ORDER

27 January 2020

The Supreme Administrative Court [Polish abbreviation: NSA], sitting in the following panel:

Presiding Judge:	Jacek Chlebny, NSA Judge (rapporteur)
NSA Judges:	Roman Hauser
	Marek Stojanowski

upon having heard on 27th January, 2020:
in chambers, General Administrative Chamber,
the motion of the [..] Foundation, established in W., regarding the disqualification of Mirosław Wincenciak, NSA Judge
in the case following the appeal in cassation of the Mayor of R.
against the judgement of the Voivodeship Administrative Court in Kraków
of 16 January 2018, Case No. SAB/Kr 253/17
in the matter following the application of B.W.
regarding failure to act on part of the Mayor of R. in making public information available,

has decided:

to dismiss the motion for disqualification of a judge.

Case No. I OSK 1917/18

JUSTIFICATION

By order delivered at the hearing on 9 January 2020, Case No. I OSK 1917/18, the Supreme Administrative Court allowed the participation of the [...] Foundation (hereinafter the "Foundation"), established in W., with the rights of a party to the proceedings. The Foundation's motion for allowing it to participate in the proceedings also contained a motion regarding the disqualification of Mirosław Wincenciak, NSA Judge, as well as regarding the disqualification of Rafał Stasikowski and Przemysław Szustakiewicz, NSA Judges, as regards the hearing of the motion regarding the disqualification of Mirosław Wincenciak should they be designated or in the alternate, of disqualification of the said judges from drawing lots for the panel reviewing the motion. This motion was joined by the attorney for B.W., the appellant (minutes of the hearing, sheet 138).

On 9 January 2020 Mirosław Wincenciak, NSA Judge, submitted a statement that the conditions of disqualification of a judge as set out in Article 18 and Article 19 of the Act of 30 August 2002 – the Law on proceedings before administrative courts (Journal of Laws of 2019, Item 2325, as amended, hereinafter the "LPAC") – have not been satisfied.

In an additional explanation submitted on 27 January 2020, following the adoption by the Supreme Court of a resolution by a joint panel of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, Case No. BSA 1-4110-1/20, Mirosław Wincenciak, NSA Judge, declared that there are no grounds for disqualification of adjudicating in the matter.

The Supreme Administrative Court has considered the following:

1. The motion for the disqualification of Mirosław Wincenciak, NSA Judge, from adjudicating in the case, Case No. I OSK 1917/18 is not justified, as the composition of the court in the matter under review has been appropriately designated.

2. Mirosław Wincenciak, NSA Judge – relying on his academic and professional achievements, as well as his high assessment during the course of a competitive procedure before the Supreme Administrative Court – has deemed the

Foundation's suggestions as damaging that he was appointed an NSA judge on a proposal of the KRS [National Council the Judiciary] for reasons other than those which follow from a fair procedure for appointing a judge. He also noted that the competitive procedure before the Supreme Administrative Court was conducted before the National Council of the Judiciary was appointed under the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017 (Journal of Laws of 2018, item 3), which presented his candidacy to the President accompanied by a proposal for appointing him to the post of NSA judge.

3. By resolution no. 531/2018 of 8 November 2018, adopted by the National Council of the Judiciary (hereinafter the "KRS"), shaped under the procedure provided under the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017, the President was presented with his candidacy accompanied by a proposal for appointing him to the post of NSA judge.

The Foundation has based its doubts as to the impartiality of the judge in question not on the personal attributes of Judge Mirosław Wincenciak, but rather exclusively on the defective manner of appointing the KRS, the composition of which, in its opinion, fails to meet the criteria set out under Article 187 (1) 0f the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78. Item 483, as amended, hereinafter the "Constitution"). The KRS resolutions – in the Foundation's opinion – adopted by a composition incompatible with the law, must be treated as defective and accordingly, it cannot be accepted that the proposal addressed to the President originated from an entity shaped in a manner compatible with the law. The Foundation submits that it is unacceptable to take the view that the President's appointment of judges cures the deficiency of the nominating procedure before the KRS, as under Article 179 of the Constitution, a condition of appointing a judge is the existence of a proposal from the KRS. The Foundation has cited the grounds for the disqualification of a judge provided under Article 19 of the LPAC, which deals with the disqualification of a judge either at his/her own request or at the request of a party, if there exists a circumstance of such a kind that would give rise to justified doubts as to his/her impartiality in the case. Based on the contents of the judgement of the Court of Justice of the European Union of 19 November 2019 A.K. and Others in Joined Cases C-585/18, C-624/18 and C-625/18 (ECLI:EU:C:2019:982), the

Foundation notes that in order for a judge to be deemed as independent, the independence of the body participating in the nomination process is required. However, the mode of operation of the KRS has been put to question in the judgement of the Supreme Court of 5 December 2019, Case No. III PO 7/18, delivered after the said Court received a response in the cited CJEU judgement in Joined Cases C-585/18, C-624/18 and C-625/18.

4. The institution of disqualification of a judge is a procedural guaranty of the court's impartiality in particular administrative court proceedings. The Constitutional Court in its judgement of 20 July 2004, Case No. SK 19/02 (OTK-A 2004 no. 7, Item 67), has stressed that the *ratio legis* of regulations governing the disqualification of a judge is clear and amounts to the elimination of any reasons which may give rise to doubts as to the judge's impartiality and objectivity in reviewing a case. On the other hand, in its judgement of 13 December 2005, Case No. SK 53/04 (OTK-A 2005, No. 11, Item 134), the Constitutional Court noted that the need of assessing the specific situation *in casu* follows from the very nature of so-called relative conditions (Article 19 of the LPAC), and accordingly, any automatic approach in the proceedings would be incompatible with the objectives for which this type of conditions has been introduced to procedures of disqualifying a judge. In a procedure involving the disqualification of a judge, an assessment must be made whether in a particular case a given judge will be able to freely and independently, regardless of personal and external circumstances, review the case and deliver a ruling. The lack of impartiality and independence of a judge may also be assessed from the standpoint of the right to a fair trial guaranteed under Article 45 (1) of the Constitution, Article 47 of the Charter of Fundamental Freedoms of the European Union of 30 March 2010 (Official Journal EU C No. 83, p. 389, hereinafter the "Charter") and Article 6 (1) of the Convention for the Protection of Human Right and Fundamental Freedoms, done at Rome on the 4th day of November 1950 (Journal of Laws of 1993, Item 284, as amended), hereinafter the "ECHR"). The improper composition of a ruling panel in a particular case is a serious breach of procedural regulations. Incompatibility of a ruling panel with the law or participation in the review of a case by a judge disqualified under the operation of the law constitutes a condition of the nullity of proceedings, which the Supreme Administrative Court shall take into account *ex officio* [Article 183 § 1 (4) of the LPAC] each time a case is being reviewed. A

situation where an unauthorised person participated in the panel of the court or a judge disqualified by virtue of law adjudicated the case, and the party has not been able to demand the exclusion before the judicial decision has become legally binding, constitutes grounds for the reopening of completed court proceedings [Article 271 (1) of the LPAC].

5. In the foregoing judgement of 19 November 2019, the Court of Justice of the European Union assessed the compatibility of the regulations governing the operation of the Disciplinary Chamber of the Supreme Court (hereinafter the "Disciplinary Chamber") against Article 47 of the Charter and Article 9 (1) of Council Directive 2000/78/EC. of 27 November 2000. establishing a general framework for equal treatment in employment and occupation (OJ EC L No. 303, p. 16). The Court of Justice indicated the criteria of the KRS's independence in relation to the legislature and the executive during the course of performance of tasks entrusted to it under national legislation (points 139 – 145) and at the same time drew attention as to the significance of "factors" characteristic of judges of the Disciplinary Chamber of the Supreme Court (points 147 – 151). As a result of the foregoing considerations, the Court of Justice declared: "Although any one of the various facts referred to in paragraphs 147 to 151 above is indeed not capable, per se and taken in isolation, of calling into question the independence of a chamber such as the Disciplinary Chamber, that may, by contrast, not be true once they are taken together, particularly if the abovementioned assessment as regards the KRS were to find that that body lacks independence in relation to the legislature and the executive" (point 152). In the view of the Court of Justice, a breach of the right to an independent and impartial court occurs in a situation where "objective circumstances under which a particular body has been created and its features, as well the manner in which its members have been appointed, are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law" (point 153). The Court of Justice ordered the referring court (Supreme Court) to establish, taking

into consideration of all relevant information at its disposal whether this is so in the case of the Disciplinary Chamber of the Supreme Court.

6. In the cited judgement of 5 December 2019, Case No. III PO 7/18, taking into account the binding judgement of the Court of Justice in this case, the Supreme Court analyzed all circumstances associated with the creation of the Disciplinary Chamber and declared that taken together, including the fact that the judges of this chamber were selected by the KRS which "was not operating in an independent manner in relation to the legislature and executive", leads to the conclusion that the Disciplinary Chamber is not a court within the meaning of Article 47 of the Charter, Article 6 of the ECHR and Article 45 (1) of the Constitution (point 71 of the Supreme Court's judgement). At the same time, the Supreme Court declared at point 80 of the judgement that "public activities directly prior to a nomination for the post of judge do not per se automatically entail a lack of independence of the adjudicating court with the participation of such a person. Likewise, not every choice of the present National Council of the judiciary is generally decisive as regards the chosen court (that is so in the case of assessors, as the results of a passed examination for judge are decisive for their nomination)."

7. Existing case-law of the Supreme Administrative Court and of voivodeship administrative courts demonstrates that separate opinions have been presented to judgements delivered by panels with the participation of a judge appointed by the National Council of the Judiciary pursuant to the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017 (inter alia, NSA judgements of 6 December 2019, Case Nos.: I GSK 1505/18, I GSK 1480/18, I GSK 1610/18, I GSK 1454/18, I GSK 1511/18, I GSK 1646/18 and of 29 November 2019 Case Nos.: I GSK 173/17, I GSK 174/17, I GSK 175/17, I GSK 188/17, I GSK 189/17, I GSK 190/17, I GSK 192/17, I GSK 191/17, I GSK 193/17, I GSK 194/17, I GSK 195/17, I GSK 255/17, I GSK 256/17, I GSK 257/17, I GSK 258/17, I GSK 259/17, I GSK 552/19; order of the Voivodeship Administrative Court in Opole of 19 November 2019, Case Nos.: II SA/Op 309/19, II SA/Op 342/19; orders of the Voivodeship Administrative Court in Opole of 12 November 2019 r., Case No.: II SA/Op 235/19; judgement of the Voivodeship Administrative Court in Opole of 19 November 2019 Case No.: II SA/Op 321/19; non-final judgement of the Voivodeship Administrative Court in Warsaw of 23 December 2019, Case Nos.: V SA/Wa

1203/19, V SA/Wa 1204/19, V SA/Wa 1205/19). In the justifications of the cited separate opinions, the judges based their doubts concerning the correctness of the composition of the court on the questions referred to the Court of Justice of the European Union by the Supreme Court in the matter designated by Case No. III PO 7/18.

8. It must be highlighted that the cited judgement of the Court of Justice of 19 November 2019 and the judgement of the Supreme Court which was a consequence of the former, have been delivered within the framework of a case which required the assessment of the compatibility of regulations governing the Disciplinary Chamber with EU law. At this point the importance of guidance to the effect that only the assessment of all doubts taken as a whole concerning the appointment of the KRS and Disciplinary Chamber of the Supreme Court would – in the view of the Court of Justice – allow the national court to assess the independence of the Disciplinary Chamber of the Supreme Court. All the more so, it does not follow from the judgement of the Court of Justice that each and every nomination to the post of judge or assessor of a court other than the Disciplinary Chamber may be automatically challenged.

9. On 23 January 2020, Case No. BSA I-4110-1/20, the Supreme Court adopted a resolution by a joint panel of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court at the motion of the First President of the Supreme Court for the purpose of settling discrepancies of interpretation of the law in the Supreme Court's case-law. The Supreme Court held that the improper composition of a court within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure or incompatibility of the court's composition with the law within the meaning of Article 379 (4) of the Code of Civil Procedure also exists in a situation where a member of the court panel is a person appointed to the office of a Supreme Court judge on a proposal of the National Council of the Judiciary, shaped under the procedure provided under the Law amending the Law on the National Council of the Judiciary and certain other laws of 8 December 2017 (Journal of Laws of 2018, Item 3). The foregoing improper composition of a court or incompatibility of the court's composition with the law also exists with regard to judges of courts of law or military courts appointed on the proposal of the KRS shaped under the procedure provided under the cited Law of 8 December 2017, where the defectiveness of the

appointment process leads, in specific circumstances, to a breach of the standard of independence and impartiality within the meaning of Article 45 (1) of the Constitution, Article 47 of the Charter and Article 6 (1) of the ECHR. The justification of the Supreme Court resolution of 23 January 2020, Case No. BSA I-4110-1/20, is not known as at the day of the delivery of this order, however, it already follows from the resolution's operative part that it only applies to Supreme Court judges, court of law judges and military court judges. The contents of this resolution do not concern NSA judges and administrative court judges. It must be stressed at this point that administrative courts and the Supreme Administrative Court are characterized as distinct from the Supreme Court and the judiciary of law. The Supreme Court, within the scope of its rulings, exercises supervision exclusively over the operation of courts of law and military courts [Article 183 (1) of the Constitution]. The Constitution has entrusted the Supreme Administrative Court and other administrative courts with the exercise of the independent review of the operation of public administration (Article 184 of the Constitution). Special conditions indicate the distinct nature of administrative courts and administrative judges, the satisfaction of which is contingent for the appointment to the post of an administrative court judge, in particular, the requirement of expertise in the area of public administration, administrative law and other branches of the law related to the operation of public administrative bodies, as well as the option of being appointed to the post of judge by reason of holding positions within the framework of public institutions for a period of ten years associated with the application or creation of administrative law [Article 6 § 1 (6,7) of the Act of 25th July 2002 Law on the system of administrative courts (Journal of Laws of 2019, item 2167, hereinafter LSAC). By pointing out the distinct nature of the administrative judiciary and the lack of grounds for the direct application of the Supreme Court resolution to administrative judges, it is worth noting that the cited Supreme Court resolution has not accepted the principle of an automatic approach as to the recognition of the improper composition of a court within the meaning of Article 439 § 1 (2) of the Code of Criminal Procedure or incompatibility of the court's composition with the law within the meaning of Article 379 (4) of the Code of Civil Procedure with regard to judges of courts of law and of military courts. The Supreme Court explicitly merged the conditions of improper composition or incompatibility of the court's composition with the law- with the need of assessing the

specific circumstances of the appointment process of a judge, which would entail a breach of the standard of independence and impartiality within the meaning of Article 45 (1) of the Constitution, Article 47 of the Charter and Article 6 (1) of the ECHR.

10. Under Article 179 of the Constitution, the President of the Republic of Poland shall appoint judges, on a proposal of the National Council of the Judiciary, for an indefinite period. This constitutional rule is implemented under Article 5 (1) LSAC with regard to the administrative judiciary, from which it follows that the President, upon request of the National Council of the Judiciary, shall appoint judges of administrative courts to hold judicial office. Judicial appointments constitute the President's constitutional and statutory power, which does not require the countersignature of the President of the Council of Ministers [Article 144 (3) (17) of the Constitution]. Case-law presents the view that the President is entitled to reject the proposals of the KRS, should they be incompatible with the values of which he is the guardian under the Constitution (judgement of the Constitutional Court of 5 June 2012, Case No. K 18/09, published in OTK-A 2012 no. 6, Item 63; order of the NSA of 7 December 2017, Case No. I OSK 857/17 and order of the NSA of 26 October 2019, Case No. I OZ 550/19). It follows from the foregoing that the President's role in the nomination procedure of judges is not restricted only to approval, but he may object to any candidate in a situation which he deems that the nomination of a particular person for the post of judge would be incompatible with constitutional values, which he is bound to protect. The powers in the area of appointing judges are the personal powers of the President, and the Constitution knows no subjective right of access to service in the capacity of a judge. This is decisive for the fact that administrative courts may not review acts associated with such a procedure (order of the NSA of 25 April 2019, Case No. II GZ 62/19). In a situation where the President has found no grounds for refusal of appointing a judge, then the Supreme Administrative Court cannot assess the correctness of the appointment of such a judge under proceedings for the disqualification of a judge. It is not the purpose of the institution of the disqualification of a judge to review the acts of the President undertaken within the framework of his constitutional powers set out under Article 179, Article 144 (2) and Article 144 (3) (17) of the Constitution.

11. It must be noted that the submitted motion for the disqualification of Mirosław Wincenciak, NSA judge, from adjudicating in the case under review is not

based on an assessment of circumstances related to the individual assessment of the behaviour of a judge or his relationship with the parties to the proceedings. The Foundation has argued its motion solely on the assessment of the defectiveness of the appointment of the National Council of the judiciary, which, it light of the foregoing considerations, does not provide sufficient grounds for allowing the forwarded motion. The Foundation has also failed to demonstrate any circumstances which may undermine trust as to the impartiality of Mirosław Wincenciak, NSA judge. It must be stressed at this point that doubts as to the impartiality of a judge within the meaning of Article 19 of the LSAC must each time be referred to a specific judge in a particular case, and other grounds of the disqualification of a judge by the operation of law are listed in Article 18 LSAC in an exhaustive manner. None of the circumstances listed in this provision exist in this case.

12. Bearing the above in mind, pursuant to Article 22 § 1 and Article 22 § 2, read jointly with Article 194 of the LPAC, the Supreme Administrative Court has ruled as in the operative part.