

PROCEDURE OF APPEAL AGAINST RESOLUTIONS OF THE NATIONAL COUNCIL OF THE JUDICIARY

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Summary. The essence of the procedure of appeal against resolutions of the National Council of the Judiciary, conducted solely before the Supreme Court, is defined by mechanisms for the recognition of public law cases. Such mechanisms concentrate around the notion of public case, which is to be legally understood here as legal proceedings in the field of public law. The considerations of legislative technique decided at the time that a public case had to, first of all, be legally based in the provisions of the Code of Civil Procedure on cassation. In this context, specific constructs of appeal proceedings against resolutions of the National Council of the Judiciary emerged.

Key words: appeal proceedings, Supreme Court, public case, resolution of the National Council of the Judiciary

The nature of the procedure of appeal against the resolutions of the National Council of the Judiciary raises much controversy. Generally, the problem is the determination of the essence of procedure of appeal against resolutions of the National Council of the Judiciary when looking from the perspective of the whole system of law. At the same time, a need emerges to define a number of constructions of the procedure of appeal against resolutions of the National Council of the Judiciary, which determine its diverse course. Undoubtedly, this only applies to individual cases where it is governed by the organic law on the National Council of the Judiciary.¹ An organic law is a legislation that regulates the responsibilities, the procedure of selection, the system and the rules of procedure before a constitutional authority of the State. This does not, therefore, apply to proceedings for general matters, even those governed by the organic law on the National Council of the Judiciary, such as the adoption of a set of rules on the professional ethics of judges and associate judges, and supervision over their observance (Art. 3, para. 1, point 3 NCJ). Of course, this cannot include proceedings involving the

¹ Act of 12 May 2011 on the National Council of the Judiciary, Journal of Laws of 2019, item 84 as amended [henceforth cited as: NCJ], Art. 1.

National Council of the Judiciary if they are regulated outside of the organic law on the National Council of the Judiciary, such as e.g.: access to public information, complaints and requests.²

Individual proceedings involving the National Council of the Judiciary are conducted with regard to specific addressees and in specific situations. In fact, one can refer here to double specificity of individual cases. First, the specificity of the addressees means that the case relates to certain persons, while the specificity of the situation means later that there is a situation other than abstract one, i.e. the situation is eventually individual and actual. An individual case always ends with a sovereign decision of the National Council of the Judiciary, as the Council each time resolves the case as to the merits in the form of a resolution. The catalogue of individual cases should include, in particular, the examination and evaluation of candidates for the positions of Supreme Court judges and judges in general courts, administrative courts and military courts and in the positions of associate judges in administrative courts; submitting to the President of the Republic of Poland requests for the appointment of judges in the Supreme Court, general courts, administrative courts and military courts and the appointment of associate judges in administrative courts; presenting to the President of the Republic of Poland applications for the appointment of examined trainee judges and trainee prosecutors to the positions of associate judges in general courts (Art. 3, para. 1, point 1–2a NCJ). In addition, it is necessary to classify the following proceedings as cases of individual nature: the examination of requests for declaring a judge inactive; the examination of applications of judges to return to the active status (Art. 3, para. 2, point 2–3 NCJ).

In this regard, appeal proceedings against resolutions of the National Council of the Judiciary will be conducted before the Supreme Court (Art. 44, para. 1–3 NCJ). From the point of view of the jurisdiction of the chambers of the Supreme Court, it must also be stated that the Chamber of Extraordinary Review and Public Affairs has proved competent here, given the general presumption of its jurisdiction in public law cases.³ Consequently, the jurisdiction of the Second Department of Disciplinary Chamber, which includes appeals against resolutions of the National Council of the Judiciary, but without the detailed specification of their subject matter, does not now prejudice the exclusion of the jurisdiction of the Chamber of Extraordinary Review and Public Affairs (Art. 27, para. 4, point 3 SC) [Szcucki 2018, 199, 206–207] especially bearing in mind that the catalogue of cases generally covered by the jurisdiction of the Disciplinary Chamber does not currently contain appeals against resolutions of the National Council of the

² Act of 6 September 2001 on Access to Public Information, Journal of Laws of 2019, item 1429, Art. 16, para. 1; act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2018, item 2096 as amended, Art. 257.

³ Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2019, item 825 [henceforth cited as: SC], Art. 26.

Judiciary (Art. 27, para. 1 SC). The jurisdiction of the Second Department of the Disciplinary Chamber as regards matters of appeal against resolutions of the National Council of the Judiciary should therefore not be regarded as an independent legal basis. Thus, it must be assumed today that the jurisdiction of the Disciplinary Chamber on appeals against resolutions of the National Council of the Judiciary also requires a detailed legal basis, which cannot be currently done. In practice, the jurisdiction of the Disciplinary Chamber on appeals against resolutions of the National Council of the Judiciary is therefore apparent.

The position of the Supreme Court in appeal proceedings against resolutions of the National Council of the Judiciary requires a broader discussion. First of all, it should be pointed out here that only the Supreme Court is competent in appeals against the resolutions of the National Council on the Judiciary. However, such an appeal is not applicable now in individual cases relating to the appointment of a Supreme Court judge (Art. 44, para 1 *in fine* NCJ). In individual cases concerning the appointment as a judge of the Supreme Court, an appeal to the Supreme Administrative Court has also ceased to be available.⁴ In this case, the recourse to law were therefore closed, so there is a manifest violation of the right to a fair trial for candidates to serve as a judge of the Supreme Court. The jurisdiction of the Supreme Court for hearing appeals against resolutions of the National Council of the Judiciary is primarily due to the nature of the resolutions of the National Council of the Judiciary and the systemic nature of the Supreme Court. As regards the nature of the resolutions of the National Council of the Judiciary, they should be classified as forms of administrative law, although they are not administrative decisions. Moreover, the National Council of the Judiciary is a constitutional body of the state that is not at the same time a public administration body. This excludes the jurisdiction of administrative courts which review the activity of public administration, which also applies to the Supreme Administrative Court. From the point of view of the systemic nature, however, the Supreme Court is the highest judicial authority, which, *inter alia*, “carries out other acts set out in the laws” so that cases of constitutional importance are subject to judicial review.⁵

The regulation of the procedure of appeal against the resolutions of the National Council of the Judiciary is hardly existent. Although the National Council of the Judiciary is a constitutional body of the state, the intentional laconic nature of the constitutional regulation means that the fundamental issues related to its

⁴ See Art. 44, para. 1a NCJ, repealed by the judgement of the Constitutional Tribunal of 25 March 2019, K/12/18, OTK ZU A/2019, item 17.

⁵ See Art. 175 in conjunction with Art. 183, para. 2 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended, and Art. 1, para. 5 SC; judgement of the Constitutional Tribunal of 10 July 2000, SK 12/99, OTK ZU no. 5/2000, item 143 and the judgement of the Constitutional Tribunal of 9 June 1998, K/ 28/97, OTK ZU no. 4/1998, item 50 [Szczycki 2018, 65–66].

functioning have been transferred to the statutory regulation.⁶ Naturally, this includes also the procedure of appeal against resolutions of the National Council of the Judiciary which is a continuation of the procedure before the National Council of the Judiciary concluded with a resolution. However, one cannot speak of a single statutory regulation, as several statutory regulations have to be taken into account at the same time. In any case, this concerns the organic law on the National Council of the Judiciary, the organic law on the Supreme Court, the Civil Procedure Code and the Administrative Procedure Code.⁷ The fundamental role is played by the organic law on the National Council of the Judiciary, which sets out the legal basis in only a few provisions for appeals against resolutions of the National Council of the Judiciary: “In proceedings before the Council, the provisions of the Code of Administrative Procedure shall not apply;” “A party to the proceedings may appeal to the Supreme Court on the grounds that the resolution is contrary to the law, unless separate provisions provide otherwise. An appeal shall not be admissible in individual cases concerning an appointment for the position of a judge of the Supreme Court;” “An appeal shall be lodged through the Chairman within two weeks of the date of delivery of the reasoned resolution;” “The proceedings before the Supreme Court shall be conducted under the provisions of the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws of 2019, item 1360 as amended). The provision of Article 87 of this Act shall not apply” (Art. 44, para. 1–3 NCJ).

The features of appeal proceedings against the resolutions of the National Council of the Judiciary must, of course, take into account the general position of the Supreme Court. In view of the above, it should be noted that the Supreme Court administers justice primarily by supervising the activities of common and military courts in the field of judgements. In fact, it is about judicial supervision, which functions as an instance supervision and extra-judicial supervision. Instance supervision consists in the hearing of appeals against decisions of lower courts and extraordinary review of final court decisions in strictly defined conditions, while extra-instance supervision allows the adoption of resolutions on legal issues. Thus, the Supreme Court acts mainly as a cassation court, but sometimes also as a substantive court. Therefore, in this context, it is not possible to reach a final conclusion, as alternative options may also be considered. Moreover, the performance by the Supreme Court of other activities specified in the legislation creates a heterogeneous set, which makes it difficult to make a more general

⁶ See the judgement of the Constitutional Tribunal of 25 March 2019, K/12/18, OTK ZU A/2019, item 17.

⁷ Act of 17 November 1964, the Civil Procedure Code, Journal of Laws of 2018, item 1360 as amended [henceforth cited as: CPC]; act of 30 August 2002, the Law on the Proceeding before Administrative Courts, Journal of Laws of 2018, item 1302 as amended [henceforth cited as: PAC].

statement.⁸ Although it may be considered here that these activities should fall within the scope of activities determined by the above mentioned essence and function of the Supreme Court [Wiliński and Karlik 2016, 1082].

Therefore, the Supreme Court, in proceedings of appeal against the resolutions of the National Council of the Judiciary, should exercise the administration of justice. Since the participant in proceedings before the National Council of the Judiciary may appeal to the Supreme Court only on the grounds that the resolution adopted as part of these proceedings is contrary to law, i.e. the criterion of legality applies here, the Supreme Court must always act as a cassation court. Certainly, the Supreme Court does not act then on an instance basis, since the National Council of the Judiciary is not a body of judicial authority, since that authority is exercised solely by courts and tribunals. After all, the National Council of the Judiciary is only upholding the independence of the courts and the independence of judges, although the functions of the National Council of the Judiciary are often linked to the judicial authority. Since the National Council of the Judiciary is a constitutional body of the state, there is a judicial procedure to challenge its resolutions, which obviously implies the jurisdiction of the Supreme Court as the supreme body of the judiciary. If the Supreme Court cannot then act substantively, as this would infringe the competence of the National Council of the Judiciary, at the same time one must not conduct or reopen the evidentiary proceedings.⁹ Thus, the Supreme Court is bound by the factual state that was previously established by the National Council of the Judiciary.

Undoubtedly, in the proceedings of appeal against resolutions of the National Council of the Judiciary, the Supreme Court must also apply the mechanisms for the resolution of public law cases.¹⁰ Such mechanisms focus on the concept of a public case, which must be understood in legal terms as public-law litigation [Niczyporuk 2019, 388]. As regards the scope of public law, it usually includes constitutional law, administrative law, labour law and financial law. This suggests that the case initiated as an appeal against a resolution of the National Council of the Judiciary is ultimately a constitutional-law case, which is preceded by an administrative-law case related to proceedings before the National Council of the Judiciary.¹¹ This should not surprise anyone, since administrative law is usually referred to as a specified constitutional right. Considering the proceedings of appeal against resolutions of the National Council of the Judiciary as a regulation of constitutional law stems from the fact that the constitutional provision first states

⁸ See for example: Art. 241, para. 1 of the act of 5 January 2011, the Electoral Code, Journal of Laws of 2019, item 684 as amended and Art. 6, para. 5 of the act of 24 June 1999 on the exercise of the legislative initiative by citizens, Journal of Laws of 2018, item 2120.

⁹ See the judgement of the Constitutional Tribunal of 15 March 2018, III KRS 1/18, OSNP 2018, no. 9, item 131.

¹⁰ *Ibidem*.

¹¹ See Decision of the Supreme Court of 10 July 2019, no. I NO 41/19, not published.

clearly that “Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary” (Art. 179 of Polish Constitution). As a result, the entire organic law on the National Council of the Judiciary is commonly included in constitutional law.

In any case, the concept of public case constitutes a classic procedural term, because it has been shaped by procedural law, thus proving to some extent to be detached from substantive law [Niczyporuk 2019, 391]. Undoubtedly, the organic law on the National Council of the Judiciary does not use the term of public case. The emergence and existence of a public case is therefore determined by the effective appeal against the resolution of the National Council of the Judiciary. As a result, the existence of a public case depends on making it the subject of legal proceedings before the Supreme Court. The notion of public case so understood must still be distinguished from the similar terms, primarily: civil case and administrative judicial case. Civil cases should therefore be understood as legal proceedings governed by the Code of Civil Procedure in the matters of civil law, family and custody law and labour law, as well as social security matters and in other matters to which the provisions of this Code apply under special laws (Art. 1 CCP). On the other hand, legal proceedings governed by the Law on proceedings before administrative courts in matters relating to the review of public administration activities and in other cases to which its provisions shall apply under specific laws prove to be judicial administrative cases (Art. 1 PAC).

The considerations of legislative technique decided that a public case had to, first of all, be legally based in the provisions of the Code of Civil Procedure on cassation appeal, except for the compulsory representation by lawyer, as there is no separate procedure in public matters and the organic law on the Supreme Court regulates proceedings before him to a very limited extent (Chapter 8 SC). Only a few procedural constructs in appeal proceedings against the resolutions of the National Council of the Judiciary show the provenance from only public law in the organic act on the National Council of the Judiciary. Hence, they must be used autonomously, taking into account their importance within the entire legal system. It is especially about the procedural construct of the final character of a resolution of the National Council of the Judiciary, because it creates a completely new legal situation, characterized by stability and incontestability of the resolution contained therein [Romańska 2010, 29]. Therefore, it constitutes a condition of inadmissibility of court proceedings, when one can no longer appeal to the Supreme Court. If the resolutions of the National Council of the Judiciary have not been appealed against by all participants in the proceedings, it becomes final and binding in the part covering the decision not to submit a request to appoint a judge, with respect to those participants of the proceedings who have not appealed (Art. 43 NCJ).

However, the reference to the direct application of the provisions of the Code of Civil Procedure on cassation raises numerous problems in appeal proceedings

against the resolutions of the National Council of the Judiciary, mainly considering that the provisions on cassation further refer to the proper application of the provisions on appeal (Art. 398²¹ CCP). Although a reference to the provisions on appeal seems sometimes unavoidable, the use of further references afterwards is not justified.¹² After all, it is necessary to delineate some limit on the application of the provisions “referring to a reference,” even if the interpretation of the provisions on cassation is broadly and functionally accepted. Therefore, references cannot be used indefinitely here, although the Code of Civil Procedure permits so. This limit sets the requirement for coherence of provisions to which reference is made with the provisions which traditionally belong to constitutional law. Thus, we are not so much dealing with the direct application of the provisions of the Code of Civil Procedure on cassation, but rather with the application of these provisions *mutatis mutandis*. The formula of application of the regulations *mutatis mutandis* means, however, that some of them will not apply at all, others will be applied directly without any modification, and others will only be applied with appropriate modifications.

In this context, one should point to specific constructs of appeal proceedings against resolutions of the National Council of the Judiciary. First, it should be kept in mind that the appeal is lodged through the Chairman of the National Council of the Judiciary, within two weeks from the date of serving the resolution with reasons.¹³ Since the appeal can currently be based only on a breach of law, a breach of interest of the participant in the proceedings cannot constitute such a basis. Therefore, the condition for admissibility of an appeal is not the substantiation that a resolution of the National Council of the Judiciary violates the interest of a participant in the proceedings. On the other hand, one cannot claim reimbursement of legal costs because there are no appropriate legal bases authorising to award them. Especially, it should be emphasized that an appeal is not subject to a court fee. Moreover, it turns out to be unacceptable to apply an injunctive relief, in particular involving suspension of enforceability or effectiveness of the contested resolution of the National Council of the Judiciary. No appropriate legal basis has been provided for this under the current legislation. Although it seems logical to jointly hear appeals in similar cases, this is usually unreasonable due to the different scope of appeal. Finally, proceedings terminated by a final judgement of the Supreme Court may be resumed in an appeal against a resolution of the National Council of the Judiciary, which is an emanation of a previously approved right to a fair trial.

¹² One should rule out here especially subsequent references under Art. 391, para. 1 CCP to the provisions on the procedure before the court of first instance.

¹³ Which is directly set out in Art. 44 NCJ.

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POSTĘPOWANIE ODWOŁAWCZE OD UCHWAŁ KRAJOWEJ RADY SĄDOWNICTWA

Streszczenie. Istotę postępowania odwoławczego od uchwał Krajowej Rady Sądownictwa, które toczy się wyłącznie przed Sądem Najwyższym, określają mechanizmy rozpoznawania spraw z zakresu prawa publicznego. Takie mechanizmy koncentrują się wokół pojęcia sprawy publicznej, którą należy tutaj rozumieć prawniczo jako postępowanie sądowe z zakresu prawa publicznego. Względy techniki prawodawczej zdecydowały wówczas, że sprawa publiczna musiała przede wszystkim znaleźć podstawy prawne w przepisach Kodeksu postępowania cywilnego o skardze kasacyjnej. W tym kontekście wystąpiły charakterystyczne konstrukcje postępowania odwoławczego od uchwał Krajowej Rady Sądownictwa.

Słowa kluczowe: postępowanie odwoławcze, Sąd Najwyższy, sprawa publiczna, uchwała Krajowej Rady Sądownictwa

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