ECLI:EU:C:2021:931

JUDGMENT OF THE COURT (Grand Chamber)

16 November 2021 (*)

(References for a preliminary ruling – Rule of law – Independence of the judiciary – Second subparagraph of Article 19(1) TEU – National legislation providing the possibility for the Minister for Justice to second judges to higher courts and to terminate those secondments – Adjudicating panels in criminal cases including judges seconded by the Minister for Justice – Directive (EU) 2016/343 – Presumption of innocence)

In Joined Cases C-748/19 to C-754/19,

SEVEN requests for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), made by decisions of 2 September 2019 (C-749/19), 16 September 2019 (C-748/19), 23 September 2019 (C-750/19 and C-754/19), 10 October 2019 (C-751/19) and 15 October 2019 (C-752/19 and C-753/19), received at the Court on 15 October 2019, in the criminal proceedings against

WB (C-748/19),

XA,

YZ (C-749/19),

DT (C-750/19),

ZY (C-751/19),

AX (C-752/19),

BV (C-753/19),

CU (C-754/19),

other parties:

Prokuratura Krajowa,

formerly

Prokuratura Rejonowa w Mińsku Mazowieckim (C-748/19),

Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie (C-749/19),

Prokuratura Rejonowa Warszawa-Wola w Warszawie (C-750/19, C-753/19 and C-754/19),

Prokuratura Rejonowa w Pruszkowie (C-751/19),

Prokuratura Rejonowa Warszawa-Ursynów w Warszawie (C-752/19),

as well as **Pictura sp. z o.o.** (C-754/19),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin and I. Jarukaitis (Rapporteur), Presidents of Chambers, J.-C. Bonichot, P.G. Xuereb. N. Piçarra, L.S. Rossi and A. Kumin, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Prokuratura Rejonowa w Mińsku Mazowieckim, by J. Ziarkiewicz, Regional Public Prosecutor, Lublin,

– the Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie, the Prokuratura Rejonowa Warszawa-Wola w Warszawie, the Prokuratura Rejonowa w Pruszkowie and the Prokuratura Rejonowa Warszawa-Ursynów w Warszawie, by A. Szeliga and F. Wolski, Regional Public Prosecutors, Warsaw,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by K. Herrmann, P.J.O. Van Nuffel, R. Troosters and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and of Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1), read in the light of recital 22 of that directive.

2 The requests have been made in criminal proceedings brought against WB (C-748/19), XA and YZ (C-749/19), DT (C-750/19), ZY (C-751/19), AX (C-752/19), BV (C-753/19) and CU (C-754/19).

Legal context

EU law

3 Recital 22 of Directive 2016/343 states:

‘The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice to any *ex officio* fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.’

4 Article 6 of that directive, entitled ‘Burden of proof’, provides:

‘1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.

2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.’

Polish law

The Law on the Public Prosecutor’s Office

5 In accordance with Article 1 § 2 of the ustawa – Prawo o prokuraturze (Law on the Public Prosecutor’s Office) of 28 January 2016 (Dz. U. of 2016, item 177), in the version in force at the time of the disputes in the main proceedings, the Public Prosecutor General occupies the highest position within the public prosecutor’s office, and the position of Public Prosecutor General is occupied by the Minister for Justice.

6 In accordance with Article 13 § 2 of that law, both public prosecutors attached to the ordinary courts and public prosecutors attached to the Instytut Pamięci Narodowej (Institute of National Remembrance, Poland) are under the authority of the Public Prosecutor General.

The Law on the organisation of the ordinary courts

7 In accordance with Article 47a § 1 of the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001, in the version in force at the time

of the disputes in the main proceedings (Dz. U. of 2019, item 52) ('the Law on the organisation of the ordinary courts'), cases are to be assigned to judges and trainee judges at random.

8 Under Article 47b § 1 of that law, a change in the composition of a court may take place only where it is impossible for that court to examine the case in its current composition or if there is a lasting obstacle to the examination of the case by that court in its current composition. In such a case, the provisions of Article 47a are to apply to the reassignment of the case. Article 47b § 3 of that law states that the decision to change the composition of a court is to be taken by the President of that court or by a judge authorised by him or her.

9 Article 77 of the Law on the organisation of the ordinary courts provides:

'§ 1. The Minister for Justice may second a judge, with his or her consent, for the purpose of exercising judicial functions or performing administrative tasks:

(1) to another court of the same or lower rank or, in particularly justified cases, to a higher court, taking into account the rational use of ordinary court staff and the needs resulting from the workload of the various courts,

– for a fixed period, which may not exceed 2 years, or for an indefinite period.

…

§ 4. Where a judge is seconded, on the basis of points 2, 2a and 2b of § 1 and of § 2a, for an indefinite period, the secondment of that judge may be terminated or the person concerned may resign from the post to which he or she has been seconded provided that three months' notice is given. In other cases where a judge is seconded, such termination or resignation shall not require prior notice.'

10 Under Article 112 § 3 of that law, the Minister for Justice is to appoint the Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych (Disciplinary Officer for Ordinary Court Judges, Poland) ('the Disciplinary Officer') and his or her two deputies for a four-year term of office, which may be renewed. Polish law does not lay down any criteria which must be used as the basis for appointing those persons.

The Code of Criminal Procedure

11 Under Article 29 § 1 of the kodeks postępowania karnego (Code of Criminal Procedure):

'In appeal and cassation hearings, the court shall sit in a panel of three judges, unless otherwise provided by law.'

12 In accordance with Article 519 of that code, an appeal on a point of law may be brought against the final ruling of the appeal court which closes the proceedings.

13 Article 439 § 1 of that code is worded as follows:

'Irrespective of the limits of the appeal and the grounds of appeal put forward and the impact of the infringement on the content of the ruling, the appeal court shall set aside the ruling under appeal if:

(1) a person who is not authorised to give a ruling or is incapable of doing so or who is excluded from ruling pursuant to Article 40 has taken part in the ruling;

(2) the composition of the court was inappropriate or one of its members was not present throughout the duration of the hearing;

…’

14 Under Article 523 § 1of the Code of Criminal Procedure, an appeal on a point of law may be brought only on the basis of the infringements referred to in Article 439 thereof or of another gross violation of the law where that violation could have had a significant effect on the content of the ruling.

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

15 The present requests for a preliminary ruling were made by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) in connection with the examination of seven criminal cases assigned to its Tenth Division (Appeals in Criminal Matters).

16 In the first place, the referring court has doubts as to whether the composition of the adjudicating panels called upon to rule on those cases is in line with the second subparagraph of Article 19(1) TEU, having regard to the presence in those panels of a judge seconded in accordance with a decision of the Minister for Justice pursuant to Article 77 § 1 of the Law on the organisation of the ordinary courts, since that seconded judge may even have come, in some of those cases, from a district court, that is to say, a lower court.

17 The referring court explains that the rules relating to the secondment of judges provide the Minister for Justice – who is also the Public Prosecutor General, who has authority over, inter alia, public prosecutors attached to the ordinary courts – with the means of significantly influencing the composition of a criminal court. The Minister for Justice assigns a judge, by way of secondment, to a higher court on the basis of criteria which are not officially known, without the secondment decision being amenable to judicial review, and may terminate that secondment at any time without such termination being subject to criteria that are predefined by law or having to be accompanied by a statement of reasons. The referring court emphasises, moreover, that the possibility of making such termination subject to judicial review is uncertain. Those elements enable the Minister for Justice to exercise influence over seconded judges within adjudicating panels, such as those called upon to rule on the disputes in the main proceedings, on two fronts. First, by seconding a judge to a higher court, the Minister for Justice may ‘reward’ that judge for the work performed by him or her in previous positions, or even set out certain expectations as to how that judge might adjudicate in the future, that secondment then being a substitute for promotion. Second, by terminating a judge’s secondment, the Minister for Justice may ‘penalise’ that seconded judge for having adopted a judicial decision which did not meet with his approval, the referring court emphasising in particular, in that regard, the currently high risk of such a penalty being imposed if the judge concerned has decided to make a request for a preliminary ruling to the Court of Justice or to disapply Polish law that is contrary to EU law. Such a system therefore creates an incentive for seconded judges to give a ruling in accordance with the wishes of the Minister for Justice, even if those wishes are not explicitly expressed, which would ultimately infringe the right of the accused person to a fair trial, that right being one of the expressions of the principle of effective judicial protection.

18 In the second place, the referring court questions, in the event that the judgments to be delivered in the cases in the main proceedings are the subject of an appeal on a point of law before

the Sąd Najwyższy (Supreme Court, Poland), whether the composition of the adjudicating panels of the Criminal Chamber of that court is compatible with the second subparagraph of Article 19(1) TEU.

19 In the third place, the referring court questions whether, in that context, the national legislation at issue in the main proceedings undermines the presumption of innocence resulting from Directive 2016/343.

20 In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and to refer the following questions, which are worded almost identically in Cases C-748/19 to C-754/19, to the Court of Justice for a preliminary ruling:

‘(1) Should the second subparagraph of Article 19(1) [TEU], in conjunction with Article 2 [TEU] and the principle of the rule of law enshrined therein, and Article 6(1) and (2), in conjunction with recital 22, of Directive [2016/343] be interpreted as meaning that the requirements of effective judicial protection, including the independence of the judiciary, and the requirements arising from the presumption of innocence are infringed in the case where judicial proceedings, such as criminal proceedings against a person accused under [provisions of the Criminal Code or the Criminal Tax Code] [or] against a convicted person related to a plea for an aggregate sentence, are conducted in the following manner:

– the composition of the court includes [a judge] seconded pursuant to a personal decision of the [Minister for Justice] from a court situated one level below in the court hierarchy, the criteria followed by the Minister for Justice when seconding this judge are not known, and national law does not provide for any judicial review of such a decision and allows the Minister for Justice to terminate the judge’s secondment at any time?

(2) Are the requirements referred to in Question 1 breached in a situation where the parties can lodge an extraordinary appeal against a judgment handed down in court proceedings such as those described in Question 1, and this extraordinary appeal is lodged with a court such as the [Sąd Najwyższy (Supreme Court)], the decisions of which cannot be the subject of appeal under national law, and national law imposes on the president of the organisational unit of that court (chamber) competent to hear the appeal the obligation to allocate cases in accordance with an alphabetical list of judges of that chamber, expressly prohibiting the omission of any judge, and the judges among whom the cases are allocated include a person appointed upon the motion of a collegiate body such as the [Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) (“the KRS”)], the members of which are judges:

– elected by a chamber of parliament which votes for a list of candidates drawn up in advance by a parliamentary committee from among the candidates nominated by parliamentary factions or a body of that chamber of parliament on the basis of proposals from groups of judges or citizens, and as a result there are three occasions on which the candidates receive support from politicians during the election procedure;

– who represent a majority of the members of that collegiate body sufficient to take decisions on submitting motions for appointments to judicial positions as well as other binding decisions required under national law?

(3) From the point of view of EU law, including the provisions and requirements referred to in Question 1, what is the effect of a judgment handed down in court proceedings such as those described in Question 1, and of a judgment handed down in proceedings before the [Sąd Najwyższy

(Supreme Court)], if the person referred to in Question 2 participates in the handing-down of that judgment?

(4) Does EU law, including the provisions referred to in Question 1, make the effects of the judgments referred to in Question 3 conditional upon whether the court in question has ruled in favour of or against the accused person?'

Procedure before the Court

21 By decision of the President of the Court of Justice of 25 October 2019, Cases C-748/19 to C-754/19 were joined for the purposes of the written and oral procedure and of the judgment.

22 On 30 July 2020, the Court sent a request for information to the referring court concerning the factual and legal context of the disputes in the main proceedings. On 3 September 2020, the referring court replied to that request.

The requests for an expedited procedure

23 In its orders for reference, the referring court requested that the Court deal with the present cases under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of its requests, it put forward, in essence, the same reasons as those on the basis of which it decided to make a reference to the Court for a preliminary ruling.

24 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.

25 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 48 and the case-law cited).

26 In this instance, on 2 December 2019, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, that it was not appropriate to grant the requests for an expedited procedure. First, the referring court did not put forward any specific grounds which would have required a decision on the requests for a preliminary ruling to be made within a short time. Second, the fact that the cases in the main proceedings fall within the scope of criminal law was not, in itself, grounds for those cases being dealt with under an expedited procedure.

The request that the oral part of the procedure be reopened

27 By document lodged at the Court Registry on 30 June 2021, the Polish Government requested that the oral part of the procedure be reopened.

28 In support of its request, the Polish Government states, in essence, that it disagrees with the Opinion of the Advocate General, who, in its view, incorrectly inferred from the wording of the questions referred and from the provisions of national law that the secondment of a judge to a higher court entails additional advantages for that judge in the form of promotion and a higher salary. In addition, the Advocate General has not indicated the legal and factual circumstances

which enabled him to establish the existence of a link between the secondment of a judge to another court, on the one hand, and better career prospects and a higher salary, on the other. In any event, those matters have neither been raised by the referring court nor been the subject of observations by the parties; this constitutes a breach of the principle of equality of arms.

29 Furthermore, the Polish Government maintains that there is a contradiction between, on the one hand, point 178 of the Opinion of the Advocate General, in which he stated that EU law does not preclude Member States from having recourse to a system according to which judges may, in the interests of the service, be temporarily seconded from one court either to another court at the same level or to a higher court, and, on the other hand, the fact that, in that same Opinion, the Advocate General carried out an assessment of the Polish legislation in the light of the requirements of EU law relating to the rule of law, in breach of the principle of respect for the national identities of the Member States set out in Article 4(2) TEU.

30 In that regard, it must be noted, 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 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 62 and the case-law cited).

31 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 submissions or by the reasoning which led to those submissions. 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 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 63 and the case-law cited).

32 It is true that the Court may at any time, after hearing the Advocate General, order that the oral part of the procedure be reopened, in accordance with Article 83 of its Rules of 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, or where the case must be decided on the basis of an argument which has not been debated between the interested persons.

33 However, in this instance, the Court notes that it has all the information necessary to give a ruling and that the present cases do not have to be decided on the basis of an argument which has not been debated between the interested persons. In addition, the request that the oral part of the procedure be reopened does not contain any new fact which is of such a nature as to be a decisive factor for the decision which the Court is called upon to give in those cases. In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Jurisdiction of the Court

34 According to the Polish Government, the Prokuratura Regionalna w Lublinie (Regional Public Prosecutor's Office, Lublin, Poland) and the Prokuratura Regionalna w Warszawie (Regional Public Prosecutor's Office, Warsaw, Poland), which have submitted observations to the Court on behalf of the district public prosecutor's offices which initiated the criminal proceedings at issue in the main proceedings, the legal and factual contexts concerned by the questions referred do not fall within the scope of EU law. They argue that the drafting of provisions of national law concerning the organisation of justice, in particular the procedure for appointing judges, the composition of councils of the judiciary or the secondment of judges to a court other than that in which they usually sit, and the legal effects of judgments of the national courts, fall within the exclusive competence of each Member State.

35 The Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, emphasise, in particular, that the Court has no power to establish the conditions under which the secondment of judges may be allowed or to assess the effectiveness of the appointment of a person to the post of judge; nor does it have the power to decide whether that person is a judge or to rule on the existence of a decision of a national court. Therefore, the Court does not have jurisdiction to answer the questions referred for a preliminary ruling that have been raised in the cases in the main proceedings.

36 In that regard, it must be noted that, 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 (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 75 and the case-law cited). The same is true of national rules relating to the adoption of decisions seconding judges so that they may exercise judicial functions in another court.

37 In addition, the objections thus raised by the Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, 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 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 76 and the case-law cited).

38 It follows from the foregoing that the Court has jurisdiction to rule on the present requests for a preliminary ruling.

The first question

39 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive 2016/343 are to be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

Admissibility

40 The Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, contend that that question is inadmissible.

41 In that regard, in the first place, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, remark that the decisions to submit the present requests for a preliminary ruling to the Court were adopted by the Chair of the adjudicating panel, ruling without the participation of the other two members of that panel. However, according to Article 29 § 1 of the Code of Criminal Procedure, an appeal court must sit in a panel of three judges unless otherwise provided for by law, and there is nothing in the cases in the main proceedings to justify the use of another adjudicating panel. Thus, the Chair of the adjudicating panel has no jurisdiction to rule alone on any question whatsoever, whether principal or incidental, so that the Court cannot be regarded as having been seised by a 'court or tribunal' of a Member State, within the meaning of Article 267 TFEU.

42 In that regard, it should be borne in mind, first of all, that, in accordance with the settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal', within the meaning of Article 267 TFEU, which is a question governed by EU law alone, and therefore to determine whether the request for a preliminary ruling is admissible, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 43).

43 In this instance, the present requests for a preliminary ruling were lodged by the Tenth Division (Appeals in Criminal Matters) of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), by way of the Chair of the adjudicating panels in the seven cases in the main proceedings. Moreover, it is not disputed that the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) meets the requirements set out in paragraph 42 of this judgment.

44 It follows from settled case-law that, in the context of a preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court, in view of the distribution of functions between itself and the national court, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law (judgment of 14 January 1982, *Reina*, 65/81, EU:C:1982:6, paragraph 7).

45 Thus, none of the arguments put forward by the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, as set out in paragraph 41 of this judgment, is such as to call in question the fact that the first question has been put by a 'court or tribunal', within the meaning of Article 267 TFEU.

46 In the second place, the Polish Government emphasises that the cases in the main proceedings fall within the scope of criminal law and criminal procedure, that is to say, areas which are not harmonised by EU law. The link with EU law which the referring court is attempting to establish and which, in its view, results from the fact that it is called upon to examine criminal cases, that the rights of defence of each accused person must be respected, and that those persons are also protected under Directive 2016/343, is not sufficiently real to permit the inference that an answer to that question is necessary to resolve the disputes before it.

47 In that regard, it should be pointed out that, by its first question, the referring court seeks to ascertain, even before the cases in the main proceedings are dealt with on the merits, whether the national rules on the basis of which a seconded judge forms part of the adjudicating panels called upon to hear and determine those cases are compatible with the principle of the independence of judges.

48 The Court has already emphasised that it may be necessary to answer questions referred in order to be able to provide referring courts with an interpretation of EU law that enables them to settle procedural questions of national law before they can rule on the substance of disputes pending before them (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 94 and the case-law cited).

49 In this instance, the first question referred concerns the interpretation of provisions of EU law and their effects, in view, in particular, of the primacy of that law, on the regularity of the composition of the adjudicating panels hearing the cases in the main proceedings. An answer from the Court is therefore required in order to enable the referring court to settle a question raised *in limine litis* before the adjudicating panels rule on the substance of the disputes in the main proceedings.

50 In those circumstances, the Polish Government's objection must be dismissed.

51 In the third place, the Polish Government argues that the question referred is hypothetical, since the Court's answer to that question can have no bearing on the outcome of the criminal cases in the main proceedings. From a procedural point of view, even if the Court were to find that the provisions at issue relating to the secondment of judges are contrary to EU law, the Chair of the adjudicating panel would be unable to apply such an interpretation, since she is not entitled to deprive another member of that panel of the right to give a ruling, including on the basis of EU law.

52 In that regard, it should be emphasised that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 25 and the case-law cited).

53 Next, it has been recalled in paragraph 36 of this judgment that, when exercising their competence in the field of the organisation of justice, the Member States are required, in particular when drawing up national rules relating to the secondment of judges in order that they may exercise judicial functions in another court or relating to the review of the regularity of the adjudicating panel, to comply with their obligations deriving from EU law.

54 In that regard, it must be pointed out that the arguments put forward by the Polish Government relate, in essence, to the scope and thus to the interpretation of the provisions of EU law with which the first question is concerned, and to the likely effects of those provisions in view, in particular, of the primacy of that law. Such arguments, which concern the substance of the question referred, cannot therefore, by their very nature, entail the inadmissibility of that question (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and*

Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 90 and the case-law cited).

55 In the fourth and last place, the Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, argue that the requests for a preliminary ruling do not contain the information referred to in Article 94 of the Rules of Procedure. They maintain that, in those requests, the referring court has not defined the subject matter of the disputes in the main proceedings or the relevant facts; nor has it set out, even in summary form, the factual information on which the questions referred are based.

56 Moreover, the requests for a preliminary ruling do not contain an adequate statement of reasons as regards, in particular, the reasons for the choice of the provisions of EU law in respect of which interpretation is sought and proof of the existence of a link between those provisions and the national rules applicable in the main proceedings. The referring court has merely cited provisions of EU law and set out in summary form the interpretation of some of those provisions, without examining either their interdependence or the relevance of the various rules in respect of which interpretation is sought for resolving the disputes in the main proceedings.

57 In that regard, it is apparent from the elements referred to in paragraphs 5 to 14 and 16 to 19 of this judgment that the requests for a preliminary ruling, as clarified by the referring court in its response to a request for information put to it by the Court, contain all the necessary information, including the content of the provisions of national legislation that may be applicable in this instance, the reasons which have led the referring court to question the Court regarding the interpretation of the provisions referred to in paragraph 39 of this judgment, and the link established by that court between those provisions and the national rules relied on, so that the Court is in a position to rule on the first question.

58 In the light of all the foregoing considerations, it must be held that the first question referred is admissible.

Substance

59 Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108 and the case-law cited).

60 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 109 and the case-law cited).

61 As is apparent from settled case-law, the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union ('the

Charter') (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 110 and the case-law cited).

62 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 111 and the case-law cited).

63 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law meet the requirements of effective judicial protection (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 104 and the case-law cited).

64 In this instance, it is common ground that the Polish ordinary courts, which include regional courts such as the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), may be called upon to rule on questions relating to the application or interpretation of EU law and that, as 'courts or tribunals' within the meaning of EU law, they fall within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, with the result that they must meet the requirements of effective judicial protection (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 106 and the case-law cited).

65 To guarantee that such courts are in a position to ensure the effective legal protection thus required under the second subparagraph of Article 19(1) TEU, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 107 and the case-law cited).

66 As the Court has emphasised on several occasions, that requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, 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 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 108 and the case-law cited).

67 It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 109 and the case-law cited).

68 In particular, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 127 and the case-law cited).

69 In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the exercise of their judicial functions must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 110 and the case-law cited).

70 In this instance, the referring court's doubts concern the possibility for the Minister for Justice of a Member State, on the basis of criteria which have not been made public, to second a judge to another criminal court for a fixed or indefinite period and, at any time, by way of a decision which does not contain a statement of reasons, to terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

71 In that regard, as has been recalled in paragraph 67 of this judgment, the guarantees of independence and impartiality which courts that may be called upon to rule on the application or interpretation of EU law are required to provide under EU law presuppose, inter alia, rules as regards the composition of the body concerned and the appointment, length of service and grounds for dismissal of its members that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. Such rules necessarily include those concerning the secondment of judges, since, as is the case with the provisions of Article 77 of the Law on the organisation of the ordinary courts, those rules are liable to affect both the composition of the body which is called upon to hear and determine a case and the length of service of the judges thus seconded. They also provide for the possibility of terminating the secondment of one or more of the members of that body.

72 It is true that the Member States may have recourse to a system according to which judges may, in the interests of the service, be temporarily seconded from one court to another (see, to that effect, ECtHR, 25 October 2011, *Richert v. Poland*, CE:ECHR:2011:1025JUD005480907, § 44, and 20 March 2012, *Dryzek v. Poland*, CE:ECHR:2012:0320DEC001228509, § 49).

73 However, compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions (see, by analogy, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 198 and the case-law cited).

74 It will ultimately be for the referring court to rule, in the light of all the principles recalled in paragraphs 59 to 73 of this judgment, having made the assessments required for that purpose, on whether the conditions under which the Minister for Justice may second a judge to a higher court and terminate that secondment, taken as a whole, are such as to lead to the conclusion that, during the period of those judges' secondment, they are not guaranteed to be independent and impartial

(see, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 131).

75 Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions, providing, inter alia, the referring court, on the basis of the material in the case file, with interpretations of EU law which may be useful to the referring court in assessing the effects of one provision of EU law or another (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 132 and 133 and the case-law cited).

76 In that regard, it is true that the fact that, in accordance with Article 77 § 1 of the Law on the organisation of the ordinary courts, the Minister for Justice may not second a judge to another court for the purpose of exercising judicial functions or performing administrative tasks without that judge's consent constitutes an important procedural safeguard.

77 However, as regards the Polish rules governing the secondment of judges and the very conditions under which judges have been seconded to the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), the referring court mentions a number of factors which, in its view, empower the Minister for Justice to influence those judges, so that doubts may arise as to their independence.

78 In the first place, as has been stated by the referring court, the criteria applied by the Minister for Justice for the purpose of seconding judges are not made public. In addition, the Minister for Justice has the power to terminate such secondments at any time, without the criteria that may be associated with that power being known and without the reasons for such a decision being stated.

79 In order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge and the decision terminating that secondment, in particular where a secondment to a higher court is involved, must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons.

80 In the second place, it is apparent from Article 77 § 4 of the Law on the organisation of the ordinary courts that the Minister for Justice may terminate the secondment of a judge irrespective of whether that secondment is for a fixed or indefinite period, and that, in the specific case where the judge has been seconded for a fixed period, the termination may even take place without prior notice. That provision thus allows the Minister for Justice to decide to terminate the secondment of a judge at any time. Moreover, that provision does not lay down specific conditions governing the termination of the secondment.

81 Thus, the possibility available to the Minister for Justice to terminate the secondment of a judge at any time, in particular in the case of a secondment to a higher court, could give an individual the impression that the assessment to be carried out by the seconded judge who is to hear and determine his or her case will be influenced by the fear of termination of the secondment.

82 Furthermore, that possibility to terminate the secondment of a judge at any time and without any publicly known reason could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice, which could give rise to the impression on the part of the judges themselves that they are 'subordinate' to the Minister for Justice, in a manner incompatible with the principle of the irremovability of judges.

83 Lastly, as the termination of the secondment of a judge without that judge's consent is liable to have effects similar to those of a disciplinary penalty, the second subparagraph of Article 19(1) TEU requires that the regime applicable to such a measure provide all the necessary guarantees to prevent any risk of such a regime being used as a means of exerting political control over the content of judicial decisions, which means, inter alia, that it must be possible for that measure to be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 115 and 118).

84 In the third place, while the Minister for Justice may, as has been recalled in paragraph 80 of this judgment, by terminating a judge's secondment, take a decision which has an effect on the composition of an adjudicating panel, that same minister also, pursuant to Article 1 § 2 of the Law on the Public Prosecutor's Office, occupies the position of Public Prosecutor General and, in that capacity, pursuant to Article 13 § 2 of that law, has authority over, inter alia, public prosecutors attached to the ordinary courts. Thus, the Minister for Justice has, in any given criminal case, power over both the public prosecutor attached to the ordinary court and the seconded judges, which is such as to give rise to reasonable doubts in the minds of individuals as to the impartiality of those seconded judges when they rule in such a case.

85 In the fourth place, it is apparent from the statements made by the referring court that the seconded judges in the adjudicating panels called upon to rule in the disputes in the main proceedings continue to perform, in parallel, the duties – which they were performing prior to their secondment – of the deputies of the Disciplinary Officer, who is the person responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 233).

86 As has also been noted, in essence, by the Advocate General in point 190 of his Opinion, the fact that one and the same person performs the duties of a seconded judge and those of a deputy of the Disciplinary Officer, in a context where, under Article 112 of the Law on the organisation of the ordinary courts, the deputies of the Disciplinary Officer are also appointed by the Minister for Justice, is such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the other members of the adjudicating panels concerned to external factors, for the purposes of the case-law referred to in paragraphs 67 and 68 of this judgment, given that those members are likely to fear that the seconded judge is involved in disciplinary proceedings concerning them.

87 It is apparent from all those elements that, taken together, the facts referred to in paragraphs 76 to 86 of this judgment are, subject to the final assessments which are to be carried out by the referring court in that regard, such as may lead to the conclusion that the Minister for Justice – who is also the Public Prosecutor General – has, on the basis of criteria which are not officially known, the power to second judges to higher courts and to terminate their secondment, at any time and without being required to give reasons for that decision, with the result that, during the period of those judges' secondment, they are not provided with the guarantees and the independence which all judges should normally enjoy in a State governed by the rule of law. Such a power cannot be considered compatible with the obligation to comply with the requirement of independence, in accordance with the case-law referred to in paragraph 73 of this judgment.

88 Furthermore, as regards the presumption of innocence, to which recital 22 and Article 6 of Directive 2016/343 – provisions which are also mentioned in the first question referred for a

preliminary ruling – refer, it presupposes that the judge is free of any bias and any prejudice when examining the criminal liability of the accused. The independence and impartiality of judges are therefore essential conditions for guaranteeing the presumption of innocence.

89 However, in this instance, it appears that, in circumstances such as those at issue in the main proceedings, described in paragraph 87 of this judgment, the independence and impartiality of judges and, accordingly, the presumption of innocence may be jeopardised.

90 In the light of the foregoing considerations, the answer to the first question is that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive 2016/343 must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

The second, third and fourth questions

91 By its second question, the referring court asks, in essence, whether the requirements of effective judicial protection, which include the independence of the judiciary, and those arising from the presumption of innocence, are infringed where, in the event that the judgments to be delivered in the cases in the main proceedings are the subject of appeals before the Sąd Najwyższy (Supreme Court), those appeals may be assigned to a judge appointed on a proposal from the KRS. By its third question, the referring court questions the Court of Justice, in essence, as to the legal effects of those judgments in the event that they are handed down by an adjudicating panel including one or more judges seconded by the Minister for Justice and, in the event of an appeal, as to the legal effects of a decision of the Sąd Najwyższy (Supreme Court) adopted with the involvement of a judge appointed on a proposal from the KRS. By its fourth question, the referring court asks, in essence, whether the fact that the court concerned has ruled in favour of or against the accused person may have a bearing on the answer to be given to the third question.

92 As the admissibility of those questions is disputed by the Polish Government, the Regional Public Prosecutor's Office, Lublin, the Regional Public Prosecutor's Office, Warsaw, and the European Commission, it should be borne in mind that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

93 In this instance, the second, third and fourth questions raised are purely hypothetical, in so far as they assume that an appeal will be brought before the Sąd Najwyższy (Supreme Court) against the judgments to be delivered in the cases in the main proceedings. In addition, in so far as the third and fourth questions concern the legal effects of those judgments, the Court does not have before it the factual or legal material necessary to give a useful answer to those questions, since the referring court has failed to specify the possible relevance of such an answer for the decisions to be taken by it in the cases in the main proceedings.

94 It follows that the second, third and fourth questions referred are inadmissible.

Costs

95 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 second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

[Signatures]

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* Language of the case: Polish.