

THEMIS

ASSOCIATION OF JUDGES

www.themis-sedziowie.eu e-mail: stowarzyszenie@themis-sedziowie.eu

Prepared for a Zoom hearing with MEPs organized by the Open Dialogue Foundation on 8 October 2020

I. Case study of Judge Beata Morawiec.

Beata Morawiec – President of Association of Judges “Themis”, the former member of the “old” National Council of the Judiciary and the former President of Kraków (Cracow) Regional Court¹.

Her story began when, at the end of November 2017, the current Minister of Justice Mr Zbigniew Ziobro removed her from the position of the President of Regional Court in Kraków. This took place within the national purge of court presidents which was conducted on the basis of introductory provisions of the Act on the Organization of Ordinary Courts. Over the 6 months since the amendment of the mentioned Act entered into force, the Minister of Justice arbitrarily and often by using untrue or fabricated statistical data on the effectiveness of the courts, dismissed around 160 presidents and vice presidents of Ordinary Courts before their terms of office expired. In an announcement posted on the ministry’s website, her name was linked to an investigation of the public prosecutor concerning an alleged corruption in the Kraków Court of Appeal, which she had no role or involvement in. Judge Morawiec was also accused of allegedly low quality of work, however the statistics which were basis for the allegation were fabricated.

Beata Morawiec was the only former court president in Poland who sued the Minister of Justice regarding the protection of her reputation – for the content of the announcement on the ministry’s website. Taking into account the above circumstances, it should come as no surprise that she won the case against the Minister in the court of first instance. Ziobro appealed so the case is pending, the files of the case have just been transferred to the Warsaw Court of Appeal.

¹ The case of Judge Morawiec was described in many publications available in English:

- <http://themis-sedziowie.eu/materials-in-english/public-prosecutor-enters-the-home-of-a-judge-fighting-for-free-courts-in-poland-by-mariusz-jaloszewski/> ,
- <http://themis-sedziowie.eu/materials-in-english/the-cba-and-the-prosecutor-in-judge-beata-morawiecs-home-they-secured-a-laptop-by-magdalena-galczynska/> ,
- <https://wyborcza.pl/7,173236,26339985,solidarity-with-morawiec-a-nationwide-campaign-against-judicial.html> ,
- <https://ruleoflaw.pl/this-time-will-verify-which-judge-has-a-moral-backbone/> ,
- <https://ruleoflaw.pl/the-disciplinary-chamber-goes-to-task-on-judges-morawiec-and-tuleya/> ,
- <https://www.polishnews.co.uk/cba-in-the-house-of-judge-beata-morawiec-judge-dariusz-mazur-comments-illegal-actions-of-the-prosecutors-office/>

On 15 September 2020, an information appeared on one of the pro-government news portals according to which the Department of Internal Affairs of the National Public Prosecutor's Office is conducting an investigation against Judge Beata Morawiec and, in the course of this investigation, a request to waive her immunity was submitted to the Disciplinary Chamber of the Supreme Court. The information was soon after confirmed by the spokesperson of the Public Prosecution Office. The prosecutor's office wants to charge Beata Morawiec firstly for an alleged, fictitious 2013 agreement with the Court of Appeal in Kraków. The prosecutor's office claims the judge took PLN 5,000, but did not prepare an opinion. Secondly, the judge is also under threat of being charged with allegedly receiving a mobile phone from a defendant in 2012 for passing sentence in his favor. There are indications that the second charge is based on the slander of a person temporarily arrested in a financial scandal in the Kraków Court of Appeal. It is very important that prior to the filing of the motion to waive the immunity of Judge Morawiec, the prosecutor did not give her any official opportunity to comment on the allegations presented to her.

In response to the charges brought against her, on 17 September 2020, Judge Morawiec published a report made by her in 2013 for the Court of Appeal on social media, which completely undermines the first of the charges against her. The judge also staunchly denied that she ever accepted any financial advantage in return for the sentence.

On 18 September 2020, a little after 6 a.m., a public prosecutor, assisted by the Central Anticorruption Bureau (CBA), entered Judge Beata Morawiec's house. Threatening to search the house, he took her official laptop containing sensitive data. The stated reason was to secure the requested report from 2013 as well as the electronic media on which it was prepared. According to the opinion of recognized legal authorities, issuing a search warrant for a judge's house without the permission of the disciplinary court, in a situation where the judge voluntarily disclosed the content of the report on social media, was an unlawful act, violating the principle of proportionality. There are currently speculations among the judicial community as to whether the current criminal charges against Judge Morawiec could be a consequence of the fact that she came into conflict with the minister and humiliated him by winning the case and of the fact that she is the President of the Judges' Association 'Themis' which is fiercely critical in respect of the pseudo-reform of the judiciary.

Although the case against Judge Morawiec does not constitute disciplinary proceedings, but criminal proceedings, it should be perceived as a manifestation of legal harassment of judges who defend the rule of law in Poland. It is characteristic that the proceedings in the case are conducted by the Internal Affairs Department of the National Public Prosecutor's Office², which was created in 2016, whose statutory purpose is to "conduct criminal proceedings against judges and prosecutors"³ and that is subordinated directly to the Minister of Justice-Prosecutor General, who lost a case for the protection of personal rights to Judge Morawiec. Equally disturbing is the fact that the waiving of judge Morawiec's immunity will be decided by the

² See subchapter V.2.b) of the report "Judges under special supervision, namely 'The great reform' of the Polish justice system", accessible under the link: http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges_under_special_supervision_second-publication.pdf

³ In the light of the opinion of Advocate General Bobek of 23 September 2020 establishment of such a special prosecutorial unit with exclusive jurisdiction for offences committed by the members of the judiciary may be contrary to the EU law, especially if it is not justified by genuine and weighty reasons and if it does not meet the requirement of independence from politicians, see: https://curia.europa.eu/jcms/jcms/p1_3230409/en/

Disciplinary Chamber of the Supreme Court, which according to the rulings of the Polish Supreme Court of 5 December 2019 and 23 January 2020 is not a court within the meaning of the Polish Constitution and the law European Union, with its operation having been likewise suspended by the CJEU under the interim measure of 8 April 2020⁴. The hearing on the revocation of the judge's immunity is scheduled for **12 October 2020, at 11 a.m. in room B** of the Polish Supreme Court building in Warsaw.

II. Disciplinary Chamber of the Supreme Court.

Since the CJEU, on April 8, 2020, imposed an interim measure freezing the activities of the Disciplinary Chamber of the Polish Supreme Court, this authority, as a rule, ceased examining typical disciplinary cases against judges and representatives of other legal professions. This does not mean, however, that the Disciplinary Chamber and its bodies have completely ceased their judicial and administrative activities, as some categories of cases are still examined by this chamber. Firstly, the adjudicators in the Disciplinary Chamber adopted the interpretation that this Chamber, despite the CJEU interim measure, may pursue cases for the waiver of judges and prosecutors' immunities, which then allows for criminal proceedings against them. Secondly, the President of the Disciplinary Chamber, at the request of disciplinary commissioners in their proceedings against judges, issues orders to appoint local disciplinary courts that are competent to hear the cases of individual judges (there is no doubt that this is an activity within the proper disciplinary proceedings). In the opinion of the author of this study, the described types of activity of the Disciplinary Chamber and its President violate the interim measure of the CJEU of 8 April 2020. In accordance with the decision on securing measures issued by the CJEU: *The Republic of Poland shall be required, immediately and pending the judgment in Case C 791/19, to – suspend the application of the provisions of Article 3(5), Article 27 and Article 73(1) of the Supreme Court Act of 8 December 2017 (OJ L 2018, item 5), as amended, which constitute the basis for the jurisdiction of the Disciplinary Chamber of the Supreme Court in both the first and second instance, in disciplinary cases of judges.*

From the formal point of view the scope of application of art. 27 of the Supreme Court Act covers both the proper disciplinary proceedings and the proceedings to waive the immunity of a judge. However, proceedings to revoke a judge's immunity are not strictly disciplinary proceedings, but a preliminary stage of criminal proceedings against a judge, which is necessary in order to bring charges against a particular judge and question him as a suspect, without which it is not possible to bring an indictment to the court. However, attention should be paid to two specific features of the proceedings for the waiver of a judge's immunity. Firstly, the proceedings to revoke immunity are carried out primarily in accordance with the provisions governing the course of disciplinary proceedings, and only in matters not covered by the provisions of the disciplinary proceedings, the provisions of the Code of Criminal Procedure (Article 128 of the Act on the System of Common Courts) apply accordingly. Second, according to Art. 129 par. 2 and par. 3 of the Act on the System of Common Courts, when issuing a decision to waive the immunity of a judge, the Disciplinary Chamber of the Supreme Court automatically suspends a judge in his/her duties (for the duration of criminal proceedings against a judge, which in practice means an indefinite period), and reduces his remuneration by

⁴ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf>

25 to 50% for a period of the suspension. Moreover, pursuant to Art. 80 par. 2 h of the Act on the System of Common Courts, if the prosecutor requests that a judge be temporarily arrested, the resolution waiving immunity also means consent to the temporary arrest of the judge. Taking into account the above-described effects of the lifting of a judge's immunity, which are manifested in the removal of a judge for an indefinite period from adjudication, lowering his remuneration and consenting to his temporary arrest, there is no doubt that this procedure also constitutes a potentially powerful weapon of repression against judges in the hands of the politicized Disciplinary Chamber of the Supreme Court.

Moreover, in the judgment of 23 September 2020 in the case number II DO 52/20 concerning the waiver of the prosecutor's immunity, 3 persons adjudicating in the Disciplinary Chamber of the Supreme Court expressed the view that the judgment of the CJEU of 19 November 2019 concerning preliminary questions from the Polish Supreme Court in joined cases C-585/18, C-624/18, and C-625/18 are not binding in the Polish legal system. The latter may not come as a surprise, as it was the judgment of the CJEU of 19 November 2019 that indicated the criteria for assessing the independence of a judicial authority, and it is on the basis of these criteria that the Polish Supreme Court in the judgment of 5 December 2019 and in the resolution of the joint chambers of 23 January 2020, ruled that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of European Union law or within the meaning of the Polish Constitution. This does not change the fact that in issuing the ruling in case II DO 52/20, the Disciplinary Chamber of the Supreme Court clearly confirmed that it does not respect European Union law, which absolutely should not be tolerated by the European community.

III. Internal Affairs Department of the State Prosecution Service.

Another central body which has the objective of handling proceedings against judges is the Internal Affairs Department of the State Prosecution Service, which was established to '*conduct and supervise preparatory proceedings in cases of intentional crimes prosecuted by public indictment, committed by judges, prosecutors, trainee judges or trainee prosecutors*'. Therefore, this department's task includes prosecuting judges for crimes. The Minister of Justice – Prosecutor General established the Internal Affairs Department, with the positioning of this Department at the top of the prosecution service's organizational structure meaning that the Minister is not only its direct superior and supervisor, but also directly influences its operations.

At this point, it should be emphasized that at present it is the Internal Affairs Department of the State Prosecution Service that is slowly taking over from the disciplinary commissioners the discretion of priority in politically motivated, legal persecution of judges. This is due to the fact that since the CJEU applied an interim measure on April 8, 2020, consisting in freezing the activities of the Disciplinary Chamber of the Polish Supreme Court, this authority, as a rule, ceased to examine typical disciplinary cases against judges and representatives of other legal professions. At the same time, as mentioned above, the adjudicators in the Disciplinary Chamber adopted the interpretation, in the opinion of the author of this study, incorrect, that this Chamber, despite securing the CJEU, may pursue cases to waive judges and prosecutors' immunities, which enables criminal proceedings against them. Applications for the waiver of judges' immunities are being prepared by the Internal Affairs Department of the State

Prosecution Service. Examples of just this type of cases are those described in point I of this report on the case of judge Beata Morawiec and Igor Tuleya.

It should be noted that an important legal opinion has recently appeared which gives grounds to question the compliance of the Internal Affairs Department of the State Prosecution Service with the principles of European law. It concerns the opinion of Advocate General Michał Bobek in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19. In this opinion, Advocate General Bobek expressed, inter alia, the position according to which: *EU law precludes the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition.* (C-83/19: 334).

IV. Action proposals.

- 1) Adopting resolutions and statements urging the European Commission:
 - a. to urgently request the ECJ for a penalty payment regarding the continuing violation of its interim measures of 8 April 2020 in order to prevent the Disciplinary Chamber from proceeding with any activities until the final decision of proceedings in Case C 791/19.
 - b. to initiate new infringement procedures against Poland for breach of EU Law as recommended by the European Parliament in its resolution of 17 September 2020, regarding:
 - Constitutional Tribunal,
 - National Council of the Judiciary,
 - So-called Muzzle Law,
 - c. extend the scope of requested infringement procedures with a new one, regarding the Internal Affairs Department of the State Prosecution Service, on the basis of the opinion of Advocate General Michał Bobek in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19,
- 2) Address the prosecuting authority headed by the Minister of Justice of Poland, who is also the current Prosecutor-General, urging it:
 - a) to immediately abandon proceedings against Polish judges who try to implement the CJEU judgement of 19 November 2019 initiated in clear breach of European Law⁵,
 - b) to conduct effective criminal proceedings against one of the members of the National Council of the Judiciary, Jarosław Dudzicz, on account of anti-Semitic hate speech entries on the Internet allegedly committed in 2015,
- 3) Address the Polish government to establish a special, independent parliamentary committee that would investigate and explain the operation of the so-called "troll farm" in the Ministry of Justice, which was exposed in August 2019. Although the case is being investigated

⁵ They are described in 'Themis' report: http://themis-sedziowie.eu/wp-content/uploads/2020/05/Response_Polish_Authorities_CJEU_Judgement_19.11.2019.pdf

by the prosecutor's office, it has not brought any results. It is hard to expect that it will be conducted in a reliable and independent manner in a situation where the closest associates of the Minister of Justice - the Prosecutor General were to be active participants in the criminal procedure.

4) Adopt a statement strongly condemning the ruling of the Disciplinary Chamber of the Polish Supreme Court of February 4, 2020, pursuant to which judge Paweł Juszczyszyn was unjustifiably suspended from his duties, since under this ruling the judge was removed from the profession for an indefinite period of time (including reduction of his salary) due to his attempt to enforce the CJEU ruling of 19 November 2019. In addition, the judgment was issued with a flagrant breach of both the procedural provisions (in the examination of the disciplinary prosecutor's complaint, which was inadmissible by law) and the substantive law (the judge was de facto punished under the "muzzle act", which was not yet in force at the time when he took his action, and thus his punishment was in breach of the principle of "lex retro non agit"). Such action of the Disciplinary Chamber is an example of multi-layered unlawfulness.

5) Adopt a stance strongly condemning the collective legal persecution of Polish judges by politicized, central disciplinary commissioners (i.e. Piotr Schab, Przemysław Radzik and Michał Lasota) in connection with actions taken by judges to defend the rule of law and the independence of the judiciary:

- a partially successful attempt to force local disciplinary commissioners to initiate disciplinary proceedings against 1,278 judges who signed a letter to OSCE expressing concern about the correct conduct of the presidential election planned for 10 May 2020,
- bringing disciplinary charges against 14 members of the Judges' Cooperation Forum committee for alleged failure to comply with the obligation to disclose their membership in the Forum in spite of the fact that the Forum is an informal group rather than a registered organization,
- bringing disciplinary charges against 10 members of the board of the Association of Polish Judges "Iustitia" due to the resolution adopted by them questioning the legal status of the Extraordinary Control and Public Affairs Chamber, and thus undermining the resolution adopted by this Chamber on the validity of the presidential election in 2020.

6) Adopt a statement condemning the situation in which the Polish neo-National Council of the Judiciary indicated as a candidate for a judge of the District Court a person who, contrary to the principles of impartiality and apoliticality of judges, financially supported one of the parties during the election campaign, openly declaring support for this party in social media, which disturbingly resembles the medieval practice of selling offices.

7) Continue activities aimed at making the distribution and payment of European funds conditional on compliance with the rule of law.