

## **Summary: order of the Supreme Administrative Court of 21/11/2018, II GOK 2/18**

**Reference for preliminary ruling – Competition for a vacant post of a judge - Principle of the rule of law - Right to an effective remedy and effective judicial protection - Principle of equal treatment - Principle of equal access to the public service - Principle of institutional balance - Treaty on the European Union - Charter of Fundamental Rights - Directive 2000/78/EC**

In the context of the cases initiated by the candidates for the positions of judges of the Supreme Court, the Supreme Administrative Court (SAC) analysed the appellate proceedings against the resolutions issued by the National Council of the Judiciary (NCJ) in the competition proceedings for vacant judicial positions at the Supreme Court.

SAC indicated that it is possible to challenge a NCJ resolution on presenting (not presenting) to the President of the Republic of Poland requests to appoint persons to hold post of a Supreme Court judge. First of all, SAC drew attention to the solution that allowed for a NCJ resolution to be legally valid and enforceable, despite having been challenged (i.e. before a court ruling being issued in response to the appellate measure having been lodged). In the light of the binding provisions of law, the said resolution becomes valid and enforceable not only in its part that covers the decision not to present requests to appoint those participants of the proceedings who did not file an appeal, but also in the part that covers the decision to present requests to appoint those participants of the competition proceedings, among whose there is also a participant who is not interested in challenging the resolution, i.e. a candidate concerned by a request to be appointed to hold a post of a judge. Therefore, challenging a NCJ resolution does not stop an appointment for a Supreme Court judge, which, according to the SAC, affect the efficiency of the challenge and prevents the carrying out by the competent court of any real control of the course of the competition proceedings for the vacant post at the Supreme Court.

The SAC also pointed out the norm that provides that setting aside by the court (SAC) of the NCJ resolution on not presenting the request to appoint persons to hold post of a Supreme Court judge only results in accepting an application from a participant of the proceedings who challenged the said resolution for a vacant post at the Supreme Court, as to which the proceedings before the NCJ has not been concluded as at the day the SAC issued its ruling, and if no such proceedings are pending, for another vacant post at the Supreme Court. According to the SAC, such a result of an appellate proceedings may not be considered an effective legal remedy.

The SAC also noted that the construction of the appeal against the resolutions in individual matters concerning the appointment for holding posts of a Supreme Court judge is different than the one that is applied with respect to the qualification proceedings for vacant posts in courts other than the Supreme Court.

Considering the above, and also considering the standards of the EU law, the Supreme Administrative Court decided to refer the following question for preliminary ruling to the Court of Justice of the European Union:

1) Whether Article 2 read together with Article 4(3) sentence 3, Article 6(1), Article 19(1) of TEU read together with Article 47 of the Charter of Fundamental Rights and Article 9(1) of the Council Directive 2000/78/EC and Article 267 paragraph 3 of TFEU shall be interpreted in such a way that the principle of the rule of law and the right to an effective legal remedy and effective judicial protection is violated when the domestic legislator, while granting the right to appeal to the court in individual matters relating to holding post in a last instance

court in the Member State (Supreme Court), relates the feature of legal validity and effectiveness of the resolution issued in the qualification proceedings preceding the presentation of the request to appoint persons to hold posts of a judge of the said court, to the situation where the resolution taken to jointly consider and assess all candidates to the Supreme Court by all participants of the qualification proceedings, including a candidate not interested in challenging the said resolution, i.e. a candidate concerned by a request to appoint them to hold a judicial position, which, as a result: – thwarts the efficiency of the appeal measure and the ability of the competent court to carry out a real control of the course of the aforementioned qualification proceedings? – and in the situation where the extent of the proceedings covers those judicial positions at the Supreme Court, with respect to those the new, reduced retirement age was applied to the judges who held them until now, without granting the right to decide whether to take advantage of the reduced retirement age exclusively to the discretion of the interested judge, in line with the principle of irremovability of judges – if it is recognised, that it was violated in this way – does this also have an impact on the scope and outcome of the judicial control of the aforementioned qualification proceedings?

2) Whether Article 2 read together with Article 4(3) sentence 3 and Article 6(1) of TEU read together with Article 15(1) and Article 20 read together with Article 21(1) and Article 52(1) of the Charter of Fundamental Rights read together with Article 2(1) and (2)(a) and Article 3(1)(a) of the Council Directive 2000/78/EC and Article 267 paragraph 3 of TFEU shall be interpreted in such a way that the principle of the rule of law, the principle of equal treatment and equal and even access to public service – holding a post of a Supreme Court judge – is violated, in the situation where, while granting the right to appeal to the competent court in individual matters, as a result of the rule of law formula discussed in the first question, may appointing to the vacant position of a Supreme Court judge take place without holding a control of the course of the aforementioned qualification proceedings, if initiated, by the competent court, and the absence of such a solution violates the right to have equal and even access to public service, which is why it is contrary to the general interest purposes, and does the situation where the composition of an authority in the Member State, which is aimed at protecting the independence of the courts and the independence of the judges (National Council of the Judiciary), before which the proceedings on the holding post of the Supreme Court judge is pending, is formed in such a way that the representatives of the judicial power are selected by the legislative power, disturb the principle of the institutional balance?