Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 March 2022 *

(Reference for a preliminary ruling – Article 267 TFEU – Interpretation sought by the referring court necessary to enable it to give judgment – Concept – Disciplinary proceedings brought against a judge of an ordinary court – Designation of the disciplinary court having jurisdiction to hear those proceedings by the President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland) – Civil action for a declaration that a service relationship does not exist between the President of that disciplinary chamber and the Supreme Court – Lack of jurisdiction of the referring court to review the validity of the appointment of a Supreme Court judge and inadmissibility of such an action under national law – Inadmissibility of the request for a preliminary ruling)

In Case C-508/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland), made by decision of 12 June 2019, received at the Court on 3 July 2019, in the proceedings

M.F.

v

J.M.,

intervening parties:

Prokurator Generalny,

Rzecznik Praw Obywatelskich,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal (Rapporteur), K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin and N. Jääskinen, Presidents of Chambers, M. Ilešič, F. Biltgen and A. Kumin, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

* Language of the case: Polish.

having regard to the written procedure and further to the hearing on 22 September 2020,

after considering the observations submitted on behalf of:

– M.F., by W. Popiołek, radca prawny,

– J.M., by himself,

– the Prokurator Generalny, by M. Słowińska, R. Hernand, A. Reczka and S. Bańko,

– the Rzecznik Praw Obywatelskich, by M. Taborowski and P. Filipek,

– the Polish Government, by B. Majczyna, S. Żyrek and A. Dalkowska, acting as Agents,

– the European Commission, initially by K. Herrmann, P. Van Nuffel and H. Krämer, and subsequently by K. Herrmann and P. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2, Article 4(3), Article 6(3), and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between M.F. and J.M. concerning an application seeking a declaration that a service relationship does not exist between the latter and the Sąd Najwyższy (Supreme Court, Poland).

National legal framework

The Constitution

3 Article 144(2) and (3) of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland; 'the Constitution') is worded as follows:

'2. In order to be valid, official acts of the President of the Republic must be countersigned by the President of the Council of Ministers who thereby assumes responsibility before the Sejm [(Lower Chamber of the Polish Parliament)].

3. The provisions of paragraph 2 above shall not apply in the following cases:

…

(17) the appointment of judges;

…’

4 Under Article 179 of the Constitution, the President of the Republic of Poland (‘the President of the Republic’) is to appoint judges, on a proposal from the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) (‘the KRS’), for an indefinite period.

The Code of Civil Procedure

5 Article 189 of the Kodeks postępowania cywilnego (Code of Civil Procedure) states:

‘Applicants may bring an action before the court for a declaration that a legal relationship or a right exists or does not exist, provided that they have a legitimate interest in bringing proceedings.’

The Law on the Supreme Court

6 The Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) entered into force on 3 April 2018. That law was amended on several occasions.

7 The Law on the Supreme Court, inter alia, established within that court a new chamber known as the Izba Dyscyplinarna (Disciplinary Chamber).

8 Article 27(1) of that law provides:

‘The following cases shall fall within the jurisdiction of the Disciplinary Chamber:

(1) disciplinary proceedings:
   (a) involving [Sąd Najwyższy (Supreme Court)] judges;
   (b) examined by the [Sąd Najwyższy (Supreme Court)] in connection with disciplinary proceedings under the following laws:

   …

   – the Law on the organisation of the ordinary courts …,

   …

…

(2) proceedings in the field of labour law and social security involving [Sąd Najwyższy (Supreme Court)] judges;

…’

9 Article 31(1) of the Law on the Supreme Court states:

‘The President of the Republic of Poland, after consulting the First President of the [Sąd Najwyższy (Supreme Court)], shall publish in the *Monitor Polski* [(Official Journal of the Republic of Poland)] the number of vacant judicial positions to be filled in each Chamber of the [Sąd Najwyższy (Supreme Court)].’

10 Under Article 33(1) of that law:

'The service relationship of a [Sąd Najwyższy (Supreme Court)] judge shall be established upon delivery of the instrument of appointment. …'

The Law on the ordinary courts

11 Ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001, as amended (Dz. U. of 2018, item 23; 'the Law on the ordinary courts') provides in Article 110:

'1. In disciplinary cases involving judges, the following shall adjudicate:

(1) at first instance:
(a) disciplinary courts at appellate courts, composed of three judges;

…

3. The disciplinary court within whose jurisdiction the judge who is the subject of the disciplinary proceedings holds office shall not be permitted to hear the cases referred to in paragraph 1(1)(a). The disciplinary court with jurisdiction to hear the case shall be designated by the President of the [Sąd Najwyższy (Supreme Court)] who directs the work of the Disciplinary Chamber at the request of the Disciplinary Officer.'

The Law on the KRS

12 The KRS is governed by the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2011, No 126, item 714), as amended, inter alia, by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3) and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the ordinary courts and certain other laws) of 20 July 2018 (Dz. U. of 2018, item 1443; 'the Law on the KRS').

13 Article 37(1) of the Law on the KRS provides:

'If several candidates have applied for a single position of judge, [the KRS] shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a resolution including its decisions for the purposes of putting forward one proposal for appointment to the position of judge in respect of all candidates.'

14 Under Article 43(2) of that law:

'Unless all the participants in the procedure have challenged the resolution referred to in Article 37(1), that resolution shall become final for the part comprising the decision not to present the proposal for appointment to the office of judge of the participants who did not lodge an appeal, subject to the provisions of Article 44(1b).'

15 Article 44 of the said law stated:

‘1. A participant in the procedure may appeal to the [Sąd Najwyższy (Supreme Court)] on the grounds that the [KRS] resolution is unlawful, unless separate provisions provide differently. …

1a. In individual cases concerning appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)], an appeal may be lodged with the [Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland)]. In those cases, it is not possible to lodge an appeal before the [Sąd Najwyższy (Supreme Court)]. An appeal before the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when making a decision on the presentation of a proposal for appointment to the position of judge at the [Sąd Najwyższy (Supreme Court)].

1b. Unless all the participants in the procedure have challenged the resolution referred to in Article 37(1) in individual cases concerning appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)], that resolution becomes final in the part comprising the decision to present the proposal for appointment to the position of judge at the [Sąd Najwyższy (Supreme Court)] and in the part comprising the decision not to present the proposal for appointment to the position of judge to that court for participants in the procedure who did not lodge an appeal.

…

4. In individual cases concerning appointment to the office of judge at the [Sąd Najwyższy (Supreme Court)], the annulment by the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] of the [KRS] resolution not to put forward the proposal for appointment to the position of judge at the [Sąd Najwyższy (Supreme Court)] is equivalent to accepting the candidacy of the participant who lodged an appeal in the procedure for the vacant position of judge at the [Sąd Najwyższy (Supreme Court)], for a position for which, on the date of delivery of the judgment of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)], the procedure before [the KRS] has not ended or, in the absence of such a procedure, for the next vacant position of judge at the [Sąd Najwyższy (Supreme Court)] which is published.’

16 Paragraph 1a of Article 44 of the Law on the KRS was inserted into that article by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, which entered into force on 17 January 2018, and paragraphs 1b and 4 were inserted into that article by the Law of 20 July 2018 amending the Law on the ordinary courts and certain other laws, which entered into force on 27 July 2018. Prior to the insertion of those amendments, the appeals referred to in that paragraph 1a were to be lodged with the Sąd Najwyższy (Supreme Court) in accordance with Article 44(1).

17 By judgment of 25 March 2019, the Trybunał Konstytucyjny (Constitutional Court, Poland) declared Article 44(1a) of the Law on the KRS incompatible with Article 184 of the Constitution, on the grounds, in essence, that the jurisdiction conferred on the Naczelny Sąd Administracyjny (Supreme Administrative Court) by paragraph 1a was not justified in the light of either the nature of the cases concerned, the organisational characteristics of that court or the procedure applied by the latter. In that judgment, the Trybunał Konstytucyjny (Constitutional Court) also stated that that declaration of unconstitutionality ‘necessarily leads to the termination of all pending court proceedings based on the repealed provision’.

18 Subsequently, Article 44 of the Law on the KRS was amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy - Prawo o ustroju sądów administracyjnych (Law amending the Law on the National Council of the Judiciary and the Law on the System of Administrative Courts) of 26 April 2019 (Dz. U. of 2019, item 914,'the Law of 26 April 2019'), which entered into force on 23 May 2019. Paragraph 1 of that Article 44 is now worded as follows:

'A participant in the procedure may appeal to the [Sąd Najwyższy (Supreme Court)] on the grounds that the [KRS] resolution is unlawful, unless separate provisions provide differently. There shall be no right of appeal in individual cases regarding appointments to the office of judge at the [Sąd Najwyższy (Supreme Court)].'

19 Furthermore, Article 3 of the Law of 26 April 2019 provides that 'proceedings in cases concerning appeals against [KRS] resolutions in individual cases regarding appointments to the office of judge at the [Sąd Najwyższy (Supreme Court)], which have been initiated but not concluded before this law comes into force, shall be discontinued by operation of law'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 M.F. holds office as a judge at the Sąd Rejonowy w P. (Regional Court of P., Poland). On 17 January 2019, the Deputy Disciplinary Officer responsible for cases concerning judges sitting in the ordinary courts decided to initiate disciplinary proceedings against M.F. for alleged slowness in the proceedings conducted by her and alleged delays in drawing up the grounds for her decisions. In his capacity as President of the Sąd Najwyższy (Supreme Court) responsible for the work of the disciplinary chamber of that court, J.M. issued on 28 January 2019, under Article 110(3) of the Law on the ordinary courts, an order designating the Sąd Dyscyplinarny przy Sądzie Apelacyjnym w … (Disciplinary Court at the Court of Appeal of …, Poland) as the disciplinary court having jurisdiction to hear those disciplinary proceedings at first instance.

21 Following the adoption of that order, M.F. brought an action before the Sąd Najwyższy (Supreme Court) under Article 189 of the Code of Civil Procedure seeking a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy (Supreme Court), within the meaning of Article 33(1) of the Law on the Supreme Court, on account of irregularities affecting his appointment to the office of judge in the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court). M.F. also made an application to have all the judges appointed to that disciplinary chamber removed and to have the Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) of the Sąd Najwyższy (Supreme Court) designated to rule on that action. Lastly, M.F. made a request, as an interim measure and for the duration of the main proceedings, for an order to stay the disciplinary proceedings brought against her.

22 In support of her action, M.F. claimed that J.M.'s appointment to the position of judge of the Sąd Najwyższy (Supreme Court) was ineffective because the instrument of appointment by the President of the Republic was delivered to him on 20 September 2018, whereas the KRS resolution of 23 August 2018 which proposed J.M. for appointment to that position was the subject of an appeal brought on 17 September 2018 before the Naczelny Sąd Administracyjny (Supreme Administrative Court), pursuant to Article 44(1a) of the Law on the KRS, by a candidate not proposed for appointment under that resolution. In addition, the selection procedure at issue was conducted following a communication from the President of the Republic adopted on the basis of Article 31(1) of the Law on the Supreme Court and published on 29 June 2018, a communication which did not bear the required ministerial countersignature.

23 By decision of 6 May 2019, the First President of the Sąd Najwyższy (Supreme Court) instructed the Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) of that court to examine M.F.'s application and, in particular, her request for an interim measure.

24 Upon examination of the latter request, that chamber, which is the referring court in the present case, entertains doubts concerning the interpretation of EU law. The referring court considers, as a preliminary point, that the connection between the case in the main proceedings and EU law stems from the fact that the principle of effective judicial protection enshrined in EU law is applicable not only to proceedings before national courts in which they apply substantive EU law. In its view, that principle also applies when it is necessary to assess whether a Member State complies with its duty, stemming from Article 4(3) and the second subparagraph of Article 19(1) TEU, to ensure that the bodies which may, as courts or tribunals within the meaning of EU law, rule in the fields covered by EU law meet the requirements arising from that principle and, in particular, the requirement that such bodies are independent and impartial courts or tribunals previously established by law. Thus, such a requirement should be satisfied when a Member State confers on a body such as the defendant in the main proceedings the power to designate the court with jurisdiction to hear disciplinary proceedings against judges.

25 In that regard, the referring court observes, in the first place, that although the administrative link between a judge and the court in which the latter holds office may be treated as a service relationship whose existence may be established in the context of the procedure laid down in Article 189 of the Code of Civil Procedure, it is apparent from the case-law of the Sąd Najwyższy (Supreme Court) that a judge's mandate, which confers the right to exercise judicial power, reflects a legal relationship governed by public law and not by civil law. In those circumstances, an action seeking, as that in the main proceedings, a declaration that a judge's mandate does not exist is not a civil case capable of falling within the scope of the Code of Civil Procedure, in particular Article 189 thereof. However, according to the referring court, there is no procedure under national law to challenge the act by which the President of the Republic appoints a judge.

26 In those circumstances, the referring court considers that the admissibility of an application such as that in the main proceedings turns on whether, in that domestic legislative context, EU law must be interpreted as conferring on it the power, which it does not have under national law, to find, in proceedings such as the main proceedings, that the defendant concerned does not have a judge's mandate. The admissibility of the application for an interim measure brought before that court and the jurisdiction of the latter to hear it are themselves subject to the admissibility of that application in the main proceedings.

27 According to the referring court, that jurisdiction and that admissibility can stem directly from EU law where the instrument of appointment of the judge concerned, as in the present case, was adopted in breach of the principle of effective judicial protection, since the Polish authorities have endeavoured to preclude any possibility of judicial review of the compatibility with EU law of national rules or procedures governing the appointment of judges prior to the delivery of the instrument of appointment.

28 In that regard, the referring court notes that there was previously, under Article 43 and Article 44(1) and then Article 43 and Article 44(1) and (1a) of the Law on the KRS, a possibility of judicial review of the resolution by which the KRS proposes a person for appointment as a judge of the Sąd Najwyższy (Supreme Court). However, even though the procedure to provide for the appointment of judges called to sit in the new Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) had been initiated and had led, inter alia, to the appointment of the defendant in

the main proceedings, and various candidates for positions as judges in that new chamber had expressed their intention to bring appeals on the basis of those provisions, the Polish legislature deliberately inserted, in Article 44 of the Law on the KRS, a paragraph 1b providing that such appeals no longer had the effect of preventing the appointments envisaged.

29 Furthermore, after the Naczelny Sąd Administracyjny (Supreme Administrative Court), by decision of 21 November 2018, referred questions to the Court for a preliminary ruling in the case which, in the meantime, has given rise to the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153) ('the judgment in *A.B. and Others*'), on whether EU law precludes amendments such as those which have thus affected Article 44 of the Law on the KRS, the Polish legislature, in the light of the judgment of 25 March 2019 of the Trybunał Konstytucyjny (Constitutional Court), referred to in paragraph 17 above, adopted the Law of 26 April 2019 which led, first, to a declaration that cases pending before the Naczelny Sąd Administracyjny (Supreme Administrative Court) such as those that gave rise to that reference for a preliminary ruling were to be discontinued. Secondly, that law once again amended Article 44 of the Law on the KRS in order to preclude, going forward, any possibility of bringing judicial proceedings against a resolution of the KRS proposing a candidate for appointment to the position of judge of the Sąd Najwyższy (Supreme Court).

30 In the second place, the referring court notes that, in the joined cases which, in the meantime, have given rise to the judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) ('the judgment in *A.K. and Others*'), questions were referred to the Court of Justice for a preliminary ruling on the compatibility with EU law of the national provisions governing the establishment and method of appointment of the members of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court). In that context, the executive was required to refrain from such appointments until the Court of Justice and the national court which had thus made a reference to the Court of Justice for a preliminary ruling had given their judgment.

31 In the third place, the referring court asks whether the fact that J.M.'s appointment to the office of judge in the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) occurred while an action had been brought against the KRS resolution proposing that appointment and the fact that the appointment procedure was initiated by an act of the President of the Republic which did not bear the ministerial countersignature required under Article 144(3) of the Constitution, amount to a breach of the principle of effective judicial protection and, specifically, of the requirement for a tribunal 'previously established by law' within the meaning of Article 47 of the Charter.

32 In the fourth place, the referring court asks whether it is possible to challenge a person's status of judge solely on the ground that the body to which that person was appointed, namely, in the present case, the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court), does not constitute a court or tribunal within the meaning of EU law because it fails to satisfy the requirement of independence.

33 In the fifth place, and in the light of considerations similar to those which justified the questions referred to the Court in the joined cases which have since given rise to the judgment in *A.K. and Others*, the referring court is of the opinion that, since the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court), on which national law confers jurisdiction to hear a dispute such as that in the main proceedings, is not a court or tribunal within the meaning of EU law, it must itself assume jurisdiction to hear that dispute.

34 In those circumstances, the Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) of the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU, in conjunction with Article 47 of the [Charter] and the third paragraph of Article 267 TFEU, be interpreted as meaning that the court of final instance of a Member State may, in proceedings seeking a declaration that a service relationship is non-existent, declare that a person who has received a document appointing him [or her] to the position of judge in that court is not a judge in the case where that document of appointment was issued on the basis of provisions which infringe the principle of effective judicial protection or under a procedure which is incompatible with that principle, in the case where a judicial review of these matters prior to the delivery of the document of appointment has intentionally been made impossible?

(2) Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the [Charter], in conjunction with Article 267 TFEU, be interpreted as meaning that the principle of effective judicial protection is infringed in the case where a document appointing a person to the position of judge is delivered after a national court has requested a preliminary ruling concerning the interpretation of EU law and where that preliminary ruling will determine the compatibility with EU law of the national provisions the application of which made it possible for the document of appointment to be delivered?

(3) Should the second subparagraph of Article 19(1), Articles 2, 4(3) and 6(3) TEU and Article 47 of the [Charter] be interpreted as meaning that the principle of effective judicial protection is infringed by the failure to guarantee the right to effective judicial protection in the case where a document appointing a person to the position of judge of a court in a Member State is delivered following an appointment procedure carried out in flagrant breach of the laws of that Member State governing the appointment of judges?

(4) Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the [Charter], in conjunction with the third paragraph of Article 267 TFEU, be interpreted as meaning that the principle of effective judicial protection is infringed through the establishment by the national legislature of an organisational unit within the court of final instance of a Member State which is not a court or tribunal within the meaning of EU law?

(5) Should the second subparagraph of Article 19(1), Articles 2 and 4(3) TEU and Article 47 of the [Charter], in conjunction with the third paragraph of Article 267 TFEU, be interpreted as meaning that the existence of a service relationship and the status of judge of a person who received a document appointing him [or her] to the position of judge of the court of final instance in a Member State cannot be determined by the organisational unit of that court which is competent in that matter under national law, to which unit that person has been appointed, and which unit is composed exclusively of persons whose appointment documents suffer from the defects referred to in Questions 2 to 4 and which unit for those reasons is not a court or tribunal within the meaning of EU law, but must rather be determined by another organisational unit of that court which satisfies the requirements of EU law for a court or tribunal?'

Procedure before the Court

The application for an expedited procedure

35 In its order for reference, the referring court requested that the present reference be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of its request, that court stated that the application of that procedure was justified, first, in view of the need to rule on the application for an interim measure brought before it within the period of seven days laid down by national law. Secondly, beyond the present case, the answers to the questions referred to the Court for a preliminary ruling are decisive as regards the future possibility of bringing actions for a declaration that a service relationship does not exist in respect of a certain number of judges recently assigned to the various chambers of the Sąd Najwyższy (Supreme Court) whose appointment took place in conditions similar or identical to those surrounding the appointment of the defendant in the main proceedings. Thirdly, those answers would serve, where appropriate, to prevent such appointments from still being made in the future.

36 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

37 It must be borne in mind that such an expedited procedure is a procedural instrument intending to address matters of an exceptional urgency (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 37 and the case-law cited).

38 In the present case, the President of the Court decided, on 20 August 2019, after hearing the Judge-Rapporteur and the Advocate General, that it was not appropriate to grant the request referred to in paragraph 35 above.

39 In that regard, it is apparent from the information in the order for reference that, by her civil action for a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy (Supreme Court), M.F. seeks, in essence, as a first step, the temporary suspension of the decision by which J.M., acting in his capacity as President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court), designated the disciplinary court with jurisdiction to hear the disciplinary proceedings brought against her and, as a second step, a finding that that decision is ineffective.

40 As regards, first of all, the fact that inter alia an application for interim measures was brought before the referring court, it should be recalled that the fact that a request for a preliminary ruling is made in national proceedings allowing the adoption of such measures is not, in itself, capable of establishing that the nature of the case requires that it be dealt with within a short time (see, to that effect, order of the President of the Court of 18 October 2017, *Weiss and Others*, C-493/17, not published, EU:C:2017:792, paragraph 12 and the case-law cited).

41 Next, neither is the clarification of whether J.M.'s decision designating the disciplinary court having jurisdiction to hear the disciplinary proceedings brought against M.F. infringes, as the case may be, EU law capable of giving rise to a situation of exceptional urgency that could justify the application of an expedited procedure.

42 Finally, nor does the mere possibility that the Court's answer to the questions put to it in the present case might, beyond the outcome of the dispute in the main proceedings, pave the way for other actions brought against other judges recently appointed to the Sąd Najwyższy (Supreme Court) seeking a declaration that a service relationship does not exist or help to prevent other similar appointments in the future appear to be capable of justifying that the present case be dealt with under an expedited procedure.

43 Moreover, in the present case, account has also been taken of the fact that, as is apparent from paragraphs 29, 30 and 33 above, several of the concerns at the basis of the referring court's questions referred in the present case were, in essence, already the subject, when they were addressed to the Court, of other references for a preliminary ruling which were being handled at fairly advanced stages.

The request that the oral part of the procedure be reopened

44 Following the written part of the procedure, interested parties, including the Polish Government, presented oral argument at a hearing on 22 September 2020. The Advocate General delivered his Opinion on 15 April 2021, the date on which the oral part of the procedure, as a consequence, was closed.

45 By document lodged at the Court Registry on 7 May 2021, the Polish Government requested that the oral part of the procedure be reopened.

46 In support of that request, that government relied on the fact that there were differences in the views expressed in, on the one hand the Opinion of the Advocate General in the present case and, on the other hand, the Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055) and the judgment of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311), concerning the assessment of the process for appointing national judges in the different Member States in the light of EU law.

47 The Polish Government also considers that a reopening of the oral part of the procedure is justified here on the ground that, in his Opinion presented in the present case, with which that government disagrees, the Advocate General did not take sufficient account of its arguments, with the result that that Opinion lacks objectivity.

48 In that regard, it should be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26 and the case-law cited).

49 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's conclusion or by the reasoning which led to that conclusion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27 and the case-law cited).

50 As regards the Polish Government's submissions relating to an alleged lack of objectivity in the Opinion of the Advocate General in the present case, it is sufficient to note that the fact that the Polish Government considers that its arguments were not sufficiently taken into account in that Opinion or in the Opinion, to which the latter refers to a large extent, of the Advocate General in the case which was dealt with in coordination with the present case and gave rise to the judgment of 6 October 2021, *W.Ż. (Extraordinary control Chamber and public cases of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), is not, in any event, capable of establishing such a lack of objectivity.

51 In accordance with Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court.

52 In the present case, the Court considers, however, after hearing the Advocate General, that it has, following the written procedure and the hearing which was held before it, all the information necessary in order to rule on the present request for a preliminary ruling. It notes, moreover, that the Polish Government's request to reopen the oral part of the procedure does not disclose any new fact which is of such a nature as to be a decisive factor for the decision of the Court in that case.

53 In those circumstances, there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

The jurisdiction of the Court

54 According to the Prokurator Generalny (Public Prosecutor, Poland), proceedings seeking a declaration that a person does not have a service relationship as a judge and, consequently, could not lawfully designate the disciplinary court or tribunal having jurisdiction to hear disciplinary proceedings brought against another judge is a matter for national law and falls within the competence of the Member States alone, so that it falls outside the scope of EU law. Therefore, the Court has no jurisdiction to reply to the present request for a preliminary ruling.

55 As regards, more specifically, the second subparagraph of Article 19(1) TEU, the Court has jurisdiction to interpret EU law only in so far as the referring court is actually called upon to apply EU law specifically in the case before it, which is not the case here. In any event, and even if a broader interpretation of that provision were to be adopted, it would still be irrelevant in the present case because, first, when he designates the body competent to act as a disciplinary court or tribunal, the President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) does not rule on the substance of an individual dispute following an adversarial procedure. Second, that President does not have the power to adopt other decisions on matters of EU law.

56 In that regard, it must be noted that, as is apparent from settled case-law, although it is true that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and that that may be the case, in particular, as regards national rules relating to the adoption of decisions appointing judges and,

where applicable, rules relating to the judicial review that applies in the context of such appointment procedures and that of the rules governing the disciplinary regime applicable to judges (see, to that effect, judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 56 and 61 and the case-law cited, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 36 and the case-law cited).

57 Moreover, the arguments put forward by the Public Prosecutor relate, in essence, to the actual scope of the provisions of EU law mentioned in the questions referred and, therefore, to the interpretation of those provisions. Such an interpretation clearly falls within the jurisdiction of the Court under Article 267 TFEU (see, by analogy, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraph 37 and the case-law cited).

58 It follows that the Court has jurisdiction to rule on the present request for a preliminary ruling.

Admissibility

59 Irrespective of the various objections raised by J.M., the Public Prosecutor and the Polish Government as to the admissibility of the request for a preliminary ruling, it is important to bear in mind that, according to settled case-law, the Court itself must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction or whether the request submitted to it is admissible (see, to that effect, judgments of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 41 and the case-law cited, and order of 6 September 2018, *Di Girolamo*, C-472/17, not published, EU:C:2018:684, paragraph 25).

60 In that regard, the Court has regularly pointed out that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them and that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (see, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44 and the case-law cited).

61 As is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 45 and the case-law cited).

62 The Court has thus repeatedly held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 46 and the case-law cited).

63 In the present case, it should be noted at the outset that, as is apparent from the order for reference, the civil action brought by the applicant in the main proceedings does indeed formally seek a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy

(Supreme Court). However, the description of the dispute in the main proceedings set out in that decision makes it clear that M.F. challenges not so much the existence of such a contractual or administrative relationship between J.M. and the Sąd Najwyższy (Supreme Court) in their respective capacities as employee and employer, or that of rights or obligations arising from such a service relationship between the parties thereto, as the circumstances in which J.M. was appointed judge in the disciplinary chamber of that court. As is apparent from that description, by bringing the said action, M.F. is in fact seeking, in essence, to challenge the decision by which J.M., in that capacity as judge and President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court), designated, pursuant to Article 110(3) of the Law on the ordinary courts, the disciplinary court having jurisdiction to hear, at first instance, the disciplinary proceedings brought against M.F.

64 In support of her action in the main proceedings, M.F. thus submits, in essence, that, having regard to the circumstances in which J. M. was appointed, that designation decision was adopted by a person who does not have the status of an independent and impartial judge previously established by law and, therefore, that her fundamental right to a fair trial is not guaranteed in the disciplinary proceedings brought against her before that disciplinary court.

65 Moreover, it should be noted that, in the dispute in the main proceedings, M.F. seeks, inter alia, as an interim measure, an order to stay those disciplinary proceedings. As is apparent from the order for reference, it was in fact upon examining specifically that request for an interim measure that the referring court decided to stay the proceedings and to refer to the Court the present request for a preliminary ruling.

66 As regards the fact that the action in the main proceedings seeks a declaratory decision with a view to preventing the infringement of a right which is seriously threatened, it is true that, in so far as that type of action is permitted under national law and a referring court has held that the action brought before it on the basis of that law is admissible, it is not for this Court to call that assessment in question, with the result that the questions submitted by that national court meet an objective need for the purpose of settling disputes properly brought before it (see, to that effect, judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 64 and 65).

67 In the present case, however, it should be noted that, in its order for reference, the referring court points out that, when it is seised of a civil action for a declaration that a legal relationship such as that in the main proceedings does not exist, it lacks precisely, under the applicable national law, the jurisdiction which would enable it to rule on the lawfulness of the instrument by which the person concerned was appointed judge, and that the admissibility of that action cannot be established on the basis of that national law either.

68 In that regard, it should be recalled that, in principle, the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU presupposes that the referring court has jurisdiction to rule on the dispute in the main proceedings, so that it cannot be regarded as purely hypothetical (order of 6 September 2018, *Di Girolamo*, C-472/17, not published, EU:C:2018:684, paragraph 31).

69 While this may be different in certain exceptional circumstances (see, to that effect, the judgment in *A.K. and Others*, paragraph 166 and the case-law cited, and the judgment in *A.B. and Others*, paragraph 150), such a solution cannot be adopted in the present case.

70 In the first place, and as has been pointed out in paragraphs 63 to 65 above, it is apparent from the description of the dispute in the main proceedings set out in the order for reference that, although formally seeking a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy (Supreme Court), which is entirely unrelated to the applicant in the main proceedings, the action brought by the latter ultimately seeks to challenge the validity of J.M.'s appointment to the position of judge of the Sąd Najwyższy (Supreme Court) and to thus to have resolved a legal issue arising in the disciplinary proceedings currently pending against her before another court, that is to say legal proceedings which are separate from those initiated in the main proceedings and in respect of which she is also seeking from the referring court an order to stay those proceedings as an interim measure.

71 It follows that the questions referred to the Court in the present case relate intrinsically to a dispute other than that in the main proceedings, to which the latter is in fact merely incidental, in that, by those questions, the referring court seeks to determine whether J.M.'s appointment as President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) and the designation by that judge of the disciplinary court called upon to hear disciplinary proceedings such as those in respect of the applicant in the main proceedings, are compatible with EU law and, ultimately, whether the disciplinary court thus designated by J.M. to hear such disciplinary proceedings in respect of that applicant constitutes an independent and impartial tribunal previously established by law within the meaning of the second paragraph of Article 47 of the Charter. In those circumstances, the Court would be obliged, in order fully to determine the scope of those questions and to provide them with an appropriate answer, to have regard to the relevant factors characterising that other dispute rather than to confine itself to the configuration of the dispute in the main proceedings, as required however by Article 267 TFEU.

72 In the second place, it appears that, in the absence of a direct right of action against J.M.'s appointment as President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) or against J.M.'s decision designating the disciplinary court in charge of examining that dispute, M.F. could have raised before that court an objection alleging a possible infringement, arising from that decision, of her right to have the said dispute determined by an independent and impartial tribunal previously established by law.

73 In that regard, it is important to note that, after the present request for a preliminary ruling was brought, the Court held that Article 110(3) and Article 114(7) of the Law on the ordinary courts, inasmuch as they confer on the President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings in respect of judges of the ordinary courts, that is to say, judges who may be called upon to interpret and apply EU law, do not meet the requirement derived from the second subparagraph of Article 19(1) TEU that such cases must be examined by a tribunal 'established by law' (judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 176).

74 In so far as it lays down such a requirement, the second subparagraph of Article 19(1) TEU must also be regarded as having direct effect (see, by analogy, the judgment in *A.B. and Others*, paragraph 146), with the result that the principle of primacy of EU law requires a disciplinary court so designated to disapply the national provisions, referred to in the preceding paragraph, pursuant to which that designation was made and, consequently, declare that it has no jurisdiction to hear the dispute before it.

75 In the third place, it is apparent from the explanations set out in the order for reference, as summarised in paragraphs 27 to 29 above, and from the very wording of the first question referred that the questions formulated by the referring court in the present case relate, inter alia, to the fact that the national legal order has been deliberately overhauled by the Polish legislature in order to prevent, going forward, the process for appointing judges to the Sąd Najwyższy (Supreme Court) from being subject to effective judicial review. In that context, the referring court asks whether, having regard specifically to the purpose and effect of that legislative overhaul, it may consider itself to have jurisdiction under EU law to carry out such a review in the dispute in the main proceedings.

76 First, as is apparent from paragraph 22 above, the KRS resolution of 23 August 2018 putting forward J.M. for appointment to the position of judge of the Sąd Najwyższy (Supreme Court) was the subject of an appeal brought, on the basis of Article 44(1a) of the Law on the KRS, before the Naczelny Sąd Administracyjny (Supreme Administrative Court) by a candidate not proposed for appointment under that resolution.

77 Secondly, as regards the legislative amendments criticised by the referring court and referred to in paragraphs 28 and 29 above, which successively affected Article 44 of the Law on the KRS, it must be pointed out that, since the present request for a preliminary ruling was made, the Court has held, inter alia, in the operative part of the judgment in *A.B. and Others*, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

– notwithstanding the fact that a candidate for a position as judge at a court such as the Sąd Najwyższy (Supreme Court) lodges an appeal against the decision of a body such as the KRS not to accept his or her application, but to put forward that of other candidates to the President of the Republic, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned, and

– moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made,

where it is apparent – a matter which the Court invited the referring court in the case which gave rise to that judgment to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

78 In that operative part, the Court also held that where amendments are made to the national legal system which, first, deprive a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the Sąd Najwyższy (Supreme Court) against decisions of a body such as the KRS not to put forward their

application, but to put forward that of other candidates to the President of the Republic for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling:

– Article 267 TFEU and Article 4(3) TEU must be interpreted as precluding such amendments where it is apparent – a matter which the Court invited the referring court in the case which gave rise to the judgment in *A.B. and Others* to assess on the basis of all the relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions;

– the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it was for that referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic, on the basis of those decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

79 Lastly, the Court stated in the said operative part that, where such infringements of EU law are proven, the principle of primacy of EU law must be interpreted as requiring the referring court in the case which gave rise to the judgment in *A.B. and Others* to disapply the national provisions concerned and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

80 Thirdly, it must be recalled that, in paragraphs 129 and 156 of the judgment in *A.B. and Others*, the Court stated, in particular, that such infringements of the second subparagraph of Article 19(1) TEU may arise in circumstances in which all the relevant factors characterising a process of appointment to judicial positions of a national supreme court, in a specific national legal and factual context, and in particular the circumstances in which the judicial remedies against such a process of appointment which previously existed are suddenly eliminated or rendered ineffective, appear to be such as to give rise to systemic doubts in the minds of subjects of the law as to the independence and impartiality of the judges appointed at the end of that process.

81 However, the Court has also expressly stated, in those paragraphs 129 and 156, that, as such, the fact that it may not be possible to exercise a legal remedy in the context of such a process of appointment may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU. It must be stated, in that regard, that an action such as that in the main proceedings seeks, in essence, to obtain a form of *erga omnes* invalidation of the appointment of the defendant in the main proceedings to the office of judge of the Sąd Najwyższy (Supreme Court), even though national

law does not authorise, and has never authorised, all subjects of the law to challenge the appointment of judges by means of a direct action for annulment or invalidation of such an appointment.

82 In the light of all the foregoing and the fact that the role of the Court under Article 267 TFEU is to supply all courts or tribunals in the European Union with the information on the interpretation of EU law which is necessary to enable them to settle genuine disputes which are brought before them, taking into account in particular, in that context, the whole system of legal remedies available to private individuals, it must be held that the questions referred to the Court in the present reference for a preliminary ruling go beyond the scope of the duties of the Court under Article 267 TFEU (see, by analogy, judgment of 11 March 1980, *Foglia*, 104/79, EU:C:1980:73, paragraph 12).

83 In those circumstances, the present reference for a preliminary ruling must be declared inadmissible.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The request for a preliminary ruling from the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland), is inadmissible.

[Signatures]