



Reports of Cases

ORDER OF THE PRESIDENT OF THE COURT

15 November 2018*

(Expedited procedure)

In Case C-619/18,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 2 October 2018,

European Commission, represented by K. Banks, H. Krämer and S.L. Kaleda, acting as agents,

applicant,

v

Republic of Poland, represented by B. Majczyna, acting as Agent,

defendant,

THE PRESIDENT OF THE COURT,

after hearing the Judge-Rapporteur, A. Prechal, and the Advocate General, E. Tanchev,

makes the following

Order

- 1 By its application, the European Commission requests that the Court declare that, on the one hand, by lowering the retirement age of the judges appointed to the Sąd Najwyższy (Supreme Court, Poland) and by applying that measure to the judges appointed to that court before 3 April 2018 and, on the other, by granting the President of the Republic of Poland the discretion to extend the period of judicial activity of judges of that court, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.
- 2 On 20 December 2017, the President of the Republic of Poland signed the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5), which entered into force on 3 April 2018. That law has undergone a number of successive amendments.
- 3 By virtue of Article 37 of the Law on the Supreme Court, the retirement age of judges at the Sąd Najwyższy (Supreme Court) has been lowered to 65 years. The reduction in the retirement age applies to all judges at that court, including those appointed before the entry into force of that law.

* Language of the case: Polish.

- 4 Extension of the period of judicial activity of the judges of the Sąd Najwyższy (Supreme Court) beyond the age of 65 years is subject to the presentation by those judges of a declaration stating their wish to continue to carry out their duties and a certificate stating that their state of health allows them to do so, together with authorisation from the President of the Republic of Poland. Article 37 of the Law on the Supreme Court governs that extension.
- 5 By virtue of Article 111(1) of the Law on the Supreme Court, judges of the Sąd Najwyższy (Supreme Court) who have reached 65 years of age at the date of entry into force of that law, or by 3 July 2018 at the latest, retire on 4 July 2018, unless they have presented, before 3 May 2018 inclusive, the declaration and certificate referred to in the paragraph above and provided that the President of the Republic of Poland has authorised the extension of their duties in the service of that court. Article 5 of the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the common law courts, the Law on the Supreme Court and certain other laws) of 10 May 2018 (Dz. U. of 2018, heading 1045) contains independent provisions governing the procedure for extending the period of judicial activity of the judges of the Sąd Najwyższy (Supreme Court) who have reached retirement age on or before 3 July 2018.
- 6 By virtue of Article 111(1a) of the Law on the Supreme Court, judges of the Sąd Najwyższy (Supreme Court) who will reach 65 years of age between 4 July 2018 and 3 April 2019, will retire on 3 April 2019, unless they have presented, before 3 April 2019, the declaration and certificate referred to in paragraph 4 of this order and provided that the President of the Republic of Poland authorises the extension of their duties in the service of that court.
- 7 With regard to judges of the Sąd Najwyższy (Supreme Court) who were appointed to that court before 3 April 2018 and who will reach 65 years of age after 3 April 2019, Article 37(1) of the Law on the Supreme Court provides that extension of the period of judicial activity of those judges beyond the age of 65 years is subject to the general regime, which requires the presentation of a declaration and a certificate and the authorisation of the President of the Republic of Poland, as set out in paragraph 4 of this order.
- 8 As is apparent from the file before the Court, in accordance with the disputed national provisions, when taking his decision on the extension of the period of judicial activity of the judges of the Sąd Najwyższy (Supreme Court), the President of the Republic of Poland is not bound by any criteria and his decision is not open to review by the courts.
- 9 Finally, it is also apparent from that file that the Law on the Supreme Court leaves the President of the Republic of Poland free to decide, until 3 April 2019, to increase the number of judges of the Sąd Najwyższy (Supreme Court).
- 10 By separate document, lodged at the Registry of the Court on 2 October 2018, the Commission also brought an application for interim relief seeking the grant of provisional measures under Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure of the Court, pending the judgment of the Court on the substance.
- 11 By order of 19 October 2018, the Vice-President of the Court, pursuant to Article 160(7) of the Rules of Procedure, even before the Republic of Poland had submitted its observations on the application for interim relief, ordered that Member State, immediately and until the order which will end the interlocutory proceedings has been delivered:
 - to suspend application of the provisions of Article 37(1) to (4) and of Article 111(1) and (1a) of the Law on the Supreme Court, of Article 5 of the Law amending the Law on the organisation of the common law courts, the Law on the Supreme Court and certain other laws and of all other measures adopted in application of those provisions;

- to adopt all necessary measures to ensure that the judges of the Sąd Najwyższy (Supreme Court) affected by those provisions may carry out their duties in the same post while benefiting from the same staff regulations, the same rights and employment conditions as those under which they were employed until 3 April 2018, the date of entry into force of the Law on the Supreme Court;
 - to refrain from any measure appointing judges to the Sąd Najwyższy (Supreme Court) in the place of those affected by the provisions which form the basis of the failure to fulfil obligations and the subject matter of the main action, and any measure to appoint the new First President of that court or to indicate the person responsible for leading that court in the place of its First President until the appointment of the new First President; and
 - to communicate to the Commission, at the latest one month after service of the order granting those measures and then regularly, each month, details of all the measures which it has adopted in order to comply fully with this order.
- 12 By separate document, lodged at the Registry of the Court on 2 October 2018, the Commission, by virtue of Article 133(1) of the Rules of Procedure, also requested the Court to determine the present case pursuant to an expedited procedure.
- 13 Article 133(1) of the Rules of Procedure states that, at the request of the applicant or defendant, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.
- 14 When asked, in accordance with that provision, by the President of the Court, the Republic of Poland stated that it opposed the present case being determined pursuant to an expedited procedure.
- 15 In support of its request, the Commission submits that the complaints which it raises in its action allege infringement of the safeguards ensuring the independence of the supreme court of a Member State and that the systemic concerns on which those complaints are based are such as to give rise to legal uncertainty and to hinder the proper functioning of the EU legal order, so that it is necessary quickly to rule on the dispute in order to limit that period of uncertainty so far as possible.
- 16 On the one hand, having regard to their specific duties and the authority attaching to their decisions in the national legal order and to the particular obligation to which they are subject under the third paragraph of Article 267 TFEU, the national supreme courts play a central role in the system for the application of EU law. Any doubts as to the compliance with the guarantees of independence as regards those courts are such as to prevent them fully from playing that role. On the other, such doubts are also likely to undermine the mutual trust between the Member States and their respective courts, necessary for the principle of mutual recognition, which plays an essential role in connection with many legal acts of the European Union concerning the area of freedom, security and justice, to function.
- 17 The Polish Government, for its part, is of the view that the Commission's request for expedited procedure has the effect of unduly restricting that government's rights of defence. First of all, since the case raises important questions of principle and, moreover, objections as regards admissibility, it is difficult to see how the defendant State could present all the necessary arguments in those various respects in a single pleading and how the procedure would not call for a reply and a rejoinder. Furthermore, it is also necessary that any interveners be able to submit observations on such questions of principle. Finally, the Commission delayed bringing the action before the Court and that delay cannot now be remedied by such a restriction on the procedural rights of the defendant State.

- 18 With regard to the alleged threats to the independence of the Sąd Najwyższy (Supreme Court) posed by the disputed national provisions, the Commission has not submitted any concrete evidence to substantiate their reality or specify their extent, nor has it shown how the proper functioning of the EU legal order could be compromised without an expedited procedure. The measures contested by the Commission are, according to the Republic of Poland, merely such as to entail the retirement of a limited number of judges of the Sąd Najwyższy (Supreme Court), which will not affect the functioning and judicial activity of that court, nor its ability to make references to the Court of Justice on the basis of Article 267 TFEU, nor the security of the legal relationships based on the decisions delivered by the judges who have not reached retirement age, nor, finally, the suitability of the Sąd Najwyższy (Supreme Court) to act in the context of the judicial cooperation between the Member States, in which cooperation that court, moreover, unlike the ordinary courts, will be called upon only rarely to act.
- 19 In the first place, as regards whether the present case is of a kind requiring to be dealt with within a short time under Article 133(1) of the Rules of Procedure, it must be borne in mind that, by the present action, the Commission argues that the recent amendments to the legislation relating to the lowering of the age at which the members of the Sąd Najwyższy (Supreme Court) retire and the conditions on which those judges may, if necessary, be authorised beyond that age to continue to carry out their duties infringe the provisions of primary EU law referred to in paragraph 1 of this order.
- 20 In particular, the present action for failure to fulfil obligations was brought in view of the doubts entertained by the Commission as to the ability of the Sąd Najwyższy (Supreme Court), following those legislative amendments, to continue to rule in compliance with the fundamental right of any individual to have access to an independent court, as enshrined in Article 47 of the Charter of Fundamental Rights.
- 21 It must be recalled that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 48).
- 22 In addition, the uncertainties thus surrounding the disputed national provisions are also liable to have an effect on the working of the system of judicial cooperation embodied by the preliminary ruling mechanism provided for in Article 267 TFEU, the keystone of the EU judicial system, for which the independence of the national courts, and particularly those ruling at last instance, is essential (see, to that effect, Opinion 2/13 (*Accession of the European Union to the ECHR*), 18 December 2014, EU:C:2014:2454, paragraph 176; judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 43; and order of the President of the Court of 26 September 2018, *Zakład Ubezpieczeń Społecznych*, C-522/18, not published, EU:C:2018:786, paragraph 15).
- 23 In the second place, as regards the allegation of the Republic of Poland that its rights of defence would be affected if the request for an expedited procedure were upheld, it must be observed first of all that, as is apparent from Article 134(1) of the Rules of Procedure, under that procedure, the application initiating proceedings and the defence may be supplemented by a reply and a rejoinder only if the President of the Court, after hearing the Judge-Rapporteur and the Advocate General, considers this to be necessary.
- 24 It must be pointed out, in that regard, that, if the lodging of a reply were not authorised by the President of the Court, a decision which has not yet been taken, it is not apparent, in the absence of such a reply and therefore of arguments supplementing and developing those appearing in the application to which the defendant had all the opportunities to reply in its defence, how the defendant

could claim that its rights of defence are affected by the fact that it was not in a position to lodge a rejoinder. Furthermore, it must be recalled that proceedings for a declaration of failure to fulfil obligations before the Court are preceded by a pre-litigation procedure during which the parties have the opportunity to set out and develop the line of argument which they will, subsequently, be called upon to expound before the Court in the event of proceedings before it being brought.

- 25 In the light of the foregoing, a response from the Court within a short time is such as, for the purposes of legal certainty, in the interest of both the European Union and the Member State concerned, to remove the uncertainties relating to fundamental questions of EU law and concerning in particular the existence of possible interference with certain fundamental rights safeguarded by EU law and the effects which the interpretation of that law is likely to have as regards the actual composition and working conditions of the supreme court of that Member State (see, to that effect, order of the President of the Court of 26 September 2018, *Zakład Ubezpieczeń Społecznych*, C-522/18, not published, EU:C:2018:786, paragraph 15).
- 26 Indeed, the Court is still seised of an application for interim relief, made by the Commission, with a view to the grant of provisional measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure. However, as has been pointed out in paragraph 11 of this order, the Vice-President of the Court, by order of 19 October 2018, which was made after the Republic of Poland lodged its observations on the request for expedited procedure, adopted, on the basis of Article 160(7) of those rules, the provisional measures sought by the Commission which will be effective until delivery of the order closing the interlocutory proceedings. It must therefore be stated that, without prejudice to the decisions which will be taken in that respect, if the Court were to maintain, in the order to be made, the provisional measures adopted pending its delivery, that Member State would itself have every interest in the procedure on the substance in the present case being closed within a short time, in order that those measures may be ended and the questions raised by this case may become the subject of a final decision.
- 27 In any event, it is appropriate to point out that the subject matter and the conditions triggering an application for interim relief and those triggering the expedited procedure provided for in Article 133 of those rules are not identical (order of the President of the Court of 11 October 2017, *Commission v Poland*, C-441/17, not published, EU:C:2017:794, paragraph 15).
- 28 In the present case, it appears, without prejudice to the decisions which will be taken in the order terminating the proceedings for interim relief, that the nature of the present case justifies application of the expedited procedure, on the grounds set out in paragraphs 19 to 25 of the present order.
- 29 Accordingly, it is appropriate to order that Case C-619/18 be determined pursuant to the expedited procedure.

On those grounds, the President of the Court hereby orders:

1. **Case C-619/18 shall be determined under the expedited procedure as referred to in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure of the Court.**
2. **The costs shall be reserved.**

[Signatures]