse. The court shall therefore notify the person entitled to make the application of the composition of the court at the time of service of the first communication in the case and at each subsequent communication if the composition of the court has changed. This opens the way for the party to file the application.

In the context of a judge's independence and impartiality, three areas in particular may be assessed in a given case: (1) the circumstances surrounding the nomination proceedings concerning the judge in question; (2) the judge's conduct after his or her appointment as a judge; (3) the possible impact of both of these circumstances on the outcome of the case in question, taking into account the circumstances of the eligible person and the nature of the case. It is through this instrument that the standard of independence or impartiality of the judge concerned is examined in this context.

As far as the circumstances surrounding the appointment of a judge are concerned, they are, as one may think, the source of the new instrument. As is known, there has been an ongoing dispute in Poland for some time as to the correctness of the appointment of judges on the recommendation of the newly formed National Council of the Judiciary.¹⁷ Within the

¹⁶ Lipiński (n 10).

¹⁷ Under Polish law, it is the National Council of the Judiciary that is the constitutional body that conducts public competitions for judicial positions. It is at the request of the National Council of the Judiciary that judges in Poland are appointed by the President of the Republic (Article 179 of the Polish Constitution). The National Council of the Judiciary is composed of representatives of the executive, the legislative and the judiciary. The latter (the judiciary part) consists, among others, of 15 judges of various courts, who until the amendments were elected by the judges themselves. After the legislative changes, the 15 judges are now elected by the Sejm, the body of the legislature, the lower house of parliament. Cf. María Valle Camacho, 'El derecho a un tribunal establecido por ley y el procedimiento de nombramiento judicial: nuevos desarrollos a través de la jurisprudencia del TEDH y del TJUE. Su aplicación al caso de Polonia' (2023) 68 Cuadernos Europeos de Deusto 19.

framework of this premise, the circumstances surrounding the competition for the position of a judge, the formal prerequisites, or a comparison of his or her candidature with other persons competing in a given competition for a given judicial position should be examined.

Regarding the conduct of a judge after his or her appointment as a judge, as one might think, this concerns, *inter alia*, issues of the judge's apparent dependence on other authorities.¹⁸ In Poland, judges often participate in the work of bodies created by the Ministry of Justice, which, according to some, especially in disputes to which the State Treasury is a party, may affect their external perception as impartial arbitrators.

The third relevant element of the examination of a judge's independence and impartiality is the question of the possible impact of the circumstances surrounding the nomination proceedings concerning the judge in question and the judge's conduct after his or her appointment as a judge on the outcome of the case in question. In other words, it is necessary to demonstrate how, in the circumstances of a particular case, a breach of the standard of independence and impartiality, related to the appointment to the office of judge and the subsequent conduct of the judge, could affect the outcome of the case, taking into account the circumstances of the eligible person and the nature of the case.

In the jurisprudential practice to date, it is assumed that all the circumstances referred to above must occur together. As postulated by the doctrine, in verifying whether a judge meets the minimum standard of independence and impartiality, the court should examine, *inter alia*: the fairness and transparency of the procedure before the National Council of the Judiciary, the type of case considered by the judge in question (particular attention should be paid to cases in which: (i) the State Treasury is a party; (ii) the public prosecutor is a party; (iii) the political authorities have publicly formulated specific expectations as to the shape of the verdict), the judge's public statements in cases with political overtones, the judge's conduct towards the parties to the proceedings, and the quality of the judge's jurisprudence. On the other hand, the attitude of the parties displayed in the course of the proceedings, indicating that they have no objections to the preservation of the judge's independence, may be of subsidiary importance.¹⁹

However, as one may think, only a few years of jurisprudential practice will show how the courts have understood the statutory prerequisites of the test of a judge's independence and

¹⁸ Cf. Mendaña (n 4).

¹⁹ Janusz Roszkiewicz, 'Indywidualny test niezawisłości sędziego powołanego z naruszeniem prawa – uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Europejskiego Trybunału Praw Człowieka, Sądu Najwyższego i Naczelnego Sądu Administracyjnego' (2022) 11–12 *Przegląd Sądowy* 75, 93 ff.

impartiality. The area is certainly a developmental one and has and will continue to have great practical importance.²⁰ The law in this area will continue to evolve.

5 Jurisprudence practice

Cases concerning the new legal instrument, so far, are few in Poland. Most are related to allegations concerning the circumstances of the appointment of judges, which is related to the reform of the National Judicial Council that took place at the end of 2017 and its consequences. There are other cases as well.

One of the cases pending before the Supreme Court, for example, concerned a case in which one of the judges concerned in connection with allegations concerning the circumstances of his appointment as a judge in a procedure involving the newly formed National Council of the Judiciary requested an examination of the independence and impartiality of the judges constituting the composition of the Supreme Court who had previously participated in the Supreme Court's resolution of 23 January 2020, BSA I-4110-1/20, which, *inter alia*, defined the status of judges such as the one concerned.²¹

The applicant pointed out that since the subject of the judgement is to be the validity of the aforementioned legal norm (as this is how some treat the aforementioned resolution of the Supreme Court due to its nature), all judges who participated in the creation of this norm by participating in the issuance of the resolution are subject to exclusion by law and should not participate in the draw to hear the case.

For the assessment of the independence and impartiality test, the composition of the court was drawn, with the participation of, among others, another judge against whom the above allegations were current. It was therefore also requested that he be excluded.

The Supreme Court, in deciding the case, pointed out, *inter alia*, that it is in the interest of the legal system as a whole, and directly in the interest of the judiciary, that there should not arise in the external perception, *i.e.* in the public perception, the conviction that there are no conditions for a court to hear a case objectively. He emphasised that a judge of the Supreme Court participating in the adoption of the earlier joint resolution of 23 January 2020, when

²⁰ Cf. Jadwiga Potrzebacz, 'Niezawisłość sędziego – autonomia moralna – profesjonalizm' (2022) 42 *Prawo i Więzy* 115.

²¹ In the assessment of the reforms made in Poland to the way judges are appointed, a significant echo and international resonance was the resolution of the Polish Supreme Court of 23 January 2020, which stated, *inter alia*, that the composition of the court in a given case is contrary to the provisions of the law when the composition of the court includes a person appointed to the office of a judge at the request of the National Council of the Judiciary formed according to the procedure established by the provisions of the law of 8 December 2017. However, this resolution was, *inter alia*, the subject of a ruling by the Polish Constitutional Tribunal, the body which in Poland decides on the constitutionality of the law.

assessing a case, the so-called independence and impartiality test, is consequently confronted each time with the need to assess the criteria arising from the norms contained in the resolution he adopted, which concern the assessment of the correctness of the procedures for the appointment of judges, as well as the consequences of the actions taken by judges in the relevant civil or criminal proceedings. In view of the obvious conflict involving the necessity of such an assessment, the decision on the status of the judges appointed to office from 2018 onwards cannot involve the persons involved in issuing the aforementioned resolution. This is because there is a classic case of a judge ruling on his or her own case, i.e. on the correctness of a procedural act in the issuance of which he or she had previously participated.²²

Consequently, the Supreme Court concluded that in the present case, legitimate doubts about the judge's institutional impartiality had materialised and the principle of the presumption of independence and impartiality had been overcome.

In another of the cases pending before the Supreme Court, on the other hand, it was argued that one of the judges of this Court did not meet the requirement of independence and impartiality, since, in assessing the fulfilment of this requirement, it is necessary to take into account the circumstance accompanying his appointment, which is the appointment procedure itself that applied to him, i.e. his appointment to office in the Supreme Court as a result of the recommendation of the National Council of the Judiciary formed after the 2017 reform. In turn, one of the parties to the dispute pending before the Supreme Court was the state, and the applicant for examination of the judge's independence and impartiality stressed that the guarantee of impartiality is of particular importance in situations where the dispute before the court concerns the interests of an individual - a citizen or a conventional entity unconnected with the state structure on the one hand and the interests of the state on the other. In such cases, the basic function of the courts in the structure of a democratic state of law is actualised, where the courts - as public institutions characterised by institutional independence, consisting of independent judges and acting impartially - are the ultimate arbiter in disputes between the individual and the state. For in this area, there is always a clash between private and public interests. This makes the requirement of impartiality particularly important. Any doubts as to impartiality must be treated with the utmost seriousness, considered particularly carefully and taken into account in order to avoid creating grounds for the public to believe that doubts exist, in particular any favouring of

²² Order of the Polish Supreme Court of 3 July 2024, III CB 26/24.

one of the parties to the proceedings before the court that goes beyond the scope of the proper manner of hearing the case.

However, the court did not grant the application. In assessing the circumstances of the judge's appointment, it emphasised that his career to date meant that he fulfilled all the statutory requirements for an application for appointment as a judge of the Supreme Court. He emphasised that the obligation to ensure the correctness of the nomination procedure and responsibility for the consequences of its failure rests with the State, and negligence in this respect cannot be charged to the judge, and the belief that the judge is not impartial is not objectively justified. Pointing to the judge's conduct after his appointment, he also found no misconduct.

In conclusion, the court considered that it was not apparent that the appointment of a judge to the post of judge of the Supreme Court following a flawed nomination procedure (even if the procedure before the current National Council of the Judiciary were to be regarded as such) could give rise, in the minds of individuals, to justified doubts as to his invulnerability to external factors, in particular to direct or indirect influences from the legislative and executive authorities, and as to his neutrality with regard to the interests that clash before them and thus lead to a lack of visible signs of independence or impartiality on his part.²³

6. First conclusions

The new instrument known to the Polish judicial procedure in the form of a test of a judge's independence and impartiality is a relatively young legal solution, the practice of which is still to be formed. As of today, there is a growing interest in this instrument and the first judgments which, despite the criticism of this solution that sometimes appears, allow for an analysis of other prerequisites of a judge's independence and impartiality in relation to traditional instruments.

The evaluation of the nomination procedure concerning a given judge, the conduct of the judge after his or her appointment and their possible impact on the outcome of the case seem to be an important novelty in the discussed area of guarantees of a fair trial. It is likely that the law will evolve in this area in the future, and the Polish example may prove interesting for other democracies confronted with various judicial problems.

²³ Order of the Polish Supreme Court of 28 February 2023, III CB 13/23.

REFERENCES:

Camacho MV, 'El derecho a un tribunal establecido por ley y el procedimiento de nombramiento judicial: nuevos desarrollos a través de la jurisprudencia del TEDH y del TJUE. Su aplicación al caso de Polonia' (2023) 68 Cuadernos Europeos de Deusto 19

Chróścielewski W, 'Glosa do uchwały NSA z 3 kwietnia 2023, I FPS 3/22' (2024) 1 Orzecznictwo Sądów Polskich 146

Clooney A and Webb P, *The Right to a Fair Trial in International Law* (Oxford University Press 2021)

Firlus JG, 'Test niezawisłości i bezstronności sędziego sądu administracyjnego – aspekt procesowy' (2023) 5 Przegląd Sądowy 5

Grabowski A and Naleziński B, 'Konstytucyjne prawo do niezawisłego i bezstronnego sądu w państwie pozornie praworządnym' (2020) 10 Państwo i Prawo 25

Kruk E, 'Judge's Recusal as One of the Guarantees of Fair Criminal Trial. A few Remarks in the Context of Articles 40 and 41 of the Polish Penal Code' (2023) 16 Teka Komisji Prawniczej PAN Oddział w Lublinie 139

Lipiński K, 'Ustawowy test niezawisłości i bezstronności sędziego w sprawach karnych' (2022) 10 Palestra 33

Matthew Chuks Okpaluba and Tumo Charles Maloka, 'The Fundamental Principles of Recusal of a Judge At Common Law: Recent Developments' (2022) 43 *Obiter* 88

Mendaña NM, 'La garantía de independencia del juez europeo: Una revolución encubierta del TJUE' (2022) 70 Estudios de Deusto 81

Potrzeszcz J, 'Niezawisłość sędziego – autonomia moralna – profesjonalizm' (2022) 42 Prawo i Więź 115

Roszkiewicz J, 'Indywidualny test niezawisłości sędziego powołanego z naruszeniem prawa – uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Europejskiego Trybunału Praw Człowieka, Sądu Najwyższego i Naczelnego Sądu Administracyjnego' (2022) 11–12 Przegląd Sądowy 75

Sánchez YC, 'La independencia de los jueces internacionales: análisis y valoración de las

reformas adoptadas en el marco del Tribunal Europeo de Derechos Humanos' (2021) 12
Revista Electronica de Estudios Internacionales 1

Schabas WA, *The European Convention on Human Rights: A Commentary* (Oxford University
Press 2015)

Stępień-Zalucka B, 'Niezawisłość sądownictwa a niezależność sądów i niezawisłość
sędziów' (2011) 85 Przegląd Prawa i Administracji 135

Szuber-Bednarz E, 'The right to a fair trial in the ECHR judicature' (2021) 10 Studia
Administracji i Bezpieczeństwa 17