N·S·A
SUPREME ADMINISTRATIVE
COURT OF POLAND

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

European Convention on Human Rights and Administrative Law

Polish and European Perspectives

C.H.BECK

European Convention on Human Rights and Administrative Law

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Authors

in Alphabetical Order

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Participants of the Conference:

Anna Adamska-Gallant, Jacek Chlebny, Miodrag Đorđević,
Mattias Guyomar, Ivana Jelić, Andreas Korbmacher,
Julia Laffranque, Bettina Maurer-Kober, Michail Pikramenos,
Barbara Pořízková, Gediminas Sagatys, Anja Seibert-Fohr,
Kateřina Šimáčková, Maciej Szpunar, Marcin Wiącek,
Krzysztof Wojtyczek, Skirgailė Žalimienė

PART II

Judges of the Supreme Administrative Court of Poland:

Tomasz Bąkowski, Stanisław Bogucki, Jacek Brolik, Jacek Chlebny,
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Krzysztof Winiarski, Bartosz Wojciechowski,
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European Convention on Human Rights and Administrative Law

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Scientific Editor
prof. dr hab. Krzysztof Wojtyczek
Judge of the European Court of Human Rights
from 2012 to 2024

C.H.BECK

Reviewers:

prof. dr hab. Leszek Garlicki
Judge of the European Court of Human Rights from 2002 to 2012

dr hab. Marcin Wiącek, prof. UW
Commissioner for Human Rights

Translation:

IURIDICO Legal & Financial Translations Sp. z o.o.

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ul. Bonifraterska 17, 00-203 Warszawa
e-mail: dok@beck.pl, tel. +48 22 311 22 22

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1. Legal Acts

Agricultural Tax Act	the Act of 15 November 1984 on the Agricultural Tax (consolidated text, Polish Journal of Laws of 2025, item 1344)
APAC or PPSA	the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (consolidated text, Polish Journal of Laws of 2024, item 935 as amended)
ATGS	the Act of 11 March 2004 on the Goods and Services Tax (consolidated text, Polish Journal of Laws of 2025, item 775 as amended)
CAO Law or PrUSA	the Act of 25 July 2002 – Law on the Organisation of Administrative Courts (consolidated text, Polish Journal of Laws of 2024, item 1267)
CAP	the Act of 14 June 1960 – Code of Administrative Procedure (consolidated text, Polish Journal of Laws. of 2025, item. 1691)
CC or Criminal Code	the Act of 6 June 1997 – Criminal Code (consolidated text, Polish Journal of Laws of 2025, item 383)
CCO Law or PrUSP	the Act of 27 July 2001 – Law on the Organisation of Common Courts System Law (consolidated text, Polish Journal of Laws of 2024, item 334 as amended)
CCP or Code of Civil Procedure	the Act of 17 November 1964 – Code of Civil Procedure (consolidated text, Polish Journal of Laws of 2024, item 1568 as amended)
CEC	the Act of 6 June 1997 – Criminal Enforcement Code (consolidated text, Polish Journal of Laws of 2025, item 911)
Civil Code	the Act of 23 April 1964 – Civil Code (consolidated text, Polish Journal of Laws of 2025, item 1071 as amended)
CFR or Charter	the Charter of Fundamental Rights of the European Union of 7 June 2016 (Official Journal of EU C 2016, No. 202, p. 389)
Competition and Consumer Protection Act	the Act of 16 February 2007 on Competition and Consumer Protection (consolidated text, Polish Journal of Laws of 2025, item 1714)

Constitution	the Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws of 1997, No. 78, item 483 as amended)
ECHR or Convention	the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Polish Journal of Laws of 1993, No. 61, item 284, as amended)
Energy Law	the Act of 10 April 1997 r. – Energy Law (consolidated text, Polish Journal of Laws of 1996, No 13, item 74 as amended)
Environmental Protection Law	the Act of 27 April 2001 – Environmental Protection Law (consolidated text, Polish Journal of Laws of 2025, item 647 as amended)
GospNierU	the Act of 21 August 1997 on Real Estate Management (consolidated text, Polish Journal of Laws of 2024, item 1145 as amended)
ILO Convention No. 29	the Convention Concerning Forced or Compulsory Labour (No. Du29) done at Geneva on 28 June 1930 (Polish Journal of Laws of 1959, No. 20, item 122 as amended)
Inheritance and Donation Tax Act	the Act of 28 July 1983 on the Inheritance and Donation Tax (consolidated text, Polish Journal of Laws of 2024, item 1837 as amendend)
Local Government Act	the Local Government Act of 8 March 1990 (consolidated text, Polish Journal of Laws of 1996, No 13, item 74 as amended)
Nationality Act	the Act of 2 April 2009 on Polish Nationality (consolidated text, Polish Journal of Laws of 2025, item 1611)
Nature Conservation Act	the Act of 16 April 2004 on Nature Conservation (consolidated text, Polish Journal of Laws of 2024, item 1478 as amended)
NCJ Act	the Act of 12 May 2011 on the National Council of the Judiciary (consolidated text, Polish Journal of Laws of 2024, item 1186)
PF Act	the Act of 11 March 2022 on the Protection of Fatherland (consolidated text, Polish Journal of Laws of 2025, item 825 as amended)
Postal Law	the Act of 23 November 2012 – Postal Law (consolidated text, Polish Journal of Laws of 2025, item 366 as amended)
Protection of Personal Data Act	the Act of 10 May 2018 on the Protection of Personal Data (consolidated text, Polish Journal of Laws of 2019, item 1781)

Protocol No. 1 to the ECHR	the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 r. (Polish Journal of Laws of 1995, No. 36, item 175 as amended)
PrUSWoj	the Act of 21 August 1997 – Law on the Organisation of Military Courts (consolidated text, Polish Journal of Laws of 2025, item 1614)
PS Act	the Act of 9 April 2010 on the Prison Service (consolidated text, Polish Journal of Laws of 2024, item 1869 as amended)
Rail Transport Act	the Act of 28 March 2003 on Rail Transport (consolidated text, Polish Journal of Laws of 2025, item 1234)
Repatriation Act	the Repatriation Act of 9 November 2000 (consolidated text, Polish Journal of Laws of 2022, item 1105 as amended)
SNU	the Act of 8 December 2017 on the Supreme Court (consolidated text, Polish Journal of Laws of 2024, item 622)
Tax on Civil Law Transactions Act	the Act of 9 September 2000 on the Tax on Civil Law Transactions (consolidated text, Polish Journal of Laws of 2024, item 295 as amendend)
TEU	the Treaty on European Union of 7 February 1992 (Polish Journal of Laws 2004, No. 90, item 864[2] as amended)
TO	the Act of 29 August 1997 – Tax Ordinance (consolidated text, Polish Journal of Laws of 2025, item 111 as amended)
The 1952 Constitution	the Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (consolidated text, Polish Journal of Laws of 1976, No. 7, item 36as amended) – abolished act
USP28	the Regulation by the President of the Republic of Poland of 6 February 1928 – Law on the Organisation of Ordinary Courts (consolidated text, Polish Journal of Laws of 1964, No. 6, item 40 as amended) – abolished act

2. Journals, publications and case-law databases

AUL FI	Acta Universitatis Lodziensis. Folia Iuridica
AUWr PPiA	Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji
CBOSA	Centralna Baza Orzeczeń Sądów Administracyjnych
EPS	Europejski Przegląd Sądowy
Gl.	Glosa
GSP	Gdańskie Studia Prawnicze
HUDOC	Human Rights Documentation
KPP	Kwartalnik Prawa Prywatnego

KPPod	Kwartalnik Prawa Podatkowego
MLR	Modern Law Review
MoPod	Monitor Podatkowy
ONSA	Orzecznictwo Naczelnego Sądu Administracyjnego
ONSAiWSA	Orzecznictwo Naczelnego Sądu Administracyjnego i wojewódzkich sądów administracyjnych
OSNAPU	Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych
OSNP	Orzecznictwo Sądu Najwyższego Izba Pracy
OSP	Orzecznictwo Sądów Polskich
OTK-A	Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy. Seria A
PiP	Państwo i Prawo
PPK	Przegląd Prawa Konstytucyjnego
PPP	Przegląd Prawa Publicznego
PrBPiS	Prawo Budżetowe Państwa i Samorządu
Przegl.Pod.	Przegląd Podatkowy
PS	Przegląd Sądowy
PUG	Przegląd Ustawodawstwa Gospodarczego
RPEiS	Ruch Prawniczy, Ekonomiczny i Socjologiczny
Sam.Teryt.	Samorząd Terytorialny
SIL	Studia Iuridica Lublinensia
SPE	Studia Prawno-Europejskie
SPPub	Studia Prawa Publicznego
Wok.	Wokanda
ZNSA	Zeszyty Naukowe Sądownictwa Administracyjnego
ZNUWr	Zeszyty Naukowe Uniwersytetu Wrocławskiego

3. Courts and institutions

ACA-Europe	The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union
CJEU	The Court of Justice of the European Union
CoE	The Council of Europe
ECtHR or ETPC	The European Court of Human Rights / Europejski Trybunał Praw Człowieka
ECtHR [GC]	The Grand Chamber of the European Court of Human Rights
EU	The European Union
GCEU	The General Court of the European Union

KNF	Komisja Nadzoru Finansowego, eng. The Polish Financial Supervision Authority
NATO	The North Atlantic Treaty Organization
NCJ	The National Council of the Judiciary
NSA	Naczelny Sąd Administracyjny, eng. The Supreme Administrative Court of Poland
ONZ	Organizacja Narodów Zjednoczonych, eng. The United Nations
RP	Rzeczypospolita Polska RP, eng. The Republic of Poland
TK	Trybunał Konstytucyjny, eng. The Constitutional Tribunal of Poland
WSA	Wojewódzki Sąd Administracyjny, eng. The Regional Administrative Court

4. Other abbreviations

art.	article
cf.	confer
ed./eds.	editor/editors
e.g.	*exempli gratia* (for example)
eng.	English
etc.	*et cetera*
et seq.	*et sequens* (and the following one) / *et sequentes* (and the following ones)
i.a.	*inter ali*a (among other things)
ibid.	*ibidem*
i.e.	*id est* (that is, in other words)
no./nos.	number/numbers
Nr	*numer* (Nummer)
p./pp.	page/pages
sec.	section
T.	tom
transl.	translation
v.	*versus*
Vol.	volume
wyr.	*wyrok* (judgment)

Introduction

It is our distinct honour and pleasure to introduce this monograph, which emerges from the international conference "Seventy-Five Years of the European Convention on Human Rights: The Role of Administrative Court Judges", organised by the Supreme Administrative Court of Poland and the European Court of Human Rights at the Royal Castle in Warsaw on 2 October 2025. As one of the central events marking this anniversary year, the conference brought together presidents and judges of the highest administrative courts from across Europe, judges of the European Court of Human Rights, as well as representatives of the Court of Justice of the European Union and the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe).

This remarkable gathering was a powerful embodiment of the judicial dialogue that sustains the Convention system. We are extremely grateful to all those who contributed to its success through their presence, reflections and spirited exchanges.

Signed in Rome in 1950, the Convention stands among Europe's most remarkable achievements. Conceived as a peace project, it drew upon the constitutional traditions of European States and the collective determination to prevent the horrors of totalitarianism from ever returning to our continent. Its genius lies not only in transforming the principles of the Universal Declaration of Human Rights into binding legal obligations, but also in establishing a unique system of international supervision anchored in the right of individual application, an innovation that empowers individuals to seek justice beyond their national borders.

This system is based on the principle of subsidiarity where the primary responsibility for safeguarding Convention rights rests with the national authorities, notably with national judges. The Convention was thus conceived as a shared legacy, entrusted equally to domestic courts and to the European Court of Human Rights. This is not a relationship of hierarchy, but one of complementarity and shared responsibility. Administrative courts, whose task is to ensure that public authority is exercised in accordance with both domestic law and the Convention, often provide the first and most effective line of defence for the rights it guarantees.

Over the decades, the Convention has become an integral part of national legal systems. In doing so, it has profoundly shaped the constitutional landscape of our continent and has become a "constitutional instrument of European public order".

The enduring strength of the Convention lies in its capacity to evolve, to be interpreted in light of present-day conditions. This ensures its continuing vitality and relevance in the face of challenges that its drafters could have never imagined, from digital transformation and climate change to geopolitical tensions and migration crises. The Convention's dynamic and evolutive interpretation as a "living instrument" is not the sole responsibility of the

European Court. It is a shared endeavour that requires constant and respectful engagement between the Strasbourg Court and national jurisdictions.

This dialogue is the lifeblood of the European human-rights architecture and takes many forms. It takes place through the European Court's judgments and their implementation by national courts, as well as through the invaluable exchanges among domestic courts themselves, facilitated by networks such as the Superior Courts Network and ACA-Europe. Through these frameworks, judges share reasoning, align standards, and cultivate mutual trust.

The papers and articles collected in the first part of this book, reflecting the conference's main themes – from judicial review and the enforcement of Strasbourg judgments to the scope of the margin of appreciation – richly illustrate this dialogue in practice. They offer insights from judges and scholars across Europe who, grounded in their respective constitutional and legal traditions and social contexts, engage with the Convention to craft solutions faithful to its spirit and effective within their national legal orders.

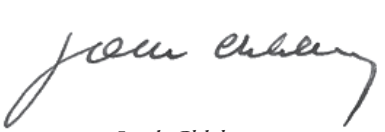
The Polish experience, explored in the second part of this volume, provides a compelling case study of the Convention's direct applicability and the complex interplay between domestic law, constitutional identity, and European standards.

Together, these contributions demonstrate how the Convention continues to inspire and evolve through the combined work of European and national judges.

We extend our profound gratitude to all who made this publication possible: the contributing authors, panellists, editors, translators, reviewers, and to Professor *Krzysztof Wojtyczek*, former Judge of the ECtHR elected in respect of Poland, for his commitment as the scientific editor of this monograph. Their work ensures that the discussions begun in Warsaw will continue to resonate beyond the conference hall.

We hope this publication will serve not only as a record of a memorable event and a contribution to the ongoing dialogue between courts, but also as a source of reflection and inspiration, strengthening the bonds of mutual trust and reinforcing our collective resolve to uphold the great legacy of the European Convention on Human Rights for generations to come.

Mattias Guyomar
President of the European Court of Human Rights



Jacek Chlebny
President of the Supreme Administrative Court of Poland

Part I:

Application of the European Convention on Human Rights – General Issues Seen from the Perspective of European and National Courts

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Programme of the Conference "Seventy-Five Years of the European Convention on Human Rights: The Role of Administrative Court Judges" Royal Castle Warsaw, 2 October 2025

Thursday, 2 October 2025

08:15-09:00 Registration

09:00-10:30 **Opening remarks**:

President of the Supreme Administrative Court of Poland **Jacek Chlebny**

President of the Republic of Poland **Karol Nawrocki**

President of the European Court of Human Rights (ECtHR) **Mattias Guyomar**

Commissioner for Human Rights **Marcin Wiącek**

First Advocate General of the Court of Justice of the European Union (CJEU) **Maciej Szpunar**

President of ACA-Europe, President of the Hellenic Council of State **Michail Pikramenos**

10:30-12:00 **Panel I: The Convention as a tool for judicial review by an administrative court judge**

Moderator: Vice-President of the ECtHR **Ivana Jelić**

Panellists: Vice-President of the Supreme Administrative Court of Austria **Bettina Maurer-Kober**

President of the Supreme Administrative Court of Lithuania **Skirgailė Žalimienė**

President of the Supreme Court of Slovenia **Miodrag Đorđević**

First Advocate General of the CJEU **Maciej Szpunar**

Judge of the ECtHR **Kateřina Šimáčková**

Q&A session

12:00-12:30 Refreshments

12:30-14:00 **Panel II: The enforcement of a ECtHR judgment by a national judge**

Moderator: Judge of the ECtHR **Anna Adamska-Gallant**

Panellists: Judge of the Administrative Law Chamber of the Supreme Court of Estonia **Julia Laffranque**

Judge of the Supreme Administrative Court of Poland, Director of the Judicial Decisions Bureau **Marian Wolanin**

Judge of the Administrative Cassation Court at the Supreme Court of Ukraine **Olesia Radyshevska**

Judge of the ECtHR **Gediminas Sagatys**

Q&A session

14:00-15:30 Lunch

14:50-15:20 Guided tour of the Royal Castle

15:30-17:00 **Panel III: The scope and limits of the margin of appreciation exercised by administrative court judges**

Moderator: Judge of the ECtHR **Jolien Schukking**

Panellists: Vice-President of the Supreme Administrative Court of the Czech Republic **Barbara Pořízková**

President of the Federal Administrative Court of Germany **Andreas Korbmacher**

Judge of the Curia of Hungary, Head of Panel at the Administrative Chamber **Gábor Remes**

Judge of the Supreme Court of Latvia, Chair of the Department of Administrative Cases **Anita Kovaļevska**

Judge of the ECtHR **Anja Seibert-Fohr**

Q&A session

17:00-17:20 **Summary of the panel discussions, general observations** Prof. **Krzysztof Wojtyczek**, former Judge of the ECtHR

17:20-17:30 **Closure of the Conference**

President of the ECtHR

President of the Supreme Administrative Court of Poland

Opening Statements

Good morning, Ladies and Gentlemen,

it is my great pleasure to welcome you to this joint conference of the judges of the Supreme Administrative Court of Poland, the judges of the European Court of Human Rights, and the presidents and representatives of the supreme administrative jurisdictions and councils of state of the Member States of the European Union, organised to mark the 75th anniversary of the European Convention on Human Rights.

Allow me to welcome the representative of the President of the Republic of Poland, Chief of the Chancellery of the President, Minister *Zbigniew Bogucki*.

Our distinguished guests from the European Court of Human Rights, whom I warmly welcome, are:

– the President of the European Court of Human Rights – *Mattias Guyomar*, elected in respect of France;
– the Vice-President of the Court – *Ivana Jelić*, elected in respect of Montenegro;

as well as the following judges of the European Court of Human Rights: *Kateřina Šimáčková*, elected in respect of the Czech Republic; *Jolien Schukking*, elected in respect of the Netherlands; *Anja Seibert-Fohr*, elected in respect of Germany; *Peeter Roosma*, elected in respect of Estonia; *Mykola Gnatovskyy*, elected in respect of Ukraine; *Gediminas Sagatys*, elected in respect of Lithuania; *Artūrs Kučs*, elected in respect of Latvia; *Anna Adamska-Gallant*, elected in respect of Poland; *Vasilka Sancin*, elected in respect of Slovenia; and *Marialena Tsirli*, Registrar of the European Court of Human Rights.

I would also like to welcome *Marcin Wiącek*, the Polish Commissioner for Human Rights; *Maciej Szpunar*, First Advocate General of the Court of Justice of the European Union; and *Krzysztof Wojtyczek*, Judge of the European Court of Human Rights from 2012 to 2024.

I am delighted to welcome the President of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA–Europe), President of the Council of State of Greece *Michalis Pikramenos*, as well as the Secretary-General of ACA-Europe, member of the Council of State of Belgium Geert Debersaques.

I am pleased to welcome all the presidents and representatives of the supreme administrative jurisdictions and councils of state of EU Member States present with us

here today: from Austria, Vice-President of the Supreme Administrative Court *Bettina Maurer-Kober*; from the Czech Republic, President of the Supreme Administrative Court *Karel Šimka*; from Estonia, President of the Supreme Court *Villu Kõve*; from Germany, President of the Federal Administrative Court *Andreas Korbmacher*; from Hungary, President of the Senate in the Administrative Chamber of the Curia *Gábor Remes*; from Lithuania, President of the Supreme Administrative Court *Skirgailė Žalimienė*; from Latvia, President of the Supreme Court *Aigars Strupišs*; from Slovakia, President of the Supreme Administrative Court *Pavol Nadʼ*; from Slovenia, President of the Supreme Court *Miodrag Đorđević*; and from Ukraine, Judge of the Administrative Court of Cassation within the Supreme Court *Olesia Radyshevska*.

I would also like to extend a warm welcome to the Vice-President of the Supreme Administrative Court of Poland and President of the Financial Chamber *Jan Rudowski*; to all the judges of the Polish Supreme Administrative Court and the presidents of regional administrative courts present with us here today; and finally, to the Head of the Chancellery of the President of the Supreme Administrative Court, *Hieronim Kulczycki*.

Ladies and Gentlemen,

it is an honour to welcome you here in the Royal Castle in Warsaw, which is a special place for Poles. It was here on 3 May 1791 that the Great Sejm of the Polish-Lithuanian Commonwealth came to adopt the Constitution of 3 May 1791, which was the first Constitution in Europe and the second one in the world.

The Royal Castle in Warsaw is also an important place for administrative justice. Three years ago, this was the venue where we celebrated – together with the President of the Republic of Poland, representatives of the highest constitutional authorities of the state, as well as representatives of the Court of Justice of the European Union and the highest European administrative courts – the 100th anniversary of the establishment of the Supreme Administrative Tribunal, the first administrative court in independent Poland, reborn in 1918.

Many of our today's guests were also with us then. We always remember your presence.

Ladies and Gentlemen,

the Convention for the Protection of Human Rights and Fundamental Freedoms has shaped the basic standards for the protection of human rights in Europe for 75 years. Thanks to the Convention, Member States of the Council of Europe have extended the protection of their citizens' rights, strengthening democracy and the rule of law.

The political changes that took place in our part of Europe after 1989 made it possible for Poland and the countries of our region to accede to the Convention, with Poland signing the European Convention on Human Rights in 1991. Its ratification and entry into force followed two years later.

Today, the Convention is part of the Polish legal system, directly applicable and taking precedence over statute. Such a high position of the Convention in the domestic system of sources of law ensures that its provisions have a real impact on the protection of individuals' rights and on the rulings of administrative courts.

The Supreme Administrative Court of Poland and the 16 regional administrative courts are part of the judiciary, separate from the general jurisdiction and the Supreme Court.

In the administration of justice, Polish administrative courts are obliged to examine whether the actions taken by administrative authorities comply with the law, and therefore also the provisions of the Convention. I strongly believe that our conference will be an excellent opportunity to share experiences concerning the application of the Convention as a benchmark for monitoring the legality of public administration's actions.

Taking into account the case-law of the Strasbourg Court, judges of administrative courts can ensure a uniform minimum standard of protection of the fundamental rights of individuals in the Member States of the Council of Europe. In individual cases, even if the administrative decision under review meets the requirements of domestic law, it can be overturned if it violates the Convention. To ensure that the standard arising from the Convention is maintained, however, legislative intervention is often indispensable, particularly when the ECtHR issues a pilot judgment finding systemic human rights violations. This is exemplified, among others, by the pilot judgment in the case of *Wałęsa v. Poland*[1].

Ladies and Gentlemen,

from the perspective of a domestic judge, it is important to consider where the limits of creative interpretation of the Convention lie, and what relevance its provisions have for the constitutional identity of a state.

Judges recognise the bold response of the Strasbourg Court to the changing social conditions which often necessitate a redefinition of concepts found in the Convention, *e.g.* the notion of family life or private life. The most important consideration, however, is to maintain a proper balance in this matter, and the dialogue between European and national judges, together with respect for the constitutional

[1] ECtHR judgment of 23 November 2024, *Wałęsa v. Poland*, application no. 50849/21.

traditions of the Member States of the Council of Europe, should contribute to achieving this. Dialogue and cooperation between judges should always be based on mutual trust and openness; it should take place with a sense of shared responsibility for the protection of the fundamental rights of individuals and the common interests of citizens.

It is important for there to be a dialogue both between the judges of the Strasbourg Court and national judges, as well as between judges from the different member states of the Council of Europe. The latter takes place primarily through the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe). I am pleased to have the President of ACA–Europe, President of the Council of State of Greece *Michalis Pikramenos*, present at our conference.

Ladies and Gentlemen,

the social and political crises of the past few years – the migration crisis, also manifested by the hybrid war against the Baltic states and Poland, the COVID-19 pandemic, the climate crisis and, above all, the outbreak of the war in Ukraine as a result of Russia's aggression and the recent hybrid attacks on NATO countries – bring new challenges not only for judges of the ECtHR but also for judges of national administrative courts.

The application of the Convention raises questions about the reasons and rules for balancing individual human rights with such values as national security and law enforcement. This problem will certainly come to the fore during today's discussion.

At the political level, these concerns were expressed in the open letter of 22 May 2025, addressed by the leaders of nine European countries, including Poland, to the ECtHR. The letter called for a 'new interpretation' of the Convention with regard to the subject of asylum and migration.

I would now like to address our foreign guests directly:

Dear President *Mattias Guyomar*, dear Vice-President *Ivana Jelić*, distinguished Judges from the Court of Human Rights, dear President of ACA-Europe *Michalis Pikramenos*, dear presidents and representatives of the highest administrative courts across Europe,

Our conference would not have been possible without the initiative of the former President of the ECtHR – *Marko Bošnjak*. It was his idea to hold our conference in Warsaw.

I wish to thank him for that initiative, even though he is unfortunately not with us today.

I would now like to thank President *Mattias Guyomar* and Vice-President *Ivana Jelić* and their team for their commitment to making the idea of a conference in Warsaw a reality.

Dear President of ACA-Europe *Michalis Pikramenos*, presidents and representatives of the highest administrative jurisdictions across Europe, thank you for coming. I wish you all an enjoyable conference and an opportunity to get to know our capital city.

Enjoy the conference, and enjoy your visit to Warsaw.

Ladies and Gentlemen,

to celebrate the 75th anniversary of the Convention and our special meeting, the judges of the Supreme Administrative Court have prepared a publication outlining our experiences in applying the Convention standards and the Court's case-law. The book has been given to all of you today as part of our conference materials. The monograph reveals not only the complexity of the application of the Convention, but also its appeal and topicality.

I would like to thank the judges of the Supreme Administrative Court who wrote the papers included in the publication. I would also like to express my deep appreciation and thanks to the scientific editor of the monograph, who is present at our conference, former judge of the ECtHR Professor *Krzysztof Wojtyczek*.

I would also like to thank the reviewers – former judge of the ECtHR Professor *Leszek Garlicki*, who unfortunately could not be with us today, and Professor *Marcin Wiącek*, Commissioner for Human Rights, who is with us today.

I wish you all a successful conference!

prof. dr hab. Jacek Chlebny
President of the Supreme Administrative Court of Poland

President of the Republic of Poland
Karol Nawrocki

Warsaw, 2 October 2025

The organisers and participants of the conference titled
"75 years of the European Convention on Human Rights
– experiences of judges of administrative courts"
at the Royal Castle in Warsaw

Ladies and Gentlemen,

today's conference reminds us of one of the most important moments in the history of protection of human rights. Seventy-five years ago, on 4 November 1950, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome. This was only two years after the UN General Assembly had adopted the Universal Declaration of Human Rights, to which the Convention refers in its preamble.

The signatories of the Convention, mindful of the dramatic experiences of World War II, were fully aware that the protection of human rights and freedoms was the foundation for peace and justice. In the preamble, they expressed their deep belief in these values, recognising them as a condition for a sustainable peace in Europe and across the world.

It is worth remembering this especially today, at a time when some states are flagrantly violating the principles of international law and rejecting the foundations of human rights protection. The Russian Federation's withdrawal from the Council of Europe and its denunciation of the Convention in 2022 serves as a striking example of the consequences carried by the rejection of these values.

It is particularly telling that on the anniversary of the signing of the Convention, the situation in which Poland finds itself, instead of strengthening the rule of law, leads towards dangerous chaos. I am referring to the insistent unlawful attempts to undermine the legality of judicial appointments under the currently applicable Act on the National Council of the Judiciary, one which was adopted as a result of a full

legislative process, signed by the President of the Republic of Poland, in compliance with the Constitution. I do not, and will not, consent to this as President, all the more so because I had clearly and consistently presented my position on this matter prior to being entrusted by the Nation with the highest office of the Polish state; the people exercising their sovereign power have in fact decided in their majority, unequivocally and definitively, that they do not consent to the chaos caused by this lawlessness where one judge does not recognise another.

Questioning the status of judges appointed by the President of the Republic of Poland under this procedure is a brutal attack on the constitutional principle of irremovability and, consequently, a deliberate attack on the independence of judges and the autonomy of the judiciary, both of which guarantee respect for human rights and the protection of fundamental freedoms. It is also an attempt at questioning the sovereign power of the People who entrust each successive President with the exclusive prerogative of appointing judges. It is by the virtue of the Constitution and by the will of the people which is expressed in free, universal, equal and direct elections, that the President of the Republic of Poland has the final word in this matter. This is why segregating judges, in a way, into different categories and entirely denying the status of a judge to many brings to mind the worst connotations; such actions can be described as terror of lawlessness masquerading as restoration of the rule of law, and this terror actually leads to destruction and immense injustice. Today, it affects some of the judges of the Supreme Court and the Constitutional Court, but tomorrow it will affect the judges of the Supreme Administrative Court, of which we have seen an attempt, and then judges of subsequent instances of common and administrative courts, and finally all those judges who were appointed under the previous procedure but who have ruled with judges appointed under the current rules, too. This is a path that leads straight to paralysing the entire justice system and truly eradicating the rule of law; we know full well that there are no human rights without the rule of law.

The constitutional basis for the status of judges was confirmed in a recent resolution by the Board of the Supreme Administrative Court in response to an illegal summons by the Public Prosecutor General who attempted to unlawfully force 38 judges appointed in accordance with the Polish Constitution and Polish laws to cease and desist from ruling. Therein, the Supreme Administrative Court made it clear that the mode of a judge's appointment cannot be the basis for automatically questioning their impartiality and autonomy, and that the proper rationale for being excluded from ruling lies in the individual assessment of a judge in a particular case. The resolution of the Board is an important voice confirming the constitutionally unquestionable status of judges appointed by the President of the Republic of Poland. It is an attempt at stabilising a system unbalanced by a section of the judiciary which is acting for political motives and by representatives of the current parliamentary majority.

Polish society has the right to expect that courts, including administrative courts, will act efficiently, adjudicate the people's cases and support people in asserting their rights and resolving conflicts. Citizens have the right to be confident that their cases will be decided by judges who are independent and therefore not subject to any – let me stress – any influence or pressure. The Constitution clearly states that the appointment of judges is the exclusive prerogative of the President of the Republic of Poland. As President of the Republic of Poland, I will remain the guardian of this principle, the guardian of the autonomy of courts, of the independence of judges, and of their irremovability.

Respecting international courts and tribunals, we must remember that this respect should work both ways. Its true manifestation is respecting the jurisdiction and competence of each body and not going beyond the bounds of a treaty or convention. This means that the organisation of the judiciary in Poland, in accordance with the Constitution, falls within the exclusive competence of Polish authorities.

Our model for the appointment of judges, especially to the highest courts, has an element which is particularly worth highlighting. The procedure involves either the National Council of the Judiciary, a constitutional body consisting of representatives of all types of authorities – the judicial, the legislative and the executive branch of government – or, as in the case of the State Tribunal and Constitutional Court, the Sejm. Here, it is worth noting that the involvement of different types of authorities in the judicial appointment process is not unusual in Europe. In Germany, judges of the Federal Constitutional Court are elected by the Bundestag and the Bundesrat in a qualified majority vote. In France, the Constitutional Council consists of persons appointed by the President of the Republic and the Presidents of the two houses of Parliament. In Spain, the Parliament elects some of the members of the Judicial Council; in Italy, judges of the Constitutional Court are appointed by the President, the Parliament and the judiciary.

Against this background, the Polish model stands out for its particular degree of pluralism and diversity. In addition to representatives of the legislative and executive branches of government, the National Council of the Judiciary also includes representatives of the judicial branch to a significant extent. This ensures that all three branches of government have a say in shaping justice in a balanced way. This solution makes the whole process broadly legitimate, more inclusive, and resistant to the domination of just one branch of government. With the aforesaid in mind, I can objectively and decisively say that there are many countries that could learn from the rules and procedures currently applicable in Poland with regard to the appointment of judges – countries from which come those judges of the European courts who unjustifiably interfere with the shape of the Polish judicial system through their rulings.

That is why it is now necessary to stop this politically motivated and legally completely unmotivated chaos in the Polish justice system that weakens the state and hurts citizens. The institutional disorder cannot continue indefinitely; it leads to at least a partial paralysis of legal transactions and further undermines public confidence in the courts and the state in general. The role of the President of the Republic of Poland is to resolve this state of affairs for the sake of the best interests of the state and its citizens as a whole. This is a difficult task, requiring the restoration of the full constitutional order by showing a way out of the current systemic crisis. But it is an absolutely necessary task, as it is the only way we can rebuild confidence in the justice system and provide people with legal certainty and, by extension, secure their rights and freedoms. Therefore, I will be setting up a Council for the Repair of the State Government System in the weeks to come.

This responsibility has a special aspect in Poland. Our history shows that even in the most difficult times, the Polish people have been able to remain faithful to the ideals of freedom and justice. This legacy should continue to inspire today, at a time when justice needs to be defended and fully restored.

As a historian specialising in the period of the heroic resistance of Poles to two totalitarian regimes, but also simply as a citizen of my country, it is with real pride and satisfaction that I think of Poland's great success in its peaceful overthrow of the communist dictatorship and return to the ranks of free states and nations of Europe. After an imposed hiatus from 1939 to 1989, Poland once more participates in shaping European jurisprudence, as it has done for centuries. Our domestic jurisprudence and high-level case-law of Polish courts – particularly administrative courts, outstanding in this regard – significantly contributed to this. I am convinced that overcoming those difficulties which I could not fail to mention today will only enrich the experiences and reflections that legal theorists and practitioners in Poland and abroad will be able to draw on in the future.

I would like to thank the representatives of the Supreme Administrative Court for organising today's ceremony, and express the hope and expectation that this theme will be appropriately developed during the conference.

Best regards,
Karol Nawrocki
President of the Republic of Poland

letter read by *Zbigniew Bogucki*
Chief of the Chancellery of the President of the Republic of Poland

Dear President *Chlebny*,

Distinguished Presidents, Judges, and colleagues,

Ladies and Gentlemen,

it is a profound honour to deliver this opening address and to greet you, judges of supreme administrative courts from across our continent, at this joint conference commemorating the 75th Anniversary of the European Convention on Human Rights.

Our theme – the 75th anniversary of the Convention and the role of administrative court judges – allows us to reflect both on the origins and achievements of the Convention's unique human rights system and on the responsibilities we share for its continued vitality.

Allow me first to thank warmly our hosts, the Supreme Administrative Court of Poland, for organising this judicial conference – and for my part as President of the European Court of Human Rights, I will remain in a purely judicial field – their hospitality and for the rich programme they have prepared.

I also wish also to express my profound gratitude to President *Chlebny* for his vision and energy in putting together our largest and arguably most important event for the 75th anniversary of the Convention, with the participation of ten Judges from the European Court of Human Rights, and of Marialena Tsirli, Registrar of the Court, under whose authority more than 700 staff members work for the Court with strong commitment.

Let me introduce them to you, because the participation of so many European Judges at one event is quite exceptional in itself.

Vice-President *Ivana Jelić* (Montenegro) and Judge *Jolien Schukking* (the Netherlands), who have also been very involved in the organisation from our side and I would like to thank them warmly for that; *Anja Seibert-Fohr* (Germany); *Peeter Roosma* (Estonia); *Kateřina Šimáčková* (the Czech Republic); *Mykola Gnatovskyy* (Ukraine); *Gediminas Sagatys* (Lithuania); *Artūrs Kučs* (Latvia); *Anna Adamska-Gallant* (Poland) and *Vasilka Sancin* (Slovenia).

Finally, we are all pleased to see our friend and former colleague, *Krzysztof Wojtyczek*, participating in today's discussions and taking the floor at the end of the day.

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We convene at a time when Europe faces escalating geopolitical tensions and war on its soil, as Poland and its neighbours can testify directly.

These pressures are compounded by disinformation, populism, the resurgence of authoritarian tendencies, a troubling erosion of trust in public institutions, and increasing threats to judicial independence.

Against this backdrop, I propose to share with you a brief "return to the sources". This is more than just a historical exercise, it is a "back to the future"; a reminder of why the Convention was conceived as a pillar of democracy and the rule of law and why it remains indispensable.

As *Pierre-Henri Teitgen*, one of the architects of the post-war human rights order, warned: "Democracies do not become Nazi states overnight. Evil operates cunningly. One by one, freedoms are suppressed […] until public opinion and the entire national conscience are asphyxiated […]. It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril […]. An international court, within the Council of Europe, a system of supervision and guarantees, could be that conscience".

Throughout our continent's long and often painful history, there have been many who sought to resolve diversity not through dialogue or understanding, but through violence. Yet, alongside this darker current, there has always been another voice: the voice of peace.

It is this enduring tradition of irenic thought that underpins the Council of Europe, established by the Treaty of London on 5 May 1949, and the European Convention on Human Rights, signed in Rome on 4 November 1950[1].

They are both peace projects, rooted in the conviction that democracy, human rights and the rule of law are not noble aspirations but essential pillars of human coexistence.

The preparatory works of the Convention provide a window into the minds of its framers, capturing their foresight, the urgency of their mission and the nobility of their aspirations. They testify that the The Convention was an expression of legal humanism, at the same time a new beginning and a bulwark against the totalitarianism. It was designed not only to prevent the return of past horrors, but also to shield Europe from new threats at a time when communism was spreading, and to stand as a beacon of hope for those who found themselves behind the "iron curtain"[2].

[1] On that date twelve States signed the Convention in Rome: Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey, and the United Kingdom.

[2] "This battle in the human conscience, we can win by giving firm reality to the moral and spiritual values and to the democratic principles of our civilisation. It is through such an ideal that it will be

The Convention was conceived as a regional embodiment of the Universal Declaration of Human Rights of 1948. It explicitly references the Declaration in its Preamble and adopts its universalist language.

What made the Convention unique is that it was the first international instrument which transformed certain rights from the Universal Declaration, which was essentially aspirational, into binding legal obligations for States.

But the Convention went even further. To ensure that these rights and the corresponding obligations were not merely symbolic but concrete and enforceable, the Convention established an international supervision mechanism based on the right of individual application.

For the first time in history, that mechanism allowed individuals to bring proceedings against States before an international forum [composed of a Court of elected Judges[3]]. It contributed to the recognition of individuals as subjects of international law, marking a significant shift from the traditional principle that placed a State's treatment of its own citizens beyond international scrutiny or liability[4]. It is a choice coming from the sovereign will of the Member States of the Council of Europe.

As *Robert Badinter* later explained, the Convention "pierces […] the screen of the State to reach the individual, the immediate subject of international law, the holder of rights and duties". He also provided a philosophical justification of the system: "The universality of human rights legitimises the approach that consists in complementing the guarantee of rights with an intellectual construction that goes beyond the purely national framework".

Equally remarkable was the fact that, by accepting the Convention mechanism, the Contracting States implicitly acknowledged the need for a remedy outside their borders. In doing so, they agreed to derogate – at least to some extent – from the traditional principle of non-interference and accepted to exercise over one another a mutual, collective guarantee entrusted to an international judicial body to ensure

possible to inspire faith in our aims, not only among our peoples, but also among the other peoples of Europe who are not part of the Council of Europe", said Mr *MacBride* of Ireland.

[3] As Mr *Kiesinger*, speaking for Germany, foresaw: "It would certainly be a milestone in history if human rights were not only safeguarded within national borders, but if, beyond them, any person whose rights had been violated could seek the protection of a European court". To this, *Teitgen* replied with even greater clarity: "If we truly want collective protection in Europe of fundamental rights and freedoms […] we must turn to the only force that has definitive authority in these countries: justice – a Court, a tribunal, judges". He saw an international mechanism available to victims as the only way to persuade the people of Europe that "something new is being done".

[4] *P.H. Teitgen* explained what this meant for the peoples of Europe: "the feeling that these rights and freedoms, which they have won after so many centuries of effort and toil, after so much pain and suffering, wars, uprisings, and revolutions, after so much blood and tears, will now be guaranteed against any domestic arbitrariness by these European authorities in which they place, in advance, such touching trust".

that no country would again slide into tyranny unchecked. As Mr *Roberts* of the United Kingdom declared: "This Convention means that the European community as a whole guarantees the maintenance in all its Member States of a living democracy, and that the liberty of each individual […] is the concern of all"[5].

What was once a dream became a reality. Over the years the Convention system became not only the most advanced and effective international mechanism for enforcing human rights but also the most far-reaching system of international justice.

Through successive accessions – notably those of Spain and Portugal in the late 1970s, following their democratic transitions, and of numerous Central and Eastern European countries in the 1990s after the fall of communism – the Convention gradually came to embrace almost the entire continent. From its 12 original signatories[6], it expanded to 47 States, and today binds 46, following Russia's expulsion from the Council of Europe in 2022 after its full-scale invasion of Ukraine. It now stands as a safeguard for the rights of some 700 million people.

The supervisory mechanism established by the Convention is, by design, a subsidiary one. It is activated only after domestic remedies have been exhausted. The primary responsibility for safeguarding the Convention rights rests squarely with the Contracting States themselves. This reflects the system's true nature: not one of hierarchy, but of complementarity of jurisdictions.

The drafters therefore left the Convention as a shared legacy, entrusted both to the national courts and to the European Court, making it their common responsibility to keep it alive.

To serve this purpose, the Convention was deliberately drafted in broad and inclusive terms, echoing the language of the Universal Declaration, precisely to allow judges to adapt the scope of its rights to new circumstances. As the Preamble proclaims, the Convention is dedicated to "the maintenance and further realisation of human rights". The drafters thus entrusted judges not only with safeguarding those rights, but also with developing them. To do so the Convention had to be interpreted in a dynamic and contextualised manner.

The Court has remained faithful to that vision. Through its dynamic and evolutive interpretation of the Convention as a "living instrument"[7], which guarantees

[5] Lord *Layton* remarked along the same lines "[…] the maintenance of certain basic democratic rights in any one of our countries is not the concern of that country alone, but is the concern of the whole group".

[6] Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Norway, the Netherlands, Turkey and the United Kingdom.

[7] ECtHR judgment of 25 April 1978, *Tyrer v. United Kingdom*, application no. 5856/72, § 31, Series A no. 26.

the rights that are not "theoretical or illusory but practical and effective"[8], the Court has ensured that it speaks to realities that were unforeseeable and unimaginable at the time it was adopted, including issues related to new technologies, bioethics or climate change.

The metaphor of the "living instrument" resonates with another interpretative tradition: the "living tree doctrine" derived from a seminal case of the Supreme Court of Canada[9].

Of course, evolutive interpretation is not without limits. Judges cannot become legislators and invent new rights and thereby transform the Convention from a "living tree" into a "moving tree". They cannot go further in their judicial interpretative power than to harvest the fruit from the tree planted by the drafters.

Only sovereign States, Parties to the Convention, have legitimacy to create new rights. Indeed, the Convention has over the years been supplemented by various additional Protocols, signed and ratified by the Member States themselves, which have expanded the catalogue of substantive and procedural rights.

However, the Convention has not evolved solely at the international level. Many contracting States have incorporated it into their national legal systems where it often acquired a *quasi*-constitutional status. A significant role in this process of "embedding" of the Convention has been played by its unique character. Unlike an ordinary international treaty, the Convention goes beyond mere reciprocal engagements between the Contracting States and directly creates rights for private individuals[10].

It has become, as the Court has called it, "a constitutional instrument of European public order"[11]. This order is to be understood as embracing, not excluding, national constitutional identities. It cannot be otherwise, for – as the Preamble reminds us – the Convention rests on the very rights that form the common heritage of all European countries.

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The principle of subsidiarity, enshrined in the Preamble since Protocol No. 15 and stemming from shared responsibility, is the cornerstone of the Convention system.

[8] ECtHR judgment of 9 October 1979, *Airey v. Ireland*, application no. 6289/73, § 24, Series A no. 32.

[9] *Edwards v. Canada* of 1929.

[10] See, *e.g.* ECtHR judgment of 18 January 1978, *Ireland v. The United Kingdom*, application no. 5310/71, § 239, Series A no. 25.

[11] See, *e.g.* ECtHR [GC] judgment of 18 December 1996, *Loizidou v. Turkey*, application no. 15318/89, § 75, Series A no. 310 and ECtHR [GC] judgment of 21 June 2016, *Al-Dulimi and Montana Management Inc. v. Switzerland*, application no. 5809/08, § 145.

The effective functioning of this system requires a continuous, dynamic, and robust judicial dialogue. It is this dialogue that fosters coherence, mutual trust, and the progressive development of human rights. Importantly, it is multi-layered and takes many forms.

There is, first, the vital dialogue between European Court and the national courts through our judgments, the comparative analysis that underpins them, our advisory opinions, our Knowledge Sharing platform, and, increasingly, through networks and platforms for direct exchange.

Foremost among these is the Superior Courts Network, a key pillar of judicial dialogue within the Convention system, which celebrates its 10th anniversary this year. In just a decade, it has grown into the largest judicial network in the world, bringing together 111 national apex courts from 46 Council of Europe Member States, joined by five observer courts[12].

Equally essential, however, is the horizontal dialogue among national courts. I would like to salute the presence here of President *Pikramenos* from the Greek Council of State, who I had the honour of hosting in Strasbourg recently with a delegation of judges. President *Pikramenos* is here today in his capacity President of ACA-Europe, the International Association of Supreme Administrative Jurisdictions. Through these regular meetings of supreme administrative courts, judges learn from one another, align their standards, and strengthen mutual trust. When a national court draws upon the reasoning of a fellow court from another Convention State, it helps to prevent fragmentation, consolidate the common legal space, and reinforce the shared understanding of human rights. Even when a court decides to depart from a solution adopted elsewhere, the spirit of dialogue prompts it to provide explanations or justifications for that divergence.

Naturally, our Court is also in constant dialogue with the Court of Justice of the European Union. This contributes to ensuring coherence between the two European legal orders. I therefore welcome among us today Mr *Maciej Szpunar,* the First Advocate General of the CJEU.

This regional conference is a vivid example of judicial dialogue in action. It is emblematic of our "shared responsibility" Courts from twelve countries – with different history, language, and legal tradition – are represented here today. Many of these countries also share a common past, having lived for decades under communist rule. Together, you embody Europe's richness and diversity but also its unity. For beyond all differences, you share common values: democracy, human rights, and the rule of law.

[12] The CJEU, the Inter-American and African human rights courts, the Supreme Court of Justice of Mexico, and the Supreme Court of Canada.

On a personal note, this conference holds special significance for me. Having served for 25 years as an administrative judge at the French *Conseil d'État,* I feel a particular affinity with your work. That experience has given me a unique perspective on the striking parallels between administrative courts and the European Court.

Both confront disputes between individuals and the State, requiring a careful balancing between individual rights and collective (public) interests. As you perfectly know, dear colleagues coming from superior administrative Courts of the region, each case ledged before your jurisdiction is not only about remedying an individual wrong but also about ensuring that public authority is exercised in accordance with the law and with respect for human rights.

We both must carefully navigate our relationship with the political branches, making clear that what we do is not judicial activism but judicial pragmatism, attentive to context and consequences, anchoring justice in present realities while remaining faithful to the law's purpose and respectful of the limits of our role.

Administrative justice and European justice are therefore branches of the same tree.

Judicial dialogue reminds us that law is not static, but a living work, written together, like Dworkin's "chain novel", across generations and across jurisdictions.

Let me give you some recent, concrete examples of this on-going "chain novel". These are cases before the European Court where we have benefited from the reasoning and decision-making of a national supreme administrative or constitutional court.

My first example is the Grand Chamber case from 2021: *Vavřička and Others v. the Czech Republic*[13] which dealt with compulsory childhood vaccination. The Grand Chamber in reaching its conclusion that the Czech measures had not exceeded the wide margin of appreciation in this area, found no violation of Article 8. The Court also noted the procedural safeguards provided for in national law. The applicants had had at their disposal both administrative appeals as well as judicial remedies before the administrative courts and, ultimately, the Constitutional Court. They had failed to make out claims calling into question the institutional arrangements in place in the Czech Republic in the area of formulating the compulsory vaccination policy and the effectiveness and safety of the vaccines concerned.

In *Savickis and Others v. Latvia*[14] from 2022, the issue at stake concerned a difference in treatment regarding pension entitlements dating from the Soviet period. The Latvian Constitutional Court which had been seized of the claims deemed that the applicants had not been deprived of their pensions and that the difference in treat-

[13] ECtHR [GC] judgment of 8 April 2021, *Vavřička and Others v. the Czech Republic*, applications nos. 47621/13 and 5 others.

[14] ECtHR [GC] judgment of 9 June 2022, *Savickis and Others v. Latvia*, application no. 49270/11.

ment was justified and proportionate, and dismissed the case. Our Court, finding no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1, relied on the reasoning of the Constitutional Court finding that the Latvian domestic authorities had acted within their discretion concerning the assessment of the applicants' pension entitlements.

In 2023, in the case of *Humpert and others v. Germany*[15] the applicants were teachers with civil-servant status who complained of disciplinary sanctions imposed on them for having participated, during their working hours, in strikes organised by their trade union. They were protesting against worsening working conditions for teachers. In finding no violation of Article 11 the Court took into consideration the solid and convincing justifications for the restrictions as presented by the respondent Government and reflected in the extensive assessment of the German Federal Constitutional Court.

In *Bielau v. Austria*[16] from 2024, the applicant was a doctor who complained under Article 10 about a suspended disciplinary fine imposed on him because of scientifically untenable statements he had about the ineffectiveness of vaccines. The Supreme Administrative Court concluded that the restriction of the applicant's right to freedom of expression resulting from the disciplinary sanction could not be regarded as disproportionate, in view of the aim set out in Article 10 § 2 of the Convention. In our Court judgment we found no violation of Article 10. Why? Because as the domestic courts had given relevant and sufficient reasons in striking a fair balance between the competing interests of the general public and of the applicant's freedom of expression at issue in the present case. The Court found nothing arbitrary or manifestly unreasonable in that interpretation of the relevant provisions and reiterated that it was first and foremost for the national authorities, and notably the courts, to interpret domestic law.

In each of those cases national superior courts thoughtfully crafted a chapter faithful to the foundational principles of the Convention while appropriately reflecting the specific historical, social, and legal context of their respective countries. These examples illustrate the harmony between the case-law of national courts and the ECtHR and the well-functioning of the "shared-responsibility".

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To conclude, I can do no better than to return once again to the preparatory works. The following triptych of citations reminds us that the Convention system was born from a powerful combination of insights:

[15] ECtHR [GC] judgment of 14 December 2023, *Humpert and Others v. Germany*, applications nos. 59433/18, 59477/18, 59481/18 and 59494/18.

[16] ECtHR judgment of 27 August 2024, *Bielau v. Austria,* application no. 20007/22.

> **Awareness:** "We must therefore create in advance, within Europe, a conscience that sounds the alarm. This conscience can only be a court proper to Europe. […] In truth, what we want to prevent is the re-establishment or establishment, in some countries, of totalitarian dictatorships like those we knew in Italy and Germany before the war. It is against this horror that we want to protect ourselves"[17].
>
> *P.-H. Teitgen* from France

> **Vigilance:** "What we must fear today is not the seizure of power by totalitarianism through violence, but rather that totalitarianism may seek to seize power by the way of pseudo-legality"[18].
>
> *M. Benvenuti* from Italy

> **The duty of intervention:** "What we want is, if I understand correctly, to have a higher, sublime control of the European spirit. I fully accept the idea that if one day – as we have seen in a neighbouring country – so-called people's tribunals begin to condemn deputies to death and carry out executions, that is a travesty of justice, and with all my heart I declare that a Europe conscious of its greatness and its attachment to human rights must then intervene"[19].
>
> *Dusursal* from Turkiye

Indeed, through our respectful dialogue, the Convention is still alive, not only in our hearts and our minds, but also thanks to our shared judicial mission.

It was precisely for troubled times such as these that the Convention was drafted and the Court was created. The threats that the drafters sought to guard against are re-emerging in new forms. This brief "return to the sources" reminds us that it must also be a "back to the future".

Teitgen's warning speaks with undiminished force today: "In the times we live in, human rights are threatened everywhere in the world, but also in this Europe that is said to be a land of asylum and freedom. […] More today than yesterday, the respect for the European Convention is imperative".

May these words inspire us. Their enduring power reminds us of the responsibility we bear and strengthens the optimism of our will. It is by remaining attentive to this legacy that all together we ensure the Convention rights remain practical and effective for the generations to come.

Mattias Guyomar
President of the European Court of Human Rights

[17] *P.-H. Teitgen*.
[18] Mr *Benvenuti*, Italy – Plenary session, 8 September 1949.
[19] Mr *Dusunsel*, Turkey – Plenary session, 8 September 1949.

Ladies and Gentlemen,

the Convention for the Protection of Human Rights and Fundamental Freedoms is, and should be, one of those documents that is permanently present on a judge's table, alongside the Constitution of the Republic of Poland. The Convention is a source of law that is universally binding in Poland and should be applied directly, *i.e.* it can be the legal basis for an individual's claim and a court decision. Moreover, in the process of applying the Convention, the court is empowered to disregard a provision of a law or regulation that is incompatible with it.

A lot of credit, when it comes to implementing the Convention standards into Polish case-law, should go to the Polish administrative courts. The Convention is present in numerous rulings of regional administrative courts and the Supreme Administrative Court, and is a benchmark for the review of actions taken by public administrative authorities. Administrative courts have on many occasions overturned decisions that were incompatible with the Convention, or co-applied the Convention when interpreting Polish law. One could mention cases concerning the right to ownership of real property (*e.g.* in the area of spatial planning), freedom of assembly, the protection of personal data, the right of access to public information, the situation of refugees, the prohibition of discrimination, the rights of persons belonging to minorities, as well as administrative penalties. Many of these rulings, significantly strengthening the position of the individual *vis-à-vis* the state, were also made with the involvement of the office of the Commissioner for Human Rights. In particular, I wish to highlight the judgments in which the practice of pushing foreigners back to the border line on the basis of a blanket provision found in a ministerial regulation, without any procedure, was declared illegal. I appreciate that administrative courts have stood unequivocally on the side of human dignity in these cases.

With these types of cases in mind, it is no exaggeration to say that thanks to administrative courts, both citizens and public institutions are starting to hold a more and more grounded view that the Convention is not just a declaration or a demand, but a real legal document that people can invoke before public institutions, one that effectively constrains the authorities in their decisions to encroach on human freedoms and rights.

The case-law of the ECtHR also plays an important role in the activities of the administrative courts; without it, obviously, the content of the various provisions of

the Convention cannot be fully reconstructed. In many cases, administrative courts refer to the case-law of the ECtHR, and not only to the judgments against Poland. In doing so, they build citizens' trust in the community of states that is the Council of Europe, as well as testify to a commitment to the universal values that should unite all democratic countries.

As an aside, it is a pity that Poland has not ratified Protocol No. 16 to the Convention, which allows courts themselves to initiate proceedings before the ECtHR. I am sure that the case-law of the ECtHR would then be enriched by many valuable advisory opinions brought about by Polish administrative courts. I hope that ratification of this Protocol will take place in the future.

But I wanted to talk about something else. For several years, there has been a fierce dispute in Poland about the legal effect that judgments of the ECtHR have in the Polish legal system. This dispute obviously relates to the crisis of judicial power; it was initiated by the judgment of 22 July 2021 in the case of *Reczkowicz v. Poland*, reaching its high point in the pilot judgment of 23 November 2023 in the case of *Walesa v. Poland*. Since then, public debate features radically different, or even contradictory and mutually exclusive concepts as to the relevance of ECtHR judgments to rulemaking and the application of the law. Legal, journalistic and political arguments intertwine, unfortunately not making the discussion on this issue fair or objective. On the one hand, there is strong opposition, with allegations that the Polish Constitution is being violated and the ECtHR is overstepping its authority accompanied by attempts at prohibiting courts from referring to the allegedly unconstitutional case-law of the Strasbourg Court; on the other hand, there are claims that the ECtHR has annulled thousands of judicial appointments and thus completely deprived some Polish judges of their right to adjudicate.

Against this background, we should note the rational, balanced, unemotional and non-adversarial position of administrative courts. There is no doubt that judgments of the ECtHR must be enforced and applied; this is the duty of all public institutions belonging to the legislative, executive and judicial branches of government. However, it should not be based on misunderstandings of and misinferences from ECtHR rulings, suggesting either that they violate the Polish Constitution and undermine Polish sovereignty, or that several thousand Polish judges were not appointed effectively, with several million of their rulings being in fact legally irrelevant. The Convention should be applied in a personally tailored manner, giving individuals guarantees of a fair trial, but at the same time it should not lead to a paralysis of the justice system. This type of approach should be seen as evidence of the responsibility of administrative judges to protect the citizens and the functioning of the state – a state mired in a crisis of judicial power, unresolved for years.

I trust that today's event will reverberate through the legal and judicial communities, as well as society at large. At a time of a constitutional crisis, a crisis of authority that the national public institutions are suffering, we need a point of reference – a compass that will show us the direction in which a modern democratic state should be heading, with the human being as its core value, along with the protection of a human being's dignity and freedom. This is the role played by the Convention and the case-law of the Strasbourg Court encapsulating it. It is good that the administrative judiciary is also moving in this direction, shaping respect for the law, for justice, and for the values on which a modern European society should be built.

dr hab. Marcin Wiącek, prof. UW
Commissioner for Human Rights

Ladies and Gentlemen, dear participants of this conference,

it is both a privilege and an honour to address you today on the occasion of the seventy-fifth anniversary of the European Convention on Human Rights. This milestone invites us not only to celebrate the achievements of this important European legal instrument, but also reflect critically on its enduring significance for both administrative justice, and those of us responsible for giving concrete effect to its principles in daily adjudication.

When the Convention was drafted in 1950, its signatories could scarcely have anticipated the breadth of public authority – and its regulation – that would emerge in Europe over the following decades. Administrative law lies precisely at the frontier between public power and individual rights. It is here that the standards developed by the European Court of Human Rights (ECtHR) have been most transformative.

Although the ECHR was not initially designed for administrative law, the Strasbourg Court has consistently affirmed that administrative proceedings fall within the protective scope of Article 6(1), which guarantees a fair trial in the determination of „civil rights and obligations". Landmark judgments such as *Ringeisen v. Austria* (1971)[1], by adopting an autonomous interpretation of Article 6 ECHR, extended this article's scope to a wide range of administrative procedures. In doing so, the ECHR recognised that civil rights may be determined not only by civil courts in the traditional sense, but also by administrative jurisdictions. This was a crucial turning point, affirming that procedural guarantees of fairness, impartiality and timeliness are fully applicable in administrative adjudication – at least when it comes to enforcing civil rights and obligations.

As regards the institution which I represent, the Court of Justice of the European Union (CJEU), the breadth of EU law means that judges wear many hats in ensuring that the law is correctly interpreted and applied – as a civil, criminal or constitutional judge, not to mention the various sub-categories of these fields. One of the many functions of the CJEU is that of an *administrative* court.

When it comes to the Convention and EU law, we know that the Union itself is, at present, not a party to the Convention, although all of its 27 Member States are.

[1] See ECtHR (Chamber) judgment of 16 July 1971, *Ringeisen v. Austria* (Merits), application no. 2614/65.

As a result, the Convention does not and cannot directly apply in proceedings before the EU Court of Justice. Nor does our court attempt to interpret it in an authoritative manner, as this is a matter for the Strasbourg Court.

The legal answer to this situation was provided by the ECtHR in the *Bosphorus* case[2]. The 'Bosphorus Presumption' asserts that measures adopted by EU Member States under legal obligations from EU law offer equivalent protection to the ECHR unless manifestly deficient. Conversely, the CJEU, *via* Article 52(3) CFR regularly interprets the Charter in light of Strasbourg standards, which gives the Strasbourg Court considerable influence on the case-law and methodology of our Luxembourg Court. When the meaning of a Charter right is unclear or under challenge, the CJEU has relied explicitly on ECtHR decisions to clarify interpretation and strengthen legitimacy. In this way, I believe that the reference to Strasbourg standards serves both to ensure 'judicial harmonisation' and as a way to potentially fill gaps in EU legal protection.

Without intending to prejudge the specific topics for discussion in this conference, I would like to illustrate this point with a few examples.

The CJEU regularly interprets Charter rights in light of Strasbourg standards [*via* Article 52(3) CFR], adopting ECtHR reasoning for issues like fair trial guarantees, judicial independence, and procedural safeguards. This judicial dialogue is clear: in areas such as *ne bis in idem*, the Luxembourg Court directly adopts Strasbourg's "close connection in substance and time" test to EU administrative sanction regimes.

Thus, in *Menci*[3] the CJEU ruled on the *ne bis in idem* principle in administrative and criminal law by referencing Article 50 of the Charter. Here, the Court took good care to incorporate the ECtHR's approach in *A and B v. Norway*[4] which, by stating that dual administrative and criminal penalties may be permissible if closely connected in substance and time, provided important clarifications to the *ne bis in idem* principle.

Similarly, recent cases on the right to an impartial tribunal – such as *Commission v. Poland*[5] – or on legal professional privilege in administrative proceedings – such

[2] See ECtHR judgment of 30 June 2005 (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* application no. 45036/98.

[3] See judgment of the Court of Justice (Grand Chamber), 20 March 2018, *Luca Menci v. Procura della Repubblica*, C-524/15.

[4] See ECtHR (Grand Chamber) of 15 November 2016, *A and B v. Norway*, applications nos. 24130/11 and 29758/11.

[5] See the Court of Justice (Grand Chamber) judgment of 5 June 2023, *Commission v. Poland (Indépendance et vie privée des juges)*, C-204/21, and the Court of Justice (Grand Chamber) judgment of 15 July 2021, *Commission v. Poland (Régime disciplinaire des juges)*, C-791/19.

as *Orde van Vlaamse Balies*[6] – invoke Article 47 CFR, which is interpreted in light of ECtHR's case-law under Article 6 ECHR. This approach reinforces the impartiality and independence of tribunals overseeing administrative acts, with Article 52(3) CFR functioning as a bridge between the two systems.

But before I get carried away in too many individual decisions, I think I will rest my case here and wish you all a very good and successful conference.

prof. dr hab. Maciej Szpunar
First Advocate General of the Court of Justice of the European Union

[6] See the Court of Justice (Grand Chamber) judgment of 8 December 2022, *Orde van Vlaamse Balies and Others v. Vlaamse Regering*, C-694/20.

The Administrative Judge Faced with Continuous Challenges

My speech has two levels, corresponding to the titles I bring to today's programme. As President of the Hellenic Council of State, I will address the challenges that arise in view of the jurisprudence of the ECtHR and briefly present the example of my Court. As president of ACA-Europe I will refer the most important challenges in view of the great transformations of the European societies, and outline, *grosso modo*, the priorities of the Hellenic Presidency for the next two years. The above levels are closely connected, as they highlight our common European path.

I. Aspects of the Influence of the ECtHR Jurisprudence on the Hellenic Council of State

1. The "procedural formalism" of the national judge

From its inauguration in 1929, the Greek Council of State has exercised a highly fertile practice of judicial law-making in the field of substantive administrative law alongside a particularly creative interpretation of constitutional provisions under the 1975 Constitution. However, throughout those decades, and up until today, the Court has displayed a tendency toward what has been described as "procedural formalism". In other words, procedure, instead of serving as a tool for the enforcement of substantive law, has been transformed into an elaborate technique that frequently leads to the dismissal of legal remedies and actions.

There are numerous causes of this "proceduralism". It functions, in part, as a defensive response to the heavy workload of the courts, while also reflecting a lack of judicial empathy in certain quarters of the judiciary, in the sense of failing to perceive the social consequences of refusing to enter into the substance of disputes. Finally, one might argue that there exists a tacit incapacity among certain judges to address complex legal questions directly.

The contribution of the ECtHR was decisive in changing the way procedural rules were interpreted and applied by Greek courts. Our institutional precedent shows that prevailing views within the judiciary rarely change purely from internal

causes, without external influence. The largely conservative features of the judicial system, together with the self-entrapment of the courts within established precedents, make an anti-formalist shift from within particularly difficult.

2. The institution of the trial and restrictions on access to a court

The trial, in a broad sense, is the institution through which the application of legal rules in social life is ensured. It consists of a set of legally regulated actions by judicial bodies and litigants, designed to ensure an authoritative ruling on the applicable legal situation and compel the adjustment of reality to that ruling.

Another purpose is legal certainty, which operates on two levels: at the level of the specific dispute, by its final resolution and the restoration of social peace to the extent that it was disrupted by the dispute's emergence; and, at a broader level, through the very existence of the trial as an institution, which strengthens society's confidence in the application of legal rules and reinforces the sense of security experienced by citizens within the legal order.

At yet another level, the trial contributes to the development of the law by clarifying legal questions. With the publication of judicial decisions, the intellectual work produced within the trial becomes accessible to the wider public, offering material for scholarly analysis and public debate.

According to the consistent case-law of the ECtHR, the core of the right of access to a court lies in the ability to submit a claim before a court that has the jurisdiction and competence to examine its legal and factual merits and to issue a binding decision resolving the dispute. The right of access to a court, guaranteed by Article 6 ECHR as one of the expressions of the right to a fair trial, is not absolute and is subject to limitations that are implicitly accepted, in particular those concerning admissibility requirements.

This is because, by its very nature, the right requires regulation by the state, which enjoys a margin of appreciation in this regard. However, any limitations must not restrict the exercise of the right to such an extent that its very essence is impaired; they must also pursue a legitimate aim, and there must be a reasonable proportionality between the means employed and the objective pursued.

In cases concerning Greece, the ECtHR has repeatedly found a violation of this right, holding that restrictions imposed on the applicants' right of access to a court were disproportionate to the purposes pursued. Greece has been condemned in several such cases, including those where a legal remedy was dismissed as inadmissible due to a minor procedural omission in its drafting or filing.

3. Reasonable time as part of a fair trial

Article 20(1) of the Greek Constitution and Article 6(1) ECHR together form a unified framework, of heightened normative force, for the exercise of the individual right to judicial protection in its various manifestations, as shaped by the case-law of national courts and the ECtHR. There are, however, certain differences between these provisions. In particular, Article 6(1) ECHR additionally guarantees the right to have a case concluded within a reasonable time. This right does not arise from the literal wording of the provisions of the Greek Constitution, nor had our national courts developed, as a distinct aspect of the right to judicial protection, a requirement that proceedings must be completed within a reasonable time. Today, the temporal element is central to the right to judicial protection: given the accelerating pace of social and economic life, the reasonable duration of proceedings is decisive for a citizen's ability to obtain real and effective benefit from the judgment ultimately issued. In this way, judicial protection is not emptied of practical meaning; it is effective, since it is afforded at a time and in a manner that truly secures the administration of justice.

The ECtHR has an extensive case-law on the reasonable duration of proceedings, issuing a series of condemnations against states that violated this specific right. The Court has emphasised the Convention's commitment to the proper administration of justice without delays that undermine its effectiveness and credibility and, ultimately, give rise to situations comparable to a denial of justice. The issue has arisen repeatedly in Greek cases, with numerous condemnations finding excessive length of proceedings – most acutely in administrative justice, but also in civil and criminal justice.

4. The importance of the 'filter' for the Council of State and the ECtHR

In recent decades, the administrative justice system has tended to limit appeals and cassations, before the Council of State, to reduce incoming cases in light of significant delays. In 2010, a new admissibility requirement was legislatively introduced for these two remedies.

Given the Court's basic function to ensure unity of case-law, an application for cassation is admissible only when the required specific allegations are made. By relieving the Court from overload (which undermines the rule of law and the protection of constitutional rights) and discouraging dilatory cassations lacking serious legal issues, the filter enables the Court to exercise its supreme-court functions where most needed; serious issues can still reach it through a "cassation in the interest of the law", which remains unaffected.

The ECtHR has assessed whether this admissibility requirement is compatible with Article 6 ECHR and held that it is not contrary to the Convention for a supreme court to reject an appeal by referring to the statutory screening provisions

where the issues raised are not of particular importance or the appeal has little prospect of success. Article 6 does not require detailed reasoning in a decision by which an annulment court rejects an appeal as lacking prospects under a specific statutory filter. More generally, under Article 6 the ECtHR has held that supreme, constitutional, or last-instance courts are not obliged to provide detailed reasons when refusing to consider an appeal at the filtering stage.

5. Divergent perspectives of the ECtHR and the Council of State and the need for mutual convergence

The ECtHR's influence on national jurisprudence is immensely valuable, enabling domestic judges to view issues through a broader lens that reflects the principles and values of a shared European legal culture, and to move beyond traditional approaches that can lead to formalistic or unduly harsh outcomes. Even when a national court disagrees with Strasbourg, it can reformulate its position with new arguments, thereby prompting the ECtHR to study those arguments and to refine its own responses; this dynamic may lead to fresh syntheses. In this way, a fruitful dialogue emerges – serving citizens, institutions, fair trial rights, and democracy itself in the sensitive field of fundamental rights, where constitutional and international norms of superior force are interpreted and applied to protect individuals from state arbitrariness.

For the Council of State in particular, the ECtHR's case-law – especially since the 1980s – has contributed to more cogent resolution of many issues, often procedural in nature, thereby reinforcing the progressive and qualitative profile of the supreme administrative court built up since its early years. At the same time, as the foregoing shows, ECtHR case-law has also generated challenges for the Council's organisation and functioning. Such problems can be addressed through institutional dialogue between the two courts: either *via* a retrial application before the Council of State following an adverse ECtHR judgment, or by submitting a request for an advisory opinion to the ECtHR in the context of a pending case that raises questions of Convention interpretation.

II. The Role of ACA-Europe in View of the Great Transformations of European Societies

ACA-Europe is a European association composed of the Court of Justice of the European Union, as well as the Councils of State and the Supreme administrative jurisdictions of the member states of the European Union. The objectives of ACA-Europe are to obtain a better understanding of EU law by the judges of the Supreme Administrative Courts across Europe and a better knowledge of the functioning of

the other Supreme Administrative Courts in the implementation of EU law; to improve the mutual trust between judges of the Supreme Administrative Courts; to foster an effectively and efficiently functioning of administrative justice in the EU; to provide exchange of ideas on the rule of law in the administrative judicial systems and, finally, to ensure access to the decisions of the Supreme Administrative Courts implementing EU law.

There is a reality that we all experience: our societies are confronted with unprecedented and complex challenges, stemming from:

– The impact of human activities on the climate and the environment;
– Technological developments;
– Social and economic inequalities;
– The need for effective public finance management;
– The need for effective public governance.

These challenges are unfolding under increasingly intricate geopolitical conditions in both Europe and the wider world.

Administrative courts-and above all the Supreme Administrative Jurisdictions by virtue of their institutional weight-are inevitably at the forefront of the relevant transformations, called upon to adjudicate disputes arising from public authority actions or omissions that are deeply interwoven with these challenges.

Administrative judges today face novel questions and dilemmas, which call for reflection on several key issues:

– Are our traditional judicial tools and methods – concerning the conditions of access to justice, the procedural norms, the interpretation and application of substantive rules in the matters in question, the scope and intensity of the judicial review, the enforcement of the decisions handed down by the courts, and the respect of *res iudicata* – still adequate in this new context?

The Hellenic Presidency of ACA-Europe will focus on the above complex challenges.

III. Judiciary–Democracy and Public Confidence

Public confidence in an independent judiciary is of paramount importance for a vibrant and functional democracy, with a lack of such confidence having the potential of eroding the moral authority of the judiciary. Our judgments are obeyed because their moral authority generates public confidence. If we lose that confidence, we are finished. Accountability is therefore essential, for it is a foundational value of our democracy and applies to everyone, including the judiciary.

The European Court of Human Rights has recognised the prominent place that the judiciary occupies among State organs in a democratic society, emphasising its special role as the guarantor of justice – a fundamental value in a law-governed State – which requires public confidence if it is to be successful in carrying out its duties. Within this framework, judges bear greater duties and responsibilities than ordinary civil servants.

prof. Michail Pikramenos
President of ACA-Europe
President of the Hellenic Council of State

Conference Papers

Anna Adamska-Gallant*

The Execution of the Judgments of the European Court of Human Rights in the Context of the Subsidiarity Principle

§ 1. Introduction

The Preamble to the Convention establishes that one of its primary objectives is to ensure that the protection of rights and freedoms within member states of the Council of Europe is practical and effective. The European Court of Human Rights has referred to this objective in numerous judgments, utilising it as a benchmark for assessing the acts and omissions of the High Contracting Parties. In the landmark judgment of *Airey v. Ireland*, the Court emphasised that the purpose of this international agreement is not to guarantee rights and freedoms that are theoretical or illusory, but those that are practical and effective[1]. Indeed, the Convention is not merely a declaratory treaty; its purpose is to provide real protection for individual rights.

In the first instance, the responsibility for respecting human rights rests with national authorities, reflecting the principle of subsidiarity upon which the Convention system is founded. This was reiterated *i.a*. in the Brussels Declaration of 27 March 2015, which emphasised the primary responsibility of High Contracting Parties to ensure the application and effective implementation of the Convention. It further reaffirms the special role of domestic courts, which act as the "first guardians" of human rights, ensuring the full, effective, and direct application of the Convention within their domestic legal systems[2]. It is the domestic courts that are best placed to

* Judge of the European Court of Human Rights, dr, University of Wrocław; ORCID: 0000-0001-7547-0216.

[1] ECtHR judgment of 9 October 1979, *Airey v. Ireland*, application no. 6289/73, § 124.

[2] Government of Poland, Declaration on the Implementation of the Convention, 27 March 2015, https://www.gov.pl/attachment/55c65c94-e030-4a88-8cf8-1f4c43f39877 (date of access: 10.10.2025).

protect the rights and interests in dispute, rendering the national judge the natural – and most important – judge of the Convention. Since 1 August 2021, the principle of subsidiarity has been explicitly enshrined in the Preamble to the Convention, introduced by Protocol No. 15[3].

The execution of final judgments is a cornerstone of any system of governance based on the rule of law. With regard to domestic legal orders, the Court has repeatedly emphasised that the right to institute legal proceedings would be illusory if a final court decision remained unenforced to the detriment of a party[4]. This obligation to implement applies equally to the judicial mechanisms established under the Convention. The Committee of Ministers of the Council of Europe has stated that the prompt and effective execution of judgments is essential for the credibility and effectiveness of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depends[5].

§ 2. The principle of subsidiarity and the margin of appreciation

The principle of subsidiarity – and the associated margin of appreciation – constitutes one of the fundamental pillars of the Convention[6]. In the context of the Convention's protection system, this implies that the obligation to ensure the effective protection of individual rights and freedoms rests primarily with the High Contracting Parties, with the Court intervening only when protection at the national level has proven ineffective. State responsibility is thus the starting point, while the Court's review is triggered only as a measure of last resort[7]. Article 1 of the Convention ex-

[3] Protocol No. 15 of 1 August 2021 supplemented the Preamble to the Convention as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention", Council of Europe, Explanatory Report to Protocol No. 15 amending the European Convention on Human Rights; https://www.echr.coe.int/documents/d/echr/protocol_15_explanatory_report_eng (date of access: 10.10.2025).

[4] ECtHR judgment of 19 March 1997, *Hornsby v. Greece*, application no. 18357/91, § 40; Opinion no. 13 (2010) of the Consultative Council of European Judges (CCJE) on the role of judges in the enforcement of judicial decisions, CCJE(2010)2 Final, 19 November 2010, § 7, https://rm.coe.int/168074820 (date of access: 10.10.2025).

[5] *C. Hillebrecht*, "Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals", 1(3) Journal of Human Rights Practice 2009, p. 362.

[6] Protocol No. 15 of 1 August 2021 supplemented the Preamble to the Convention as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

[7] *F. Krenc*, The European Convention on Human Rights: pillars, shifts, and challenges, [in:] Human Rights Law Review 2025, Vol. 25, p. 5.

plicitly states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention," thereby designating States and their authorities as the primary actors responsible for implementing its provisions. The Court has repeatedly noted that "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities"[8]. Subsidiarity, therefore, possesses both a procedural and a substantive dimension.

At the procedural level, subsidiarity encompasses the obligation to exhaust domestic remedies before a case is brought before the Court (Article 35 § 1 of the Convention). This requires not only the prior utilisation of available remedies that are appropriate in the particular situation but also that the applicant must have raised, either explicitly or in substance, the complaint regarding the violation of Convention-protected rights[9]. The State must be afforded the opportunity to address the allegations before the case is submitted to an international tribunal such as the Court. This approach is consistent with Article 13, which imposes an obligation on the State to provide an effective remedy[10].

At the substantive level, subsidiarity signifies that the Convention provides only a minimum standard of protection, leaving High Contracting Parties the freedom to implement a higher level of protection in accordance with their constitutional traditions, as explicitly provided for in Article 53. The Court has emphasised that the system of collective guarantees reinforces the protection offered at the national level but never curtails it[11]. Consequently, the Convention does not serve to homogenise national legal systems[12]. By protecting the autonomy of individual High Contracting Parties, who are afforded a margin of appreciation, and by respecting their diversity, the Convention serves to protect a common standard of human rights.

It follows from the principle of subsidiarity that the European system for the protection of human rights is structured to be activated only in the event of failure at the national level. It is not the Court's role to substitute for domestic courts or to diminish their significance; indeed, they play a key role in the protection of rights and freedoms – rendering it practical and effective – as only individual States are capable

[8] ECtHR judgment of 26 October 2000, *Kudła v. Poland* [GC], application no. 30210/96, § 152; ECtHR judgment of 13 December 2016, *Paposhvili v. Belgium* [GC], application no. 41738/10, § 184.

[9] ECtHR judgment of 9 July 2015, *Gherghina v. Romania* (dec.) [GC], application no. 42219/07, § 83.

[10] *Kudła v. Poland*, § 152.

[11] ECtHR judgment of 6 January 2010, *Vera Fernández-Huidobro v. Spain*, application no. 74181/01, § 112.

[12] *F. Krenc*, The European Convention, p. 6.

of ensuring such protection[13]. Furthermore, the Court does not act as a "fourth instance" tribunal. This means it lacks jurisdiction to adjudicate on alleged errors of law or fact committed by domestic courts, unless such errors result in a violation of rights and freedoms protected by the Convention[14]. Simultaneously, the principle of subsidiarity requires domestic courts to treat the Convention as an integral part of their own legal order and to apply it on an ongoing basis.

Integral to the principle of subsidiarity is the margin of appreciation, a specific interpretative rule firmly established in Strasbourg jurisprudence[15]. Its function is to regulate the intensity of the review exercised by the Court in a given case. As the Court has repeatedly emphasised: "The national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions"[16].

In practice, the margin of appreciation is not uniform; its scope depends on various factors. The starting point is the specific Convention right at issue, followed by the Court's consideration of the degree of consensus existing among the High Contracting Parties. As a result, the margin is wider in cases concerning sensitive moral or ethical issues, as national authorities are in principle in a better position than the international judge to give an opinion not only on the "exact content of the requirements of morals" in their country, but also on the necessity of introducing restrictions intended to meet them[17].

Similarly, the margin of appreciation is wider in cases requiring the balancing of competing public interests. This necessitates not only direct knowledge of a specific society and its needs but also the consideration of political, economic, and social issues upon which opinions may differ significantly. Hence, the Court, finding it natural that the margin of appreciation available to the national legislature in

[13] *S. Greer*, The Interpretation of the European Convention On Human Rights: Universal Principle or Margin of Appreciation?, UCL Human Rights Review 2010, Vol. 3, p. 5.

[14] ECtHR judgment of 17 October 2019, *López Ribalda and Others v. Spain* [GC], applications nos. 1874/13 and 8567/13, § 149.

[15] ECtHR judgment of 7 December 1976, *Handyside v. the United Kingdom*, application no. 5493/72, §§ 48–49.

[16] ECtHR judgment of 8 April 2021, *Vavřička and Others v. the Czech Republic* [GC], applications nos. 47621/13 and 5 others, § 273.

[17] ECtHR judgment of 10 April 2007, *Evans v. the United Kingdom* [GC], application no. 6339/05, § 77; ECtHR judgment of 22 April 1997, *X, Y and Z v. the United Kingdom* [GC], application no. 21830/93, § 44; ECtHR judgment of 26 February 2002, *Fretté v. France*, 26 February 2002, application no. 36515/97, § 41; ECtHR judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom* [GC], application no. 28957/95, § 85; ECtHR judgment of 3 November 2011, *S.H. and Others v. Austria* [GC], application no. 57813/00, §§ 94–97.

implementing social and economic policies should be wide, respects the legislature's assessment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation[18].

Conversely, the margin of appreciation is considerably narrower in cases involving essential aspects of an individual's integrity or identity[19]. In a number of judgments, the Court has noted that particularly important aspects of such identity were at stake in cases concerning the legal parent-child relationship[20], access to information regarding one's origins and the identity of one's parents[21], ethnic identity[22], or gender identity. Similarly, claims by same-sex partners for legal recognition and protection of their relationships touch upon particularly important aspects of their personal and social identity[23].

The application of the margin of appreciation has led the Court to develop a model of procedural review. This implies that where national authorities are clearly better positioned than the Court to weigh competing interests (*e.g.* in child custody disputes), the Court may focus less on the merits of the contested measure and more on the quality of the decision-making process that led to its adoption. The Court will determine whether the measure was adopted in accordance with fundamental procedural requirements (such as the hearing of interested parties, adversarial proceedings, justification of the measure, and the independence and impartiality of the competent authorities). In other words, the Court examines whether all conditions necessary for taking a proper decision were met. This procedural approach is particularly prevalent in cases involving violations of Articles 2 and 3 of the Convention, where national authorities are under an obligation to conduct an effective investigation[24]. The Court's task is to determine whether such investigations were independent, thorough, and sufficiently comprehensive[25].

[18] ECtHR judgment of 21 February 1986, *James and Others v. the United Kingdom*, application no. 8793/79, § 46.

[19] ECtHR judgment of 17 January 2023, *Fedotova and Others v. Russia* [GC], applications nos. 40 792/10, 30538/14 and 43439/14, § 183–185.

[20] ECtHR judgment of 4 December 2007, *Dickson v. the United Kingdom* [GC], application no. 44362/04, § 78.

[21] ECtHR judgment of 13 February 2003, *Odièvre v. France* [GC], application no. 42326/98, § 29.

[22] ECtHR judgment of 15 March 2012, *Aksu v. Turkey* [GC], applications nos. 4149/04 and 41029/04 § 58.

[23] ECtHR judgment of 6 April 2017, *A.P., Garçon and Nicot v. France*, applications nos. 79885/1 2, 52471/13 and 52596/13, § 123.

[24] ECtHR judgment of 9 April 2009, *Šilih v. Slovenia* [GC], application no. 71463/01, § 153.

[25] ECtHR judgment of 28 September 2015, *Bouyid v. Belgium* [GC], §§ 114–123.

§ 3. The obligation to execute Final judgments of the European Court of Human Rights

Once the ECtHR has delivered a final judgment against a respondent State, that State is under a binding obligation to execute it. While the State retains discretion regarding the means of implementation, the process is subject to supervision by the Committee of Ministers of the Council of Europe. This obligation to execute judgments stems not only from Article 46 of the Convention[26] but is also a manifestation of the general engagement of the High Contracting Parties to secure the rights and freedoms defined therein, ensuring a level of protection that meets, at the very least, the minimum Strasbourg standards. Furthermore, from the perspective of general international law, the Vienna Convention on the Law of Treaties is of particular relevance – specifically Article 26, which enshrines the principle of *pacta sunt servanda*, obliging States to perform their treaty obligations in good faith.

The Court placed particular emphasis on this international dimension in the judgment of *Wałęsa v. Poland*, underscoring the gravity of the respondent State's duty to execute final judgments. The recourse to general principles of international law was necessitated by the persistent failure of domestic authorities to execute earlier rulings concerning legislative changes to the judicial system (*i.a. Broda and Bojara*[27], *Reczkowicz*[28], *Dolińska-Ficek and Ozimek*[29], and *Advance Pharma sp. z o.o.*[30]). This defiance was further evidenced by rulings of the Constitutional Tribunal – sitting with irregularly appointed judges – which challenged the Tribunal's competence to assess these judicial reforms[31].

The Court reiterated that "all Contracting Parties should abide by the rule-of-law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention". It emphasised that this principle has long been embedded in international law; specifically, "a State cannot

[26] ECtHR judgment of 30 June 2009, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2) [GC], application no. 32772/02, § 84; see generally the commentary by *L. Garlicki*, *P. Hofmański*, *A. Wróbel* and *R. Degener* on Article 46, [in:] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Vol. II, Komentarz do artykułów 19–59 oraz Protokołów dodatkowych (ed. *L. Garlicki*), Warszawa 2011, p. 349 *et seq*.

[27] ECtHR judgment of 29 June 2021, *Broda and Bojara v. Poland*, applications nos. 26691/18 and 27367/18.

[28] ECtHR judgment of 22 July 2021, *Reczkowicz v. Poland*, application no. 43447/19.

[29] ECtHR judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, applications nos. 49868/19 and 57511/19.

[30] ECtHR judgment of 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, application no. 1469/20.

[31] ECtHR judgment of 23 November 2023, *Wałęsa v. Poland*, application no. 50849/21, § 144.

adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"[32].

The Court further emphasise that "the acceptance of the State's obligations under the Convention may not be selective and that the Contracting State – including its highest courts – cannot, at its will, exclude the operation and application of the Convention by, [...], "removing" its provisions, together with certain final and binding judgments of the Court, from the domestic legal system [...]. In ratifying the Convention, the States take upon themselves, as stated in the Preamble to the Convention, "the primary responsibility to secure the rights and freedoms defined in [the] Convention". While the Preamble recognises the State's margin of appreciation in discharging that responsibility, that margin is subject to the Court's supervisory jurisdiction. As a consequence, the States must respect the Court's treaty-given power under Article 32 of the Convention to rule on all matters concerning the interpretation and application of the Convention"[33].

§ 4. Legal consequences of the judgment

A judgment of the ECtHR, insofar as it establishes that a State has violated a right guaranteed by the Convention, is declaratory in nature. It merely affirms the existence of a violation but does not, of itself, alter the legal status of the parties to the proceedings, nor does it automatically restore a lawful situation. Specifically, a judgment by the Court does not have the effect of quashing the impugned individual measure taken at the domestic level which gave rise to the violation, nor does it replace such a measure. Consequently, the domestic ruling remains legally binding in the national legal order, notwithstanding the finding by an international judicial body that it is defective. Similarly, a judgment of the Court does not repeal the legislative act that constituted the source of the violation. By contrast, the judgment is constitutive in nature insofar as it awards the applicant – pursuant to Article 41 of the Convention – just satisfaction from the respondent State for pecuniary and non-pecuniary damage, as well as the reimbursement of costs and expenses incurred[34].

The text of the Convention does not specify the precise manner in which a State must execute a judgment finding a violation of rights or freedoms. Initially, the prevailing view in the case-law was that the respondent State should be allowed the discretion to choose the means within its domestic legal order to discharge its

[32] ECtHR judgment of 15 March 2022, *Grzęda v. Poland* [GC], application no. 43572/18, § 340.

[33] *Wałęsa v. Poland*, § 144.

[34] See: *L. Garlicki* [in:] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Vol. I, Komentarz do artykułów 1–18, (ed. *L. Garlicki*), Warszawa 2010, pp. 27–33.

obligations arising from the judgment[35], subject to the supervision of the Committee of Ministers. Over time, however, the Court began to deliver judgments that were more precise on how the judgments finding a violation should be implemented. One of the first instances in which such specific recommendations were formulated was *Papamichalopoulos and Others v. Greece* (Article 50)[36]. In this case, the Court addressed the non-execution of an earlier judgment concerning the same applicants, in which a violation of the right to property (Article 1 of Protocol No. 1) had been found due to the *de facto* seizure of their land[37].

In its judgment of 31 October 1995, the Court emphasised that by becoming High Contracting Parties to the Convention, States undertook to abide by the final judgments in any case to which they are parties. This implies a legal obligation to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. While State Parties generally retain the choice of means to execute a judgment, where the nature of the violation allows for *restitutio in integrum*, it is incumbent upon the State to effect such restitution, as the Court possesses neither the competence nor the practical capacity to do so itself[38].

In the *Papamichalopoulos* case, the Court held that the failure of the Greek authorities to pay just satisfaction for the deprivation of property constituted a continuing violation. This conclusion was further reinforced by the protracted duration of the violation – exceeding 28 years – during which the authorities disregarded domestic court judgments as well as their own pledges to the applicants, in which they had promised to remedy the violations. The Court further distinguished between an unlawful deprivation of property – as experienced by the applicants in *Papamichalopoulos* – and a lawful expropriation. The Court held that the pecuniary consequences of a lawful expropriation cannot be assimilated to those arising from a deprivation of property incompatible with the Convention[39].

In determining that the violation required redress through *restitutio in integrum*, the Court drew upon the jurisprudence of international courts and arbitral tribunals. Specifically, it cited the seminal judgment of the Permanent Court of International

[35] ECtHR judgment of 13 June 1979, *Marckx v. Belgium*, application no. 6833/74, § 58, ECtHR judgment of 22 March 1983, *Campbell and Cosans v. the United Kingdom*, applications nos. 7511/76 and 7743/76, § 16.

[36] ECtHR judgment of 31 October 1995, *Papamichalopoulos and Others v. Greece (Article 50)*, application no. 14556/89.

[37] ECtHR judgment of 24 June 1993, *Papamichalopoulos and Others v. Greece,* application no. 14556/89.

[38] *Papamichalopoulos and Others v. Greece (Article 50)*, § 34.

[39] *Ibid.*, §§ 36, 37.

Justice (PCIJ) of 13 September 1928 in the Factory at Chorzów case, which established the following principle:

"*… Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law*"[40].

Subsequent jurisprudence of the Court confirms that eliminating the consequences of a violation through *restitutio in integrum* is, in principle, the optimal solution. This recommendation is of universal character and should lead, where feasible, to the restoration of the situation prior to the violation, as pecuniary compensation often proves insufficient[41]. Simultaneously, States are under a positive obligation to organise their legal systems to facilitate such *restitutio in integrum*, including through the introduction of procedures for the reopening of proceedings in cases where the Court has found a violation of the Convention[42].

Where the source of a violation of rights and freedoms is an individual measure (*e.g.* an administrative decision or a judicial ruling), the respondent State must primarily consider the mechanisms available under domestic law to amend or set aside the impugned act. The objective is to bring the legal situation into conformity with the Convention, particularly given that the Court itself lacks the jurisdiction to order specific remedial measures such as the reopening of proceedings[43]. The Committee of Ministers endorsed this approach in Recommendation No. R (2000) 2, calling upon the High Contracting Parties to introduce domestic mechanisms for the re-examination of cases, including the reopening of proceedings. These measures are recognised as "the most effective, if not the only, means of achieving *restitutio in integrum*"[44].

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[40] Judgment in the *Factory at Chorzów* case: https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf.

[41] ECtHR judgment of 13 July 2000, *Scozzari and Giunta v. Italy* [GC], 13 July 2000, applications nos. 39221/98 and 41963/98, §§ 249–250; ECtHR judgment of 17 February 2004, *Maestri v. Italy* [GC], application no. 39748/98, § 47; *Papamichalopoulos and Others v. Greece (Article 50)*, §§ 38–40; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, § 85.

[42] ECtHR judgment 20 April 2010, *Laska and Lika v. Albania*, applications nos. 12315/04 and 17605/04, § 75.

[43] *Saïdi v. France*, § 47; *Pelladoah v. the Netherlands*, § 44.

[44] Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies); https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000016805e-

The application of *restitutio in integrum* is relatively straightforward in vertical relations between the individual and the State. By contrast, it becomes significantly more complex in horizontal relations – particularly in civil law disputes – where a specific measure has generated legal effects not only for the applicant but also for third parties. Consequently, given the imperative to safeguard the principle of legal certainty and the stability of legal relations, the reopening of proceedings must be exercised with the utmost caution.

Where the source of the established violation is a normative act, proper execution of the judgment requires the State to amend or even repeal the defective regulation. In its earlier case-law, upon finding that a normative act was the root cause of a violation, the Court would merely indicate the need for its amendment in an implicit manner[45]. Currently, however, judgments in which the Court explicitly formulates the necessity of introducing specific legislative changes are becoming increasingly frequent. This trend is particularly evident in the application of the pilot judgment procedure, discussed below.

The necessity of implementing appropriate legislative amendments also extends to situations where the mere existence of a specific legal regime violates individual rights and freedoms – a scenario which, as evidenced by the Court's case-law, is not an isolated occurrence. A pertinent example is the judgment in *Pietrzak, Bychawska-Siniarska and Others v. Poland*, in which the Court held that a legal framework empowering state services to conduct extensive surveillance of citizens – ostensibly for the purpose of combating crime and addressing threats to public security – violated Article 8 of the Convention. Crucially, the Court affirmed its competence to examine the impugned provisions *in abstracto*, dispensing with the requirement for the applicants to demonstrate that they had, in fact, been subjected to surveillance measures[46].

§ 5. General effects of the judgment

As a fundamental rule, the judgments of the Court adjudicate a specific dispute concerning a violation of rights and freedoms between the applicant and the respondent State. However, their impact is significantly broader, extending beyond the strict dimension of *inter partes* relations. It is widely recognised that when the Court establishes a violation, the State responsible must take all necessary measures to prevent the recurrence of situations similar to those that gave rise to the well-founded complaint. These measures can be manifold, encompassing not only specific legislative

2f06%22],%22sort%22:[%22CoEValidationDate%20Descending%22]} (date of access: 10.10.2025); *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, § 90.

[45] ECtHR judgment of 13 June 1979, *Marckx v. Belgium*, application no. 6833/74, § 58.

[46] *Pietrzak, Bychawska-Siniarska and Others v. Poland*, 28 May 2024, applications nos. 72038/17 and 25237/18, § 145.

amendments but also *i.a.* changes in administrative practice or capacity-building initiatives to enhance the awareness and competence of state agents operating in the sphere where the violation occurred. In this sense, the impact of the Court's rulings is viewed as providing normative direction[47].

Judgments rendered in individual cases also serve as judicial precedents, as they often formulate legal principles. Legal doctrine observes that "certain judgments 'expand upon' the content of the international legal norms contained in the European Convention, bringing the Court closer to the role of a legislator and its judgments to that of law-making precedents"[48]. The legal principles derived from this jurisprudence are utilised as an interpretative standard in similar cases, not only by the Court itself but also by domestic courts. Their legal significance is primarily underpinned by the judicial authority of the Court; they influence the practice of national courts and consequently reinforce the Convention standard. Simultaneously, the expectation that an established legal principle will be applied consistently in similar cases provides the Court with an instrument to induce Member States to implement its jurisprudence. The emphasis on the Court's role as a creator of precedent is reflected in the Interlaken Declaration, which stipulates that all States should "take into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system"[49].

§ 6. The pilot judgments

The need to introduce the pilot judgment procedure arose in response to new developments demonstrating that the established human rights protection system lacked the capacity to cope with the sheer volume of incoming applications. On the one hand, there was a sharp increase in the number of similar cases brought against Central and Eastern European countries following their accession to the Council of Europe in the 1990's. On the other hand, the search for new procedural solutions was driven by the necessity to address systemic violations of the Convention. These were caused by defective national legislation or administrative and judicial practices

[47] *E. Łętowska*, Zapewnienie skuteczności orzeczeniom sądów międzynarodowych, [in:] Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym (ed. *A. Wróbel*), Warszawa 2011, pp. 35–62.

[48] *M. Balcerzak*, Zagadnienie precedensu w prawie międzynarodowym praw człowieka, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora" 2008, p. 146.

[49] More: The Interlaken Process – Human Rights Intergovernmental Cooperation, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/the-interlaken-process (date of access: 10.10.2025).

which, by their nature, affected large numbers of people[50]. Such issues included *i.a.* the excessive length of proceedings, prolonged pre-trial detention, poor conditions of detention in penal institutions, and the non-enforcement of final civil judgments. There were also massive influxes of cases arising from situation-specific issues, such as the applications by Greek Cypriots against Turkey concerning the lack of access to property in northern Cyprus, or the issue of the Bug River claims (*Polish: mienie zabużańskie*) against Poland.

The introduction of the pilot judgment procedure was significantly influenced by complaints regarding the excessive length of civil proceedings in Italy. In 1999, the Court delivered a series of judgments, in which it found a violation of Article 6. It stated that: "The frequency with which violations [of the Convention] are found shows that there is an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy. This accumulation of breaches accordingly constitutes a practice that is incompatible with the Convention"[51]. In its reasoning, the Court referred not only to its previous rulings in similar cases but also to over 1,000 resolutions of the Committee of Ministers of the Council of Europe establishing violations of the right to a fair trial.

The pilot judgment procedure, now regulated by the Rules of Court[52], was originally developed through case-law. Its principal features are: the existence of a structural or systemic dysfunction at the national level capable of generating a large number of applications to Strasbourg; and the selection of a representative case to identify the root cause of the problem in a pilot judgment. Upon finding such a violation, the Court identifies the remedial measures the respondent State must take at the national level, often prescribing a time limit for their implementation. Furthermore, the Court may decide to adjourn the examination of pending cases concerning the same issue ("repetitive cases").

The first pilot judgment delivered by the Court was *Broniowski v. Poland (Merits)*, which articulated the rationale for this procedural innovation[53]. The Court noted that in delivering a pilot judgment, it was "mindful of its increasing caseload" and that the large number of potential victims and pending applications not only "aggrav-

[50] *M. Maćkowiak*, Instytucja wyroku pilotażowego w praktyce orzeczniczej Europejskiego Trybunału Praw Człowieka, [in:] Folia Iuridica Universitatis Wratislaviensis 2016, Vol. 5, No. 2, pp. 118–126.

[51] ECtHR judgment of 28 July 1999, *Bottazzi v. Italy* [GC], application no. 34884/97, § 22.

[52] Rule 61[4] of Rules of Court (15 September 2025), Rules of Court – ECHR Official Texts – ECHR – ECHR / CEDH (date of access: 10.10.2025).

[53] ECtHR judgment of 22 June 2004, *Broniowski v. Poland (Merits)* [GC], application no. 31443/96, §§ 190–191; ECtHR judgment of 19 June 2006, *Hutten-Czapska v. Poland* [GC], application no. 35014/97, § 234.

ated the State's responsibility under the Convention... but also represented a threat to the future effectiveness of the Convention machinery"[54]. Subsequently, in *the Friendly Settlement judgment* in the same case (28 September 2005), the Court explained: "The object in designating the principal judgment as a «pilot judgment» was to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the right of property in the national – Polish – legal order. One of the (...) factors was the growing threat to the Convention system and to the Court's ability to handle its ever increasing caseload that resulted from large numbers of repetitive cases deriving from, among other things, the same structural or systemic problem. (...) the pilot judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on the Court which would otherwise have to take to judgment large numbers of applications similar in substance"[55].

In *Hutten-Czapska v. Poland,* the Court clarified the criteria justifying the application of the pilot judgment procedure, explaining that this procedure may also serve a preventive function in order to forestall the influx of numerous cases in the future; consequently, the existence of a significant number of applications already pending before the Court is not a prerequisite for its implementation. The Explanatory Memorandum points out that "In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the [human] rights it is responsible for safeguarding"[56]. It is inherent in the pilot procedure that the assessment of the situation extends beyond the sole interests of the individual applicant, requiring an examination of the case from the perspective of general measures necessary to protect other persons already or potentially affected by the systemic defect[57].

[54] *Broniowski v. Poland (Merits)*, §§ 192–193.

[55] ECtHR [GC] judgment 28 September 2005, *Broniowski v. Poland (Friendly Settlement)*, application no. 31443/96, §§ 36 and 37.

[56] *Hutten-Czapska v. Poland*, § 236; ECtHR judgment of 26 June 2012, *Kurić and Others v. Slovenia* [GC], application no. 26828/06, § 414.

[57] *Ibid.*, § 238; ECtHR judgment of 4 December 2007, *Wolkenberg and Others v. Poland (dec.)*, application no. 50003/99, § 73; ECtHR decision of 8 March 2011, *Association of Real Property Owners in Łódź and Others v. Poland (dec.)*, application no. 3485/02, §§ 86–87; ECtHR judgment of 18 October 2016, *Anastasov and Others v. Slovenia (dec.)*, application no. 65020/13, §§ 94–96; and *Burmych and Others*, cited above, § 159.

§ 7. Conclusion

The execution of final judgments of the ECtHR remains a prerequisite for maintaining the credibility of the European system of human rights protection and the democratic legal order. Contemporary challenges – such as the constitutional diversity of States, the emergence of systemic violations, and the Court's increasing caseload – necessitate the continuous refinement of mechanisms for implementing Strasbourg standards, alongside a deepening of judicial dialogue at both national and international levels.

However, emphasis on the principle of subsidiarity and respect for the margin of appreciation must not lead to a relativisation of the obligations of the High Contracting Parties, which accepted the Convention as the common foundation of European identity. While the Court's judgments open new interpretative horizons and foster higher standards of individual protection, their effectiveness is contingent upon the State's willingness to implement tangible legislative, systemic, and practical reforms.

The consistent execution of the Court's rulings – treated not as a mere formality but as a pivotal mechanism for safeguarding human rights – serves to build public trust and ensure the protection of the individual against arbitrary power. This responsibility lies primarily with domestic authorities, including the courts, which must play an active role in securing the rights and freedoms protected by the Convention. Only then can the principles of the European human rights system fulfil their mandate within a rapidly evolving reality.

Miodrag Đorđević*

The European Convention on Human Rights as a Tool for Judicial Review by Administrative Court Judges from the Perspective of Slovenia

As the third speaker today, I would like to share a perspective focused on the Slovenian approach to administrative judicial review.

§ 1. The Convention in the Slovenian Constitutional order: the hierarchy of norms

The Supreme Court of Slovenia, including its Administrative Department, engages with the ECHR on an ongoing basis. Article 8 of the Slovenian Constitution provides that ratified and published treaties form part of the domestic legal order. The Convention is therefore not considered foreign law, but a part of the legal framework that must be applied. According to the Constitution, the Convention as an international treaty is superior to statutory law in the hierarchy of legal acts. Pursuant to Article 15(5) of the Slovenian Constitution, which establishes the principle of the highest protection of human rights, the human rights and fundamental freedoms enshrined in the Convention are accorded a constitutional level of protection.

§ 2. When national legislation conflicts with the Convention

Should national legislation be contrary to the Convention (that is contrary to the ECtHR case-law), a Slovenian judge cannot base their ruling on the Convention but must stay the proceedings and initiate a constitutional review before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision. The situation is different when a by-law

* President of the Supreme Court of Slovenia, dr; ORCID: 0000-0002-2985-6748.

is contrary to the Convention or the national law or Constitution. In such cases, a Slovenian judge must refuse to apply it and may base their decision directly on the higher legal act.

§ 3. Reopening national administrative judicial review following an ECtHR judgment: unregulated aspects of the Slovenian legal order

The Slovenian Administrative Judicial Review Act does not provide, within its catalogue of extraordinary legal remedies, the possibility to reopen a case after a judgment of the ECtHR, in which violation of the ECHR would be confirmed. The Slovenian Civil Procedure Act does also not entail such an extraordinary legal remedy. Only the Slovenian Criminal Procedure Act expressly regulates extraordinary legal remedy enabling the reopening of proceedings following an ECtHR judgment confirming a breach. Furthermore, the list of grounds for reopening administrative judicial review proceedings does not encompass situations in which the ECtHR has issued a judgment in another case or against another State Party, even if that judgment raises questions relevant to the domestic proceedings.

§ 4. The direct application of the Convention

The Supreme Court may rely on the ECHR directly as a basis for its decision, or indirectly by referring to the ECtHR's interpretations when applying the Constitution or national law. In Slovenia, the primary responsibility for protecting human rights rests with ordinary courts, since effective enforcement requires that in line with the principle of subsidiarity, rights are safeguarded already in proceedings before them. Accordingly, every judge must make decisions not only considering national law but also European law, effectively acting as a European judge. Whenever national law is ambiguous, the jurisprudence of the Strasbourg Court guides us in interpreting it in line with human rights. Indeed, any provision of national law must always be read in the light of the ECHR.

The Slovenian Supreme Court refers to ECtHR case-law whenever relevant, for instance in asylum and migration matters, tax disputes, or environmental cases. In addition, comparative legal research is sometimes undertaken to identify and apply pertinent ECtHR jurisprudence.

Where both ECtHR and CJEU case-law are applicable, the Supreme Court of the Republic of Slovenia generally applies both. In its reasoning, particularly within the Administrative Department, the Court also relies on Article 52(3) of the EU Charter of Fundamental Rights, which governs the scope and interpretation of rights and principles.

§ 5. The case of referral

In its judgment I Up 23/2021 of 9 April 2021[1], the Supreme Court of Slovenia (Administrative Department) held that when interpreting Articles 4 and 19(2) of the EU Charter of Fundamental Rights, the case-law of the ECtHR must also be taken into account. This follows from the explanatory notes to the Charter, which clarify that the reference in Article 52(3) to the ECHR encompasses both the Convention and its Protocols, further stating that the content and scope of the guaranteed rights are defined not only by the wording of those instruments, but also by the case-law of the ECtHR and the CJEU, while underlining that the level of protection afforded by the Charter may never fall below that ensured by the ECHR. With respect to Article 19(2), the explanatory notes specify that it incorporates the ECtHR case-law on Article 3 ECHR. The CJEU has likewise consistently held in its judgments that ECtHR jurisprudence under Article 3 ECHR must be taken into account when interpreting Article 4 of the Charter.

Beyond this, the jurisprudence of the Strasbourg Court offers us guidance in resolving difficult questions of administrative justice, especially when we balance the power of the state against the rights of individuals.

The ECtHR case-law is at the same time an important source for improving the harmonisation of administrative law principles in Europe. The Court has developed new rules derived from the Conventional provisions, which represent important guarantees for the creation of a common core of principles in national administrative law.

§ 6. Case-law of the Slovenian Supreme Court influenced by Strasbourg

Certain rights are particularly relevant:

1) **Article 6 (Right to a fair trial)**: This is applied by the Supreme Court in numerous cases. In its decision X Ips 5/2021[2] of 1 September 2021, the Supreme Court held that the Administrative Court violated the right to a fair trial (Article 22 of the Constitution and Article 6 ECHR) by omitting a main hearing without giving clear reasons. A hearing is not merely a formality but a fundamental right, its exclusion permissible only in exceptional, well-justified circumstances. The Supreme Court referred to the ECtHR cases *Mirovni inštitut v. Slovenia*[3] and

[1] https://sodnapraksa.si/?doc-2015081111448095 (date of access: 18.12.2025).
[2] https://sodnapraksa.si/?doc-2015081111451474 (date of access: 18.12.2025).
[3] ECtHR judgment of 13 March 2018, *Mirovni inštitut v. Slovenia*, application no. 32303/13.

Cimperšek v. Slovenia[4], which found violations for the failure to hold hearings in administrative disputes.

2) **Article 8 (Right to respect for private and family life)**: This arises in family, migration and residence cases. For example, in its judgment (and decision) I Up 161/2016[5] of 19 October 2016, the Supreme Court reaffirmed that the long-standing and genuine bond between the grandmother (the appellant) and her minor grandchildren constitutes a form of 'family life' protected under Article 8 ECHR and Article 53 of the Slovenian Constitution, holding that the administrative removal of her children – carried out without proper legal basis and prior authorisation – unlawfully interfered with this protected right.

3) **Article 1 of Protocol No. 1 (Protection of property)**: In X Ips 10/2020[6] of 25 November 2020 the Supreme Court held that **foreign-currency savings** transferred to a special privatisation account in Bosnia and Herzegovina under Bosnia and Herzegovina legislation could not be considered "unpaid old foreign-currency deposits" within the meaning of the Slovenian Act on the Procedure for the Enforcement of Judgment of the European Court of Human Rights in Case No. 60642/08 (*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*[7]. Since the depositor no longer had a claim against the Sarajevo branch of **Ljubljanska Banka** after the transfer, the Republic of Slovenia could not assume responsibility for such non-existent claims.

   Addressing concerns under Article 1 of Protocol No. 1 ECHR, the Court underlined that even if the transfer occurred automatically and without the depositor's active consent, any potential interference with the right to property would be attributable to Bosnia and Herzegovina, which enacted the relevant legislation, and not Slovenia. The Supreme Court relied on the reasoning in *Ališić and Others v. Slovenia and Others* (ECtHR, 2014), which distinguished between obligations of Slovenia for deposits not transferred and those lawfully consumed or redirected under foreign legislation.

   Conclusion: Since no enforceable property right against the bank existed at the time of verification, Slovenia was not responsible for the violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

[4] ECtHR judgment of 30 June 2020, *Cimperšek v. Slovenia*, application no. 58512/16.

[5] https://sodnapraksa.si/?doc-2015081111400471 (date of access: 18.12.2025).

[6] https://sodnapraksa.si/?doc-2015081111442064 (date of access: 18.12.2025).

[7] ECtHR [GC] judgment of 16 July 2014, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, application no. 60642/08.

4) **Article 3 of Protocol No. 1 (Right to free elections)**: Case X Ips 29/2021[8] concerned an individual whose **voting rights had been fully withdrawn** by a final decision of a district court due to the lack of cognitive capacity to understand the meaning and effects of elections. The applicant sought registration in the electoral register to participate in European Parliament elections, arguing that her voting rights could not be restricted under the Slovenian Constitution, EU law, the UN Convention on the Rights of Persons with Disabilities, and **Article 3 of Protocol No. 1**.

In judgment X Ips 29/2021 of 23 February 2022, the Supreme Court dismissed the revision, holding that **registration in the electoral roll is merely a reflection of an existing judicial decision, not a fresh determination of voting rights**, emphasising that voting rights are not absolute and may be subject to legitimate and proportionate restrictions. Referring to ECtHR case-law (*e.g. Strøbye v. Denmark*, *Caamaño Valle v. Spain*[9]), the Court underlined that limitations on voting rights of persons with severe intellectual or mental disabilities may be justified, provided they result from individualised judicial assessments and pursue the legitimate aim of safeguarding the integrity of elections.

The Supreme Court found that Slovenian law, as amended after earlier Constitutional Court scrutiny, ensures such individualised assessment and thus complies with **Article 3 of Protocol No. 1 ECHR**.

Conclusion: The applicant's exclusion from the electoral register was a lawful consequence of a prior judicial decision. The restriction pursued a legitimate aim, was proportionate, and was compatible with the ECHR standard of the right to free elections.

§ 7. ECtHR case of *Kurić and Others v. Slovenia*

Before Slovenia gained independence on 25 June 1991, the applicants were nationals of both the Socialist Federal Republic of Yugoslavia (SFRY) and of one of its constituent republics other than Slovenia. As nationals of the SFRY, they had acquired the status of permanent residents in Slovenia. After the enactment of the independence legislation on 25 June 1991, the applicants did not apply for Slovenian citizenship before the deadline of 25 December 1991. On 26 February 1992, their names were removed from the Slovenian Register of Permanent Residents.

[8] https://sodnapraksa.si/?doc-2015081111458788 (date of access: 18.12.2025).

[9] ECtHR judgment of 11 May 2021, *Strøbye v. Denmark*, *Caamaño Valle v. Spain*, application no. 43564/17.

The applicants contended that their "erasure" had serious and enduring consequences. Their papers were removed; some were forcibly evicted from their apartments, and they were prevented from working or traveling. They lost personal belongings and remained for years in poor living conditions, which had severe repercussions for their physical and mental health.

The number of former SFRY citizens who lost their permanent residence status in Slovenia in 1992 amounted to 25 671. Some of the "erased" voluntarily left Slovenia, while others were deported; others were granted residence permits following two leading decisions of the Constitutional Court of 1999 and 2003 – which found the relevant provisions regulating the status of aliens unconstitutional – and more than 7000 acquired Slovenian citizenship. Following the Constitutional Court's decisions, an amended Legal Status Act was adopted and entered into force on 24 July 2010.

During the proceedings before the Grand Chamber of the ECtHR, the six applicants were granted permanent residence permits. In July 2011 the Slovenian Government submitted to the Court approximately 30 final judgments delivered in compensation proceedings brought by the "erased". All the compensation claims were dismissed, mostly for failure to comply with the prescribed time limits.

Before the ECtHR, the applicants complained in particular under Article 8 that they had been arbitrarily deprived of their legal status as permanent residents.

In its Grand Chamber judgment of 26 June 2012, the ECtHR found unanimously that there had been violations of Article 8 (right to respect for private and family life or both); of Article 13 (right to an effective remedy) in conjunction with Article 8; and, of Article 14 (prohibition of discrimination) in conjunction with Article 8 ECHR.

The Court noted in particular that the applicants had been deprived of the legal status that had previously given them access to a wide range of rights – including entitlement to social allowance, health insurance and pension rights, and renewals of identity documents and driving licenses – and opportunities, for instance in the sphere of employment.

The Court considered that the regularization of the residence status of former SFRY citizens was a necessary step which Slovenia should have taken in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the rights of the "erased" under Article 8, as demonstrated by the long-lasting problems encountered by the applicants in obtaining valid residence permits. The Court concluded that, despite the passing of the amended Legal Status Act, the Slovenian authorities had failed to remedy comprehensively and with the requisite promptness the grave consequences for the applicants of the "erasure" of their names from the Slovenian Register of Permanent Residents.

The Court also decided to apply the pilot-judgment procedure, holding that the Government should, within one year, set up a compensation scheme for the "erased" in Slovenia.

The case of *Kurić and Others v. Slovenia*[10] (the so-called *'erased' case*) had a significant impact on Slovenian judicial practice. The key points are:

1) **Establishing State Responsibility**
   - The ECtHR found that Slovenia, by erasing residents from the register of permanent residence, had violated **Article 8 ECHR (right to private and family life)** and **Article 13 (right to an effective remedy)**.
   - This was a clear signal to Slovenian courts that the state was responsible for systemic violations and that courts had to apply Convention standards when awarding remedies.
2) **Compensation Practice**
   - The judgment triggered legislative changes (**the Act Regulating the Status of Citizens of Other Successor States of the Former SFRY in Slovenia – ZUSDDD, and later the Act on Compensation for Damage to Persons Deleted from the Register of Permanent Residents – ZPŠOIRSP)**.
   - The Courts faced a significant number of claims (over 300). Case-law gradually stabilised:
     - o both **pecuniary and non-pecuniary damages** are recognised,
     - o the extent of damages depends on the duration of the erasure and its concrete consequences (loss of employment, housing, social rights, restrictions on movement, expulsion from the country, separation from family, breakdown of marriage, family ties, *etc.*).
3) **Application of ECtHR Standards**
   - *Kurić* reinforced the duty of Slovenian courts to **directly apply the ECHR** and ECtHR case-law whenever domestic legislation did not provide adequate solutions.
   - The Supreme Court and the Constitutional Court of Slovenia have since referred explicitly to *Kurić*, especially regarding:
     - o the notion of effective remedies,
     - o the interpretation of Article 8 ECHR,
     - o the principle of proportionality when balancing public interests with individual rights.

[10] ECtHR [GC] judgment of 26 June 2012, *Kurić and Others v. Slovenia*, application no. 26828/06.

§ 8. Closing reflection

The European Convention is not an abstract instrument, but rather a **daily compass** in judicial review, ensuring that administrative power is exercised within limits and that individuals are not left powerless before the state.

The challenge for us as Supreme Court judges is not whether to apply the ECHR – which we must – but how boldly and effectively is this done, ensuring that rights are both practical and effective.

That, in my view, is one of the central responsibilities of administrative justice in Slovenia and across Europe.

Ivana Jelić*

The European Convention on Human Rights as a Tool for Judicial Review by an Administrative Court Judge

§ 1. Introduction

Administrative courts operate at the sensitive junction between the individual and the State, tasked with examining whether public power is exercised lawfully, proportionately and in conformity with fundamental rights. It has been noted that in the wake of the ECHR's adoption, domestic courts increasingly began to infuse the European Convention on Human Rights principles into law, particularly when scrutinising public bodies' exercise of judicial discretion[1]. This paper contends that the ECHR continues to be an indispensable instrument for administrative courts in this endeavour– providing both substantive standards and interpretative guidance.

Della Cananea argues that judicial review of administrative action is guided by three institutional requirements: procedural due process, standards of legality, and judicial independence[2]. This paper approaches this subject in a similar vein, but focuses instead on three key dimensions where the ECHR has reshaped the landscape of administrative adjudication, including the procedural guarantees under Article 6, the principle of proportionality under Articles 8–11, and the right to an effective remedy under Article 13. Before concluding, it briefly reflects on the importance of judicial independence in administrative courts. Taken together, the analysis illustrates

* Vice-President of the European Court of Human Rights, PhD, LL.M.; ORCID: 0000-0001-8091-036X.

[1] See, *e.g. M.J. Beloff* and *H. Mountfield*, 'Unconventional behaviour? Judicial uses of the European Convention in England and Wales', European Human Rights Law Review 1996, iss. 5, pp. 467–495.

[2] *G.D. Cananea*, 'Administrative courts in Europe: common trends and requirements', European Review of Public Law 2018, Vol. 30, no. 3, pp. 749–795.

how the ECHR and jurisprudence of the ECtHR continue to provide a robust legal basis for individuals to seek and obtain administrative justice through judicial review.

§ 2. Procedural guarantees under Article 6

At first glance, the terminology of Article 6 § 1 does not appear to encompass administrative decisions or the control of discretionary powers exercised by the administration[3]. It provides that: "In the determination of his civil rights and obligations..., everyone is entitled to a... hearing...by [a] tribunal...".

The Strasbourg Court has clarified, however, that many administrative disputes fall within the scope of "civil rights and obligations". In the case of *Benthem v. the Netherlands*[4], the Court considered whether the appeal system that re-assessed and subsequently revoked the applicant's licence application was compliant with Article 6 § 1, holding that the granting of the licence was directly linked to the exercise of his activities as a businessman and had engaged his civil rights. Moreover, licensing procedures involving individuals' livelihoods must also be subject to judicial review before an independent and impartial tribunal, while the administrative organ that decided the dispute in *Mr Bentham's* case did not meet these conditions.

Similarly, in *Kress v. France*[5], the Court reinforced the importance of procedural equality in administrative proceedings, holding that any observations of an independent member of the national legal service must be communicated to litigants before the hearing providing them a chance to respond. In *Kress,* the Government Commissioner's mere presence in the deliberations, irrespective of his objectivity in the case, enabled him to enhance submissions in favour of one of the parties, which the Strasbourg Court ruled had violated the applicant's right to a fair trial. This follows the age-old adage, "Not only must Justice be done; it must also be seen to be done", and highlights that even risks to procedural equality can lead to a violation of Article 6. These cases illustrate how the Court's jurisprudence is developing the procedural and substantive requirements for a fair trial under Article 6.

As noted by *Harremoes*, the Former Director of Legal Affairs of the Council of Europe, the phrase 'determination of his rights' in the context of Article 6, "does not depend on the particular procedure prescribed by law to deal with the claim, but on the appreciation of the nature and object of the claim"[6]. The right to a fair trial must

[3] *E. Harremoes*, 'Administrative Law and the European Convention on Human Rights' in *Administrative discretion and problems of accountability* (25th Colloquy on European Law, Oxford United Kingdom, 27–29 September 1995), Oxford 1995, p. 166.

[4] ECtHR judgment of 23 October 1985, *Benthem v. the Netherlands,* application no. 8848/80, 23 October 1985.

[5] ECtHR judgment of 7 June 2001, *Kress v. France*, application no. 39594/98.

[6] *E. Harremoes*, 'Administrative Law and the European Convention on Human Rights', p. 167.

also extend to individuals in administrative proceedings, particularly when the issue at play "is decisive for private rights and obligations"[7]. Therefore, the Court's analysis of Article 6 § 1, as illustrated above, reminds us that administrative justice is not merely about technical legality, but about ensuring fairness and effective access to justice.

§ 3. Proportionality as the Convention's hallmark

While Article 6, as seen above, imposes requirements on the State to provide access to a Court and establishes requirements for fairness in proceedings, the objective is not to control national authorities' or courts' own exercise of discretion. In this regard, administrative authorities retain a margin of appreciation to make their own decisions, although it is well established that this discretion is subject to the scrutiny of the court. Proportionality may be described as the main device used by the Court for determining the level of scrutiny to be applied to a public body decision[8]. Articles 8 to 11 require that any interference with private life, expression, assembly or religion be prescribed by law, pursue a legitimate aim, and be "necessary in a democratic society". This proportionality test is central to judicial review, providing a legal basis for administrative courts to conduct a balancing exercise between competing interests and scrutinise the conduct of the state and its public authorities.

In *Smith and Grady v. the United Kingdom*[9], concerning dismissal from the armed forces on the basis of sexual orientation, the Court insisted on rigorous scrutiny of whether restrictions truly meet pressing social needs, highlighting the link between 'necessity' and 'democratic society', which is defined by principles including pluralism, tolerance and broadmindedness[10]. These considerations must form part of the proportionality assessment, which lies at the heart of the Court's article 8 analysis[11]. It follows from this that the scope of judicial review must also be sufficient to examine whether the interference with rights was proportionate and necessary in a democratic society.

On other occasions, the Court refrained to intervene in cases where public authorities had exercised their discretion to take actions that might infringe upon an individual's rights, provided they had weighed the competing interests. In *Hatton v.*

[7] *Ibid*.

[8] *P.L. McKaskle*, 'The European Court of Human Rights: what it is, how it works, and its future', University of San Francisco Law Review 2005, Vol. 40, iss. 1, pp. 1–84, p. 46.

[9] ECtHR judgment of 27 September 1999, *Smith and Grady v. the United Kingdom*, applications nos. 33985/96 and 33986/96.

[10] *Ibid.*, § 87.

[11] *Ibid.*, § 138.

the United Kingdom[12], the Court considered whether the environmental noise from night flights at Heathrow Airport amounted to an interference with private life, home, and health under Article 8, holding that it was legitimate for the State to take into account the economic interests of airline operators, their clients and the country as a whole when assessing whether the competing interests of individuals affected by noise disturbances were adequately protected. The authorities had not overstepped their margin of appreciation and had struck a fair balance between the competing interests at play.

The Court also developed clear criteria concerning the proportionality assessment in cases addressing immigration issues, such as expulsion orders. In *Üner v. the Netherlands*[13], the State withdrew the applicant's residence permit and imposed an expulsion order after he was convicted of a criminal offence, which meant he would be separated from his partner and two children. The Court held that this did not amount to a violation of Article 8, and in doing so, established the criteria to consider when conducting the proportionality assessment in expulsion cases. In similar cases which followed, the Court underlined that where domestic courts have examined the facts and balanced the competing interests carefully and thoroughly, it is not for the Strasbourg Court to substitute its own assessment of the merits for that of the national authorities unless there are strong reasons for doing so[14].

Such cases show how Strasbourg jurisprudence strengthens the capacity to weigh competing public and private interests.

§ 4. The right to an effective remedy under Article 13

Article 13 ECHR guarantees individuals whose rights are violated access to an effective remedy before a national authority. The Court has consistently interpreted 'effective' in line with its view that the ECHR rights must be practical and effective, rather than theoretical and illusory[15]. In this vein, in *Kudła v. Poland*[16], the Court considered whether the excessive length of criminal proceedings and lack of an effective remedy in national courts to challenge that delay had breached Article 13, holding that Poland had failed to provide a mechanism suitable for expediting proceedings

[12] ECtHR [GC] judgment of 8 June 2003, *Hatton v. the United Kingdom,* application no. 36022/97.

[13] ECtHR [GC] judgment of 18 October 2006, *Üner v. the Netherlands*, application no. 46410/99.

[14] ECtHR [GC] judgment of 7 December 2021, *Savran v. Denmark,* application no. 57467/15, § 189; ECtHR [GC] judgment of 14 September 2017, *Ndidi v. the United Kingdom*, application no. 41215/14, § 76; ECtHR judgment of 23 October 2018, *Levakovic v. Denmark* Application, application no. 7841/14 23.

[15] See *e.g.* ECtHR [GC] judgment of 29 March 2006, *Scordino v. Italy (No. 1)*, application no. 36813/97, § 192.

[16] ECtHR [GC] judgment of 26 October 2000, *Kudła v. Poland*, application no. 30210/96.

or compensating for delays, amounting to a violation. In its conclusion, the Court emphasised that a remedy will be 'effective' if it could have prevented the alleged violation from occurring or could have afforded the applicant redress for any violation that had already taken place[17]. Practicality and effectiveness must therefore guide the interpretation of an effective remedy, which for administrative courts means that judicial review cannot be a purely formal exercise, but must offer real redress. Whether in asylum proceedings, social welfare disputes, or regulatory matters, remedies must be effective in practice, not only in theory.

§ 5. A brief note on judicial independence

A final reflection concerns another strand of the Court's jurisprudence that is critical for the advancement of administrative justice: judicial independence. In *Baka v. Hungary* [18], the applicant was a former judge of the ECtHR and President of the Hungarian Supreme Court. However, following the implementation of a new Constitution, his mandate as President was terminated early, which he believed to be due to his public criticisms of legislative reforms that were impacting the judiciary. He was also rendered ineligible for presidency of the new Kúria following the implementation of restrictive eligibility criteria. The Court held that there was a violation of both Article 6 § 1 and Article 10 ECHR, emphasising in its judgment that these articles can be extended to ensure the protection of judicial independence. *Mr Baka* had the right to serve his full term, and his termination was not reviewed by any bodies exercising judicial powers[19]. Moreover, the applicant had the right to express his criticisms of the proposed reforms in his professional capacity[20]. Although not an administrative dispute in the per se, it serves as a reminder that administrative judges themselves must be shielded from undue interference, in order to fulfil their Convention role as guardians of rights.

§ 6. Conclusion

What unites these lines of jurisprudence is the principle of subsidiarity: the Strasbourg Court has repeatedly affirmed that national judges are the first protectors of the ECHR rights. The margin of appreciation is not an abdication but a responsibility, requiring us to embed the ECHR standards within our own legal reasoning.

In this sense, the ECHR does not stand outside administrative law; it enriches and deepens it. It transforms judicial review from a check of legality into a guarantee of

[17] *Ibid.*, § 158.

[18] ECtHR judgment [GC] of 23 June 2016, *Baka v. Hungary*, application no. 20261/12.

[19] *Ibid.*, § 121.

[20] *Ibid.*, § 168.

human dignity, reminding us that every administrative decision – whether on planning permission, social benefits, asylum, or environmental regulation – implicates fundamental rights.

To conclude, the ECtHR is more than a treaty; it is a shared grammar of legality and justice across Europe. For administrative judges, it provides the language with which to hold the State accountable, the standards by which to measure necessity and proportionality, and the legitimacy to protect citizens' trust in institutions.

By using the ECHR as a tool of judicial review, we strengthen not only individual rights, but also the very fabric of democratic governance.

Andreas Korbmacher*

Scope and Limits of the Margin of Appreciation Exercised by Administrative Judges – the German Perspective

§ 1.

The European Convention on Human Rights is rightly recognised as the beginning of a new era, as a beacon for the protection of human rights, and the most effective system in the world to enforce human rights[1]. Nevertheless, on its 75th anniversary, the European Court of Human Rights once again steers the European Convention on Human Rights in troubled waters. The European Court of Human Rights is one of the crystallisation points of the dispute over "judicial activism vs. judicial restraint"[2]. While one side welcomes its legal development as progress, the other side questions the legal basis of some of the innovations and complains about interferences with the sovereignty of the State Parties[3].

The German constitution, the Basic Law, is almost as old as the Convention. Both were written out of the same spirit and against the same historical background, and can therefore be considered legal siblings. Both also owe their development and great importance to the two neighbouring courts located in Strasbourg and Karlsruhe, which have proven to be strong and assertive companions. Thus, in its jurisprudence, the Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*) has, from the outset, provided a high standard of protection with a wide coverage of all branches of

* President of the Federal Administrative Court of Germany, prof. dr, honorary professor at the Technical University of Berlin.

[1] *Schiedermair*, ZRP 2025, p. 97; K*ulick*, [in:] HK-EMRK, 5th edition 2023, Art. 34 § 1.

[2] For supporting documents, see *Jung*, FS-Stein, p. 976.

[3] See, *e.g.*, Nußberger, Zu viel Europa*?*, APuZ of 8 September 2017.

the legal system[4]. It was only relatively late, however, that the case-law of the ECtHR in Strasbourg received greater attention through important decisions in Germany[5]. The Convention is not directly applicable in Germany and ranks as an international treaty transformed into German law below the Constitution. The Federal Constitutional Court has nevertheless established in several decisions an obligation to take account of the jurisprudence of the ECtHR. The text of the ECHR and the case-law of the ECtHR serve, at the level of constitutional law, as interpretative aids in order to determine the content and scope of fundamental rights and guarantees under the rule of law contained in the Basic Law, provided that this does not lead to a restriction or reduction of the level of protection of fundamental rights under the Basic Law – a consequence not intended by the ECHR itself (see Article 53)[6]. That obligation on the German courts to take account may relate to the determination of the scope of protection of a fundamental right, but also to the review of proportionality[7].

The administrative courts are also bound by these principles and observe the Convention in their daily judicial practice, for example in migration law[8], but also in other fields of law[9]. In the light of that obligation to take account, there is no room for the administrative courts to apply the margin of appreciation in the context of national jurisprudence. The obligation to take account applies unconditionally and is not at the discretion of the courts. The considerations applied by the ECtHR in the context of the margin of appreciation are not tailored to this constellation but serve to determine and limit the standard of review of the Court.

§ 2.

With the entry into force of Protocol no. 15 to the ECHR[10], the State Parties have now explicitly enshrined and emphasised the principle of subsidiarity and the margin of appreciation conferred on them in the preamble to the Convention[11].

The doctrine of the "margin of appreciation" enables the ECtHR to take account of the different cultural and legal traditions of the Member States. The doctrine is

[4] *Mayer*, [in:] *Karpenstein/Mayer* (eds.), EMRK, 3rd edition 2022, Einleitung § 68.

[5] *Mayer*, [in:] *Karpenstein/Mayer* (eds.), EMRK, 3rd edition 2022, Einleitung § 69 *et seq.*

[6] Rulings of the Federal Constitutional Court (BVerfGE, Entscheidungen des Bundesverfassungsgerichts) 111, 307 [ECLI:DE:BVerfG:2004:rs20041014.2bvr148104].

[7] BVerfG, decision of 4 February 2010 – 2 BvR 2307/06 [ECLI:DE:BVerfG:2010:rk20100204.2bvr230706]; *Mayer*, [in:] *Karpenstein/Mayer* (eds.), EMRK, 3rd edition 2022, Einleitung § 84; BVerfGE 128, 326 (374 *et seq*., 393 *et seq*.) – ECHR preventive detention.

[8] Rulings of the Federal Administrative Court (BVerwGE, Entscheidungen des Bundesverwaltungsgerichts) 111, 223.

[9] BVerwGE 178, 176 [ECLI:DE:BVerwG:2023:290323U10C2.22.0].

[10] https://www.lto.de/recht/justiz/j/egmr-beschwerde-frist-verkuerzt-15-zusatzprotokoll (only available in German).

[11] *Nettesheim*, [in:] HK-EMRK, 5th edition 2023, Preamble § 6 *et seq*.

anchored in the principle of subsidiarity of the Convention's system with regard to the Member States' systems of human rights protection. The European Court of Human Rights recognises that national political decision-makers in the Member States are, in principle, in a better position than an international judge to assess the concrete needs and conditions of restrictions on human rights guarantees.

The margin of appreciation is granted to the Member States by the ECtHR, in particular for assessing the democratic need to restrict human rights, the margin thus relating to the various aspects of the principle of proportionality. The specific nature of the objective pursued, as well as the nature and significance of the respective rights defined in the ECHR, have an influence on the density of the review. In addition, it is of relevance whether a question can be objectively assessed or is rather – like questions of morality and custom – shaped subjectively. Another important criterion in this respect is the existence of a "European consensus", while a more recent line of case-law of the ECtHR[12] also proceduralises[13] judicial review. The "margin of appreciation" is thus also determined by the quality of the examination of the Convention' guarantees and the weighing of the interests concerned by the national legislature, the body applying the law and the national court[14].

§ 3.

As already shown, no margin of appreciation exists for the administrative courts when taking account of the case-law of the ECtHR, which is not an unusual situation for the German courts.

The density and power of review exercised by the administrative courts in Germany is highly developed, a fact that builds on our Constitution and the jurisprudence of the Federal Constitutional Court. The right to effective legal protection guaranteed in Article 19 (4) of the Basic Law requires a complete judicial review of the law from a legal and factual point of view against executive acts of state power.

Courts, however, cannot review acts of parliament in terms of content, but they are bound by it. The legislature has a very broad scope for political assessment, decision-making and action. The Federal Constitutional Court also recognises that the legislature has a wide scope for action. It is not the task of the courts, not even of the Federal Constitutional Court, to examine whether the directly democratically legitimated legislature has reached the most appropriate, reasonable or just solution in each case. As a matter of principle, it is for the legislature itself to decide on the

[12] *Nusser*, [in:] *Bergmann/Dienelt* (eds.), EMRK, 15th edition 2025, Art. 8 § 8.

[13] *Voßkuhle*, RdA 2015, p. 336 (341); *Schorkopf*, ZaöRV 2022, p. 19 (18), with reference to ECtHR [GC] judgment of 22 April 2013, *Animal Defender International v. the United Kingdom*, application no. 48876/08.

[14] *Nusser*, [in:] *Bergmann/Dienelt* (eds.), EMRK, 15th edition 2025, Art. 8 § 8.

nature, extent and time at which the tasks of the state are to be performed[15]. This concerns the assessment and evaluation of the "political situation concerning the respective issue", as well as the prognosis of what effects a legal regulation will have. These considerations are very similar to those of the European Court of Human Rights in the context of its margin of appreciation doctrine. The Federal Constitutional Court also recognises the prerogative of the Parliament in determining the fundamental weightings and decisions of politically and socially relevant and often controversial issues.

Full judicial review therefore concerns only the interpretation and application of democratically legitimated acts of parliament. The courts have the competence to review and correct the administration in the interpretation of the law, the determination of facts and the application of the law. Bound by administrative findings of fact or assessments, courts would be as constrained as if their review powers were limited to a mere tenability check (*Vertretbarkeitskontrolle*)[16], which is inadmissible, for although discretionary decisions do exist, a highly differentiated jurisprudence has developed on the exercise of discretion.

The essence of the exercise of a discretion of the authorities is to compare and weigh up the relevant circumstances of the case for the purpose of choosing the legal consequence[17]. In its review of the administrative decision, the administrative court must respect that margin of discretion. It is not entitled to substitute its own assessment for the one of the administration, but rather the court's examination is subject only to the existence of an error in the exercise of discretion.

German administrative law distinguishes administrative discretion from administrative margins of appreciation when interpreting and applying indefinite legal terms, with the legal grant of such margins of appreciation to the administration requiring justification under German constitutional law. There must be specific reasons. Such specific reasons are recognised for the assessments of examinations, to certain decisions of expert or pluralistic bodies that are free from instructions and for individual cases of prognoses based on overall political, economic, social or cultural contexts[18]. Finally, a further area of particular material importance concerns the regulatory and planning discretion[19].

[15] *Voßkuhle*, [in:] *Huber/Voßkuhle* (eds.), GG, 8th edition 2024, Art. 93 § 43 with further references.

[16] *Schmidt-Aßmann*, [in:] *Dürig/Herzog/Scholz* (eds.), GG, as of: October 2024, Art. 19(4) § 183.

[17] *Eyermann*, VwGO, 16th edition 2022, § 114 § 24.

[18] *Geis*, [in:] *Schoch/Schneider* (eds.), Verwaltungsrecht, as of: November 2024, VwVfG § 40 § 149 *et seq*.

[19] *Geis*, [in:] *Schoch/Schneider* (eds.), Verwaltungsrecht, as of: November 2024, VwVfG § 40 § 198 et seqq. and 213 *et seq*.

Characteristic of these cases is a review that is limited to certain steps only comprehending the decision of the administrative authorities. The court may not substitute its own assessment for the one of the administrative authority.

In addition, the Federal Constitutional Court recognises the administration's own margins of appreciation, which may result from the objective functional limits of the jurisprudence. The Federal Constitutional Court has recognised this when a legal provision requires non-legal professional assessments, while there are still no generally accepted scientific standards and methods for assessment. Although is true that the courts must determine the state of scientific knowledge in the context of review of the full establishment of facts, they are neither able nor obliged to independently close gaps in scientific knowledge and to place research orders. If, in such cases, it is therefore not possible objectively to determine conclusively whether the administrative authority's response to the technical question is correct or incorrect, the court must examine only the tenability (*Vertretbarkeit*) of the authority's assumptions[20].

§ 4.

I would like to turn briefly to constitutional law. Like the ECtHR, the Federal Constitutional Court does not see itself functionally as a "supreme instance of appeals on points of law". It does not subject the final and binding decisions of the other courts to a general substantive examination, but limits its review to errors in the legal assessment of the facts, which reveal a fundamentally erroneous view of the significance of a basic right. The additional application of constitutional law is therefore primarily a matter for the administrative courts. These examine constitutional law in the context of so-called ordinary law. If the significance of a basic right is fundamentally disregarded in doing so, it will only lead to annulment if the scope of the basic rights is of some importance[21].

However, the more severe the impairment of basic rights in the individual case is, the more intensive is the review of the judicial decision before the constitutional court[22].

What is the direct comparison of this constitutional review with the principles established by the ECtHR?

For the Federal Constitutional Court, the focus is not on "procedural rationality" in the legislative procedure – that is, the involvement of different interest

[20] BVerfGE 149, 407 § 20 *et seq*.

[21] Fundamentally, see BVerfGE 18, 85; Chamber Rulings of the Federal Constitutional Court (BVerfGK, *Kammergerichtsentscheidungen des Bundesverfassungsgerichts*) 4, 243 § 34; Voßkuhle, RdA 2015, p. 336 (340 *et seq.*).

[22] *Asche*, Die Margin of Appreciation, p. 45 *et seq*.

representatives and a substantive weighing process. This is of primary importance only if it reinforces the basic rights. The substance of the fundamental rights issue is decisive[23]. Similarly, the question whether opinions on a matter can reasonably differ widely within society is only sporadically mentioned as a factor which leads to the recognition of a scope for weighing and action on the part of the democratically legitimated legislature[24]. In this respect, the case-law of the ECtHR takes greater account of the own function of the democratically elected legislature as a "forum of the nation"[25]. The legislature, and not the courts, have the task of bringing together different views on an appropriate and fair balancing of interests in the representative legislative procedure to a decision.

[23] See, on this point, *Schorkopf*, ZaöRV 2022, p. 19 (30).
[24] BVerfGE 108, 282 § 47.
[25] *Müller/Drossel*, [in:] *Huber/Voßkuhle* (eds.), GG, 8th edition 2024, Art. 38 § 31.

Julia Laffranque*

Enforcement of a European Court of Human Rights Judgment by a National Judge – the Estonian Perspective

§ 1. Introduction. Acknowledgements

Allow me to thank the organizers and our host, the Supreme Administrative Court of Poland, and in particular its President, my dear colleague and friend *Jacek Chlebny*, for taking the initiative to celebrate seventy-five years of the European Convention on Human Rights here in Warsaw at the Royal Castle. This is a very symbolic venue that demonstrates the unity of Europe – something we need in substance to increase the feeling of justice and security, and to protect our societies from brutality.

Poland and I also share a common history: One of my ancestors, *Szymon Korpent*, was originally from Galicia, a historical and geographic region spanning what is now southeastern Poland and western Ukraine, long part of the Polish Lithuanian Commonwealth. So, as you see I share roots with all members of our panel! My forefather settled on the Estonian island of Saaremaa, bringing with him traditions that emphasised the importance of education and family, leaving a lasting mark for future generations. More than a century later, Estonia together with Poland joined the Council of Europe in the early 1990's.

I would now like to turn to eight points in relation to today's topic.

Law is the art of goodness and equity.

* Judge of the Supreme Court of Estonia, Judge of the European Court of Human Rights from 2011 to 2020, prof. dr, University of Tartu.

First, let me reflect on this art of goodness and equity. Creating a European Human Rights Convention is a piece of art, requiring a certain amount of creativity and courage to accomplish wide recognition and acceptance among so many European States.

One of the most influential ancient Roman jurists of the High Classical era, *Celsus*, famously said – *ius est ars boni et aequi* [1]– law is the art of what is good and just. It is also the motto of the Estonian Supreme Court where I now serve, and which is a hybrid of a supreme administrative court and of a court of cassation in civil and criminal matters, as well as a constitutional court.

The legal culture nourished by the ECHR puts human beings and human dignity in the centre.

I would like to congratulate the President of the European Court of Human Rights, *Mattias Guyomar*, for the remarkable achievement of his court – also my former court, which I had the honour to serve from 2011–2020 – in ensuring that the Convention is alive and respected.

In Estonian we say that a judge not only renders but understands justice – you cannot decide on justice without understanding people. Human empathy in times of AI reality is especially precious. According to the competency model for Estonian judges, adopted in 2024[2], an excellent judge is professional, competent, human and efficient. In this respect the Supreme Court of Estonia administrative law chamber is a small (mini) ECtHR, as referred to by its former president, Justice *Tõnu Anton*.

§ 2. Estonian law, the ECHR, and ECtHR: some general remarks

Second, may I make a few general remarks on the reception of the Council of Europe's Human Rights Protection mechanism in Estonia.

According to the Preamble of the Estonian Constitution, Estonia is founded on liberty, justice, and the rule of law – principles created to protect peace and defend the people against aggression from the outside, and which forms a pledge to present and future generations for their social progress and welfare[3] – beautiful lines as pertinent today as at their creation. As former President of Estonia, *Toomas Hendrik Ilves*,

[1] *Aaron X. Fellmeth* and *Maurice Horwitz*, Guide to Latin in International Law, Oxford University Press (2nd ed.), 2021. *Hai-Feng Ma*, *Ius est ars boni et aequi*: A textual research on a Roman legal maxim, Journal for Legal History Studies 2017, (32): 193–236.

[2] At the Training Council on 16 September 2024, and at the Judicial Examination Committee on 15 October 2024, available online at: https://www.riigikohus.ee/sites/default/files/Koolitusn%C3%B5ukogu/Kohtuniku%20kompetentsimudel_final.pdf (date of access: 10.10.2025).

[3] The Constitution of the Republic of Estonia, Passed 28 June 1992, RT (Riigi Teataja, State Gazette) 1992, 26, 349, entry into force 3 July 1992, available online in English at: https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide/current (date of access: 10.10.2025).

put it, the perpetual keywords for the future of Estonia are: education, security, and means of subsistence (social welfare)[4].

After restoring its independence in 1991 and deciding to draft a completely new constitution instead of revitalising the one force in free Estonia prior to the Second World War, Estonia was fortunate to seek inspiration from the ECHR. This is why our Constitution, adopted by the people on referendum in 1992, includes a Chapter on fundamental rights, freedoms and duties, which is a more modern (42 years newer) version of the ECHR.

The ECHR itself was ratified by the Estonian Parliament on 16 April 1996 by the special Ratification Act[5] as any other international treaty. According to the Estonian Constitution (Article 123 section 1), the Republic of Estonia may not enter into international treaties that conflict with the Constitution. As follows from section 2 of the same article, international treaties take precedence over national laws and regulations, if laws or other acts of Estonia conflict with international treaties ratified by the Estonian Parliament.

In other words, the ECHR is hierarchically somewhere in between national laws (above them) and the Constitution (below it). International treaties have direct binding force and do not have to be transposed to national law to be applicable.

Accordingly, the Supreme Court of Estonia has applied the ECHR directly. In fact, already in 1994 (*i.e.* two years before accession of Estonia to the Convention) the Constitutional Review Chamber of the Supreme Court stated, on the issue of retroactivity of the law, that the general principles developed by the CoE and the EU must be considered when shaping the principles of Estonian law[6]. Later, the Supreme Court stated in its case-law that since 16 April 1996, the ECHR is binding to Estonia and in case of contradiction with Estonian law, the ECHR should be applied[7]. In addition, the Supreme Court in the same judgment even stated that in certain cases, it is possible to refer to the Convention also when interpreting the Estonian Constitution[8]. In its decision of 6 January 2004 in a criminal case, the Supreme Court *en*

[4] President *Ilves*: meie tuleviku märksõnad on haridus, julgeolek ja toimetulek. President *Ilves*: The keywords for our future are education, security, and coping. Opinion on Estonian Public Broadcasting, ERR (date of access: 31.12.2014), available online at: https://www.err.ee/527219/president-ilves-meie-tuleviku-marksonad-on-haridus-julgeolek-ja-toimetulek (date of access: 10.10.2025).

[5] Inimõiguste ja põhivabaduste kaitse konventsiooni (täiendatud protokollidega no 2, 3, 5 ja 8) ning selle lisaprotokollide nr 1, 4, 7, 9, 10 ja 11 ratifitseerimise seadus, passed 13 March 1996, RT II 1996, 11, 34, entry into force 11 April 1996.

[6] Judgment of the Supreme Court in Constitutional Review proceedings, 30 September 1994, case III-4/A-5/94, RT I 1994,80,1159.

[7] Judgment of the Criminal Law Chamber of the Supreme Court, 20 September 2002, case 3-1-1-88-02.

[8] Same, § 7.1.

banc noted that the ECHR is an integral part of the Estonian legal system and that guaranteeing the rights and freedoms contained therein is also the duty of the (Estonian) judiciary pursuant to Article 14 of the Constitution[9]. However, in practice, when the matter is regulated by national laws and regulations, and there is no contradiction with ECHR, national legislation is applied, with EU law prevailing more and more, especially in administrative cases.

The Supreme Court has shown the same friendly attitude also towards the case-law of the ECtHR: It has held that, in interpreting the Convention, the positions of the Strasbourg Court, and not just the text of the Convention itself, are an integral part of the Estonian legal system and take precedence over national law[10]. Since joining the Convention, the Supreme Court has consistently referred to the case-law of the ECtHR, the first of which was *Malone v. the United Kingdom*[11]. Clearly, the Supreme Court looks at the entire jurisprudence of the ECtHR, not only the judgments concerning Estonia. When interpreting the Convention, the Supreme Court does not necessarily distinguish between the ECtHR case-law concerning Estonia and other Contracting States of the ECHR. Judgments concerning other Contracting States can be equally relevant.

As a matter of fact, approximately 100 applications are filed against Estonia with the ECtHR each year. This number has been decreasing, in line with the overall tendency of the ECtHR, standing at only 97 in 2024[12]. This gives 0.71 complaints per 10,000 inhabitants, which is more than the average of Council of Europe Member States (0.38)[13]. Most of the applications concerning Estonia are declared inadmissible. Judgments on the merits are rather the exception: for example, in 2024, the ECtHR did not make a single substantive decision concerning Estonia (only five inadmissibility decisions), while in 2023, four judgments were made, all of which found violations. In 2023, the ECtHR found a violation of the Convention in a situation where the biological father of a child was unable to participate in proceedings in which another man had adopted his child[14]. In this case Estonia not only paid the compensation awarded by the ECtHR to the applicant within the prescribed time limit, but with regard to the general measures, the Estonian Government was of the

[9] Judgment of the Supreme Court *en banc* (Grand Chamber), 6 January 2004, case 3-1-3-13-03.

[10] Judgment of the Criminal Law Chamber of the Supreme Court, 20 September 2002, case 3-1-1-88-02.

[11] ECtHR judgment of 2 August 1984, *Malone v. United Kingdom*, application no. 8691/79; judgment of the Supreme Court Constitutional Review Chamber, 20 December 1996, case 3-4-1-3-96, RT O 1997, 4, 28.

[12] Country Profile (Estonia), available online on the website of the ECtHR: https://www.echr.coe.int/documents/d/echr/CP_Estonia_ENG (date of access: 10.10.2025).

[13] Annual Report, ECtHR, 2024, Statistics, p. 37 (Allocated applications by State and by population 2022–24).

[14] ECtHR judgment of 10 October 2023, *I.V. v. Estonia*, application no. 37031/21.

opinion that raising awareness of the problem elevated by the judgment and the direct impact of the case-law on Estonian law were sufficient measures to prevent similar violations in the future[15]. On 3 July 2024, the Supreme Court (Civil Law Chamber) also partially upheld the appellant's request to reopen the case domestically[16]. The Supreme Court overturned the orders made in the proceedings to revoke the adoption decision, referred the case back to the circuit court, and provided instructions on how to review the case on the basis of the ECtHR decision and apply family law in the future. The proceedings were concluded in the circuit court on 28 February 2025.

§ 3. Can a court enforce a judgment?

Third, this brings me to the following question: can a national judge enforce a judgment of another court? This question was already raised at the annual seminar marking the opening of the judicial year in Strasbourg in 2014, and in an elegant way: "Implementation of the judgments of the ECtHR: a shared judicial responsibility?"[17]. I am not referring here to the international instruments or Brussels Regulation on EU level that facilitate judgments from one (EU) country to be recognised and enforced in any other (EU) country[18].

The right to a fair trial as we know also from the case-law of the ECtHR does not stop with the judgment, as it would be without any effect and remain only illusory, not practical, should the judgment not be enforced. Thus, the "right to a court" also encompasses the execution of judgments. The right to execution of such decisions, given by any court, is an integral part of the "right to a court"[19]. Otherwise, the provisions of Article 6 § 1 ECHR would be deprived of all useful effect[20].

[15] See the annual report of the Estonian Ministry of Foreign Affairs (Government Agent) Overview of complaints against the Republic of Estonia before ECtHR, which were resolved in 2024. Available on the website of the Ministry of Foreign Affairs, https://www.vm.ee (date of access: 10.10.2025).

[16] Decision of the Civil Law Chamber of the Supreme Court, 3 July 2024, case 2-18-11489.

[17] Seminar background paper "Implementation of the judgments of the ECtHR: a shared judicial responsibility?" 1. From the point of view of the Court: its role in the implementation of its judgments, powers and limits. 2. From the point of view of national judiciaries: the role of national courts in the implementation of the Court's judgments, prepared by Organising Committee, chaired by Judge *Laffranque*, assisted by *R. Liddell* of the Registry, available at: https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2014_eng (date of access: 10.10.2025).

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[19] ECtHR judgment of 19 March 1997, *Hornsby v. Greece*, application no. 18357/91, § 40 (Execution of a judgment given by any court must therefore be regarded as an integral part of the „trial" for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings; ECtHR [GC] judgment of 29 March 2006, *Scordino v. Italy (No. 1)*, application no. 36813/97, § 196.

[20] ECtHR judgment of 7 May 2002, *Burdov v. Russia*, application no. 59498/00, §§ 34 and 37.

I recognise that the organisers of our conference understand enforcement in a broader sense than just the execution of a judgment. It concerns how the national court relates to the case-law of the ECtHR. Does the ECtHR have authority or does it compete in the run for who has the final say in the protection of fundamental rights? It is about the mentality, the state of mind. It means building together the legal culture that I mentioned before under my first key point.

I remember from my experience at the Strasbourg court that despite some professional arguments that are naturally part of the dialogue, the national judges were the best and most reliable allies of the ECtHR. Often even local judges in remote corners of Europe took Strasbourg case-law very seriously, especially if they paid a study visit to the ECtHR. This is due to the fact that despite our differences we speak the same language of law, we follow the same logic.

Nevertheless, strictly speaking and respecting the division of powers and judicial independence, the judgments of the ECtHR are to be executed by the Member States (Contracting States). More precisely, their execution is the responsibility of the Contracting States governments, subject to supervision by the Committee of Ministers of the Council of Europe at the *supra*-European political level.

It also depends on what is to be enforced – has the ECtHR simply awarded damages for the violation, or has it also prescribed some measures of a general nature to solve, for example a structural problem, thus adding Article 46 ECHR to Article 41 ECHR.

It could well be that the main task of enforcement lies within the executive, and sometimes the national, legislature that needs to accommodate national laws with Convention requirements as interpreted by the ECtHR.

However, if an applicant who won in Strasbourg would like to request the reopening of the case at national level, the national courts play an important role. Here again, sometimes the ECtHR mentions it in its reasoning *expressis verbis* that the case should be reopened, or even states it under Article 41 ECHR, while at other times, the national laws on reopening are merely cited under the facts part or not referred to at all. This has caused confusion, with applicants even returning to the ECtHR after unsuccessfully trying to reopen their case[21].

Nowadays the possibility to reopen a case at national level after a violation has been found in the Strasbourg Court is a rule rather than an exception in most of the Contracting States[22]. However, this depends on whether the possibility of reopen-

[21] See *e.g.* ECtHR decision of 17 February 2015, *Kudeshkina v. Russia (No. 2)*, application no. 28727/11.

[22] See Reouverture des procdedures judiciaires internes suite aux arrets de la Cour Europeenne, Department for the execution of judgments, CoE, October 2022, available at: https://rm.coe.int/tfs-reopening-fr/1680a8a487 (date of access: 13.10.2025).

ing covers all provisions of the Convention, or whether reopening is allowed only in certain instances – for example, only where a violation of Article 6 ECHR has been found.

According Recommendation No. R(2000)2 of the Committee of Ministers (CM)[23], a review — including the reopening of a case — should be possible at national level, particularly if following a judgment of the ECtHR. Reopening may therefore be the most effective, if not the only, means of achieving *restitutio in integrum,* mainly in the field of criminal law, and the possibility of reopening criminal cases is now provided for in almost all Member States, sometimes following a special decision by a higher court.

So we, national judges, also in administrative matters where the complicated relations between private persons and public authorities occur, bear a decisive responsibility.

§ 4. Reopening of a case. Sources of law

Fourth, it is worth noting that the possibility of reopening a case in which the ECtHR has found a violation—a remedy that now also exists in Estonian national procedural law—was first introduced by the Supreme Court of Estonia 21 years ago. Following the ECtHR's decision on the violation in the case of *Veeber v. Estonia (No. 2)*[24], which concerned an applicant who had been convicted in Estonia for tax evasion on the basis of provisions that had not yet entered into force at the time of the offense, new court proceedings were held in Estonia in the applicant's case, and he was acquitted by the Supreme Court[25]. With this decision, the Supreme Court recognised the direct legal effect of ECtHR judgments. Although the dissenting judges agreed with the outcome, they found the fact that Estonian legislation for court proceeding did not include the possibility to reopen a case after a judgment of the ECtHR to be unconstitutional[26].

Luckily, the legislature followed the position of the Supreme Court and introduced a corresponding amendment, creating a new legal basis for the reopening of a case. The explanatory memorandum to the draft law amending procedural codes mentioned *expressis verbis* the need to comply with and implement the ECtHR

[23] Rec(2000)2 – on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR, 19 January 2000, available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209125948801f6671%22],%22sort%22:[%22CoEValidationDate%20Descending%22]} (date of access: 13.10.2025).

[24] ECtHR judgment of 21 January 2003, *Veeber v. Estonia*, application no. 45771/99.

[25] Supreme Court *en banc* (Grand Chamber), 6 January 2004, case 3-3-2-1-04.

[26] Dissenting opinion of justice *Jüri Põld*, joined by justice *Jaak Luik*.

judgments, referring to the practice of the Supreme Court in this respect[27]. It was stressed that the case-law of the ECtHR has a significant impact on legislators, executive authorities and courts in most European countries, including Estonia.

Today, according to Article 240 section 2 subsection 8 of the Code of Administrative Court Procedure, reopening of a case is possible[28]. The first precondition is that the ECtHR has found a violation of the ECHR or of any protocol to the Convention. The second condition is that if an application is lodged with the ECtHR against a judgment or order entered in an administrative matter, the violation should be such as may have affected adjudication of the matter and cannot reasonably be remedied. The third precondition is that the harm that it caused cannot be compensated otherwise than by means of review (reopening of the case). Therefore, the fact that the ECtHR has identified an infringement of the ECHR is only the first precondition for reopening a case. Another precondition – that the infringement may have affected the decision – is more complicated to fulfil. Review is only possible in cases where the infringements concerned judgments regarding Estonia.

Similar provisions are also foreseen in Estonian laws concerning civil and criminal court proceedings[29].

Petition for review (request to reopen a case) may also be filed by a person who has, in a similar case and on the same legal basis, lodged an application with the ECtHR, or who is entitled, in a similar case and on the same legal basis, to lodge such an application in accordance with the time limit established in paragraph 1 of Article 35 ECHR[30]. The applicant has six months from the date of entering into force of the judgment of the ECtHR to request reopening[31].

§ 5. Reopening of a case. Practice and statistics

Fifth, although the preconditions under national law to reopen a case are perhaps at first glance not as strict those concerning the reopening of a case where the ECtHR has made a judgment, this 'discrimination' is in practice almost non-existent, as there are over 30 occasions where the Supreme Court functioning as the Supreme Court Administrative Law Chamber dealt with reopening after the admissibility stage, and around 15 of them are connected to the ECHR and ECtHR. The Supreme Court

[27] Explanatory Letter of Amendments to Procedural Codes (Seletuskiri), 545 SE I 13 December 2004.

[28] Code of Administrative Court Procedure, (Halduskohtumenetluse seadustik), RT I, 23 February 2011, 31 January 2012.

[29] Code of Criminal Proceudre, Article 366 section 7 and Code of Civil Court Procedure, Article 702, Section 2, subsection 8.

[30] Code of Administrative Court Procedure, Article 240, Section 3.

[31] Article 241 Section 2 of the Code of Administrative Court Procedure.

may also exercise a form of leave-to-appeal control in respect of requests to reopen a case. Where the Supreme Court refuses to grant leave to appeal, it is quite difficult to understand the motives behind it, as the refusal is not reasoned[32].

But even if the request for reopening has been granted leave, it must be acknowledged that applications for review are often unsuccessful. There may be several reasons for this, but an appeal is often dismissed if the violation identified by the ECtHR did not, in the opinion of the Supreme Court, affect the outcome of the case, and if the violation can be reasonably remedied or the damage caused by it compensated for in a manner other than through a retrial.

Thus, in principle, there is always the possibility to request reopening after a favourable ECtHR judgment – either in one's own case or in similar Estonian case, provided that the applicant has also turned to the ECtHR. Nevertheless, in practice, such reopenings are quite rare[33].

However, this should not be understood as if the Supreme Court is afraid of, seeks to avoid, or does not tolerate any criticism from the ECtHR. The decision to reopen depends very much on each case and is always carefully examined individually, case by case.

Positive example of a reopening following an ECtHR judgment is the case of *Andreyev v. Estonia*[34], where the ECtHR found that the applicant had been deprived of his right to appeal in criminal proceedings against him because the lawyer appointed to him under the state legal aid scheme had failed to lodge an appeal within the time limit, and none of the subsequent measures had effectively remedied the situation. Consequently, the ECtHR found a violation of Article 6(1) of the Convention in relation to access to a court. The Supreme Court Criminal Law Chamber granted leave to appeal for reopening, referring directly to the judgment of the ECtHR[35].

In another case, the Supreme Court referred to the *Andreyev* judgment even though the other case had never reached the ECtHR, and the Supreme Court applied an analogous approach and reopened the case[36].

[32] According to Article 244, Section 1 of the Code of Administrative Court Procedure, The Supreme Court decides on acceptance of the petition (request for reopening) within a reasonable time. The petition is accepted if the circumstances set out in it give reason to believe that ground for review provided by the law is present. When accepting the petition, the Supreme Court may, where needed, enter an order by which it suspends, in part or in full, enforcement of the judgment or order rendered in the administrative case to be reviewed.

[33] See in detail *J. Laffranque*, Euroopa Inimõiguste Kohus ja Eesti õigus, Juura, 2017, pp. 80 ff.

[34] ECtHR judgment of 22 November 2021, *Andreyev v. Estonia*, application no. 48132/07.

[35] Judgment of the Criminal Law Chamber of the Supreme Court, 9 May 2012, case 3-1-2-2-12.

[36] Based on Code of Criminal Procedure, Article 367 section 2, judgment of the Criminal Law Chamber of the Supreme Court, 14 March 2013, case 3-1-2-3-13.

The Administrative Law Chamber of the Supreme Court also reopened proceedings on the same basis, referring explicitly to paragraph 77 of the ECtHR judgment in the *Andreyev* case, in which the ECtHR found that although the applicant had been granted state legal aid to appeal to the Supreme Court and despite the fact that he had done everything that could have been expected of him, the failure of the lawyer appointed to him under the legal aid scheme to fulfil his obligations, and the lack of effective measures to remedy the situation, deprived the applicant of his right of access to the Supreme Court[37].

In another case concerning administrative law, the Supreme Court analysed whether the ECtHR's finding of a violation in a specific case would affect the final outcome of the court proceedings, and whether the situation could be remedied in any other way than by a re-opening. In essence, the Supreme Court agreed with the ECtHR's position that the appellant had exhausted the pre-trial legal remedies and that his complaint against the prison management was sufficiently clear. Consequently, the Supreme Court decided that a re-opening was justified, referring the case back to the lower court for review[38].

At the same time, the Supreme Court often refuses to review cases, finding that there are no grounds for reopening[39]. Having analysed the possible grounds for reopening in detail, the Supreme Court emphasises that a review is only justified if the violation identified by the ECtHR could affect the outcome of the criminal case[40]. The Supreme Court's decision to review based on the ECtHR's judgment in the *Martin v. Estonia*[41] case (about the right to choose counsel in the pre-trial stage of criminal proceedings and consequences of its violation)[42] is one of the most thorough Supreme Court decisions in this field, analysing in detail the grounds and the conditions necessary for the case to be re-examined[43]. The Supreme Court found that, in general, compensation awarded in connection with a violation can be con-

[37] Decision of Administrative Law Chamber of the Supreme Court, 3 December 2012, case 3-3-1-61-12.

[38] Decision of the Administrative Law Chamber of the Supreme Court, 18 March 2013, case 3-3-2-2-12 (based on the ECtHR judgment of 29 May 2012, *Julin v. Estonia,* applications nos. 16563/08, 40841/08, 8192/10 and 18656/10.

[39] Judgment of the Criminal Law Chamber of the Supreme Court, 17 February 2010, case 3-1-2-5-09 (based on ECtHR judgment of 25 June 2009, *Liivik v. Estonia*, application no. 12157/05 (no reopening)).

[40] Judgment of the Criminal Law Chamber of the Supreme Court, 11 April 2013, no. 3-1-2-1-13 (no reopening of the case ECtHR judgment of 6 March 2012, *Leas v. Estonia*, application no. 59577/08.

[41] ECtHR judgment of 30 May 2013, *Martin v. Estonia*, application no. 35985/09.

[42] See also *Anneli Soo*, The Right to Choose Counsel in the Pre-trial Stage of Criminal Proceedings and Consequences of its Violation, by Example of Estonian Supreme Court Decision 3-1-2-2-14, Juridica International 23/2015, pp. 124–132.

[43] Judgment of Criminal Law Chamber of the Supreme Court, 29 September 2014, no. 3-1-2-2-14.

sidered compensation for damage caused by the violation only in situations where the review proceedings find that the violation identified did not affect the outcome of the criminal case. At the same time, the Supreme Court noted that even if the review proceedings find that the violation identified by the ECtHR may have affected the domestic decision in the criminal case, this does not automatically mean that the reopening is justified. In the second stage, it must be assessed whether the violation can be eliminated or remedied in some other way. In the *Martin* case, however, the Supreme Court concluded that the violation of the right to defence that occurred during the pre-trial proceedings did not significantly influence the decision in the court proceedings, and other evidence gathered and the reasoning of the circuit court do not give grounds to claim that reopening the criminal proceedings could lead to *Martin's* (applicant's) acquittal.

Previously, the Supreme Court had also found the ECtHR judgment in the *Vronchenko v. Estonia*[44] case (the ECtHR had found a violation of Article 6 (1) and (3) (d) ECHR because of the applicant's lack of an opportunity to put questions to the witness) not to provide grounds for reopening by the Supreme Court, as sufficient circumstantial evidence had been examined in that case, collectively proving *Vronchenko's* guilt (who was convicted for sexually assaulting his step-son). *Vronchenko*, by the way, appealed to the ECtHR that his case was not reopened, but at the ECtHR his application was dismissed by a single judge[45].

Later, the entire Criminal Law Chamber of the Supreme Court reiterated similar views regarding *Rosin's* (*Rosin v. Estonia,* a judgment of the ECtHR similar to that of *Vronchenko* finding of a violation of the right of an applicant, who was convicted for sexual assault, of his right to question witnesses)[46] appeal for reopening, and also concluded that the appeal should be dismissed[47].

The question remains, of course, whether the ECtHR ruling can be considered fulfilled, in case the request for reopening was not granted, given that the refusal to grant it is justified and reasons are given? However, if the reopening is granted, what will happen to the statute of limitations for the crime and the legal security (see also below)?

According to the Estonian State Liability Act, a person may claim compensation for damage caused in the course of judicial proceedings, including damage caused by a court decision, only if a judge committed a criminal offence in the course of the

[44] ECtHR judgment of 18 July 2103, *Vronchenko v. Estonia*, application no. 59632/09.

[45] As of 22 January 2015, see *Julia Laffranque*, Euroopa Inimõiguste Kohus ja Eesti õigus, Juura, 2017, p. 83.

[46] ECtHR judgment of 19 December 2013, *Rosin v. Estonia*, application no. 26540/08.

[47] Judgment of the Criminal Law Chamber in its full composition, 18 March 2015, case 3-1-2-4-14.

judicial proceedings, but is not applied to damage caused by an administrative authority in the course of challenge proceedings. In addition, a person may claim compensation for damage caused in the course of the proceedings, including for damage caused by a decision passed on the matter, if the ECtHR has satisfied the person's individual petition due to a violation of the ECHR or any of its protocols in the relevant proceedings, if the violation lead to incorrect adjudication of the matter and the person has no other means to restore their rights[48]. Thus, it is very unlikely that a person who has asked for reopening due to winning at the ECtHR, and whose case has not been reopened, can claim for damages based on the national judiciary failing to reopen the case.

§ 6. Case study: an example of reopening a case concerning Internet access in an Estonian prison

Sixth, to illustrate the issues of reopening based on a concrete case study, let me turn to the saga of the case concerning Internet access of the prisoner *Romeo Kalda*. Before I continue, I would like to share two explanations: first, in Estonia, the complaints of prisoners concerning their prison conditions are reviewed by administrative courts; second, as you know, Estonia is generally considered to be very advanced in Internet access, which is also demonstrated by the fact that the very first Grand Chamber judgment of the ECtHR concerning freedom of expression on the Internet and the only Grand Chamber case so far in respect of Estonia, *Delfi v. Estonia*[49], set a precedent to the development of the case-law of the ECtHR on this topic. Although the Internet is part of the genetics of Estonian public services and could therefore also be expected to be available to a certain extent in prisons, it must be acknowledged that the Supreme Court has not always been able to interpret the Constitution and the Convention in a fully consistent manner. It has occurred that the Convention, as a living instrument interpreted by the ECtHR, offers stronger protection in certain specific aspects than the national Constitution (and also *vice versa*). This became apparent in the case of a prisoner serving a life sentence, where restrictions on prisoners' use of the internet, which the Supreme Court considered proportionate from a security perspective, did not withstand scrutiny under the ECtHR's standards[50]. The Supreme Court did not change its position on the interpretation of the Constitution when reviewing the appeal (reopening) but essentially noted that the Constitution does not preclude more intensive protection of certain rights under a multilateral agreement[51].

[48] Article 15 § 3¹ State Liability Act.

[49] ECtHR [GC] judgment of 16 June 2015, *Delfi AS v. Estonia*, application no. 64569/09.

[50] ECtHR judgment of 19 January 2016, *Kalda v. Estonia*, application no. 17429/10.

[51] Supreme Court *en banc*, 30 June 2017, case 3-3-2-1-16.

Let's start from the beginning: prisoner *Kalda's* complaint reached the first instance court on 28 December 2007. The final court order in this case concerning *Kalda* (the claim concerning a person interested to have access to the case file of *Kalda* was decided even later) was made on 31 March 2020 when the Supreme Court refused to give leave to appeal against the closure of the procedure after the legislature intervened. Yet, as explained above, the case does not concern Article 6 ECHR and the length of proceedings, as part of the time elapsed was also due to the case being judged by the ECtHR and reopened at the national level.

On 7 December 2009, the Supreme Court *en banc* (Grand Chamber) dismissed *Romeo Kalda's* appeal in cassation and upheld Tartu Prison's appeal in cassation against the decision of the Tartu Circuit Court of 31 October 2008, in case no. 3-07-2639[52]. The Grand Chamber of the Supreme Court overturned the decision of the Administrative Court and the Circuit Court, which had declared the prohibition of access to the website www.coe.ee unlawful and obliged the prison to allow the appellant access to the requested website. This left *R. Kalda's* complaint, in which he requested that the prison be obliged to grant him access to the websites www.coe.ee (Information and Documentation Centre of the CoE), www.oiguskantsler.ee (Chancellor of Justice and Ombudsman of Estonia), and www.riigikogu.ee (Explanatory letters to draft laws at the website of Estonian Parliament, Riigikogu), and that the prison's refusal to do so be declared unlawful, unsatisfied in its entirety. The Grand Chamber found that the restriction set out in Article 311 of the Imprisonment Act[53], according to which prisoners may not use the websites in question, is proportionate and in accordance with the Constitution for security reasons, which are important also for the prisoners themselves. The judgment of the Supreme Court was accompanied by a joint dissent of four justices of the administrative law chamber (basically all the judges from this chamber participating in the judgment)[54], a possibility widely used by the justices especially in cases in composition of *en banc*.

Romeo Kalda lodged an individual application with the ECtHR. In its judgment of 19 January 2016, the ECtHR upheld the complaint, finding a violation of Article 10 ECHR[55]. The ECtHR dismissed the applicant's claim for compensation for non-pecuniary damage. The ECtHR ruling in the *Kalda* case, which found Estonia to be in violation of Article 10 ECHR for the first time, was made in light of the circumstances of the specific case, based on the fact that under Estonian law, detainees are allowed access to certain websites that contain legal information, and therefore restricting access to other websites that also contain legal information infringes on

[52] Supreme Court *en banc*, 7 December 2009, case 3-3-1-5-09.

[53] Imprisonment Act, passed 14 June 2000, RT I 2000, 58, 376, entry into force 1 December 2000.

[54] Joint dissenting opinion of justices *Tõnu Anton*, *Indrek Koolmeister*, *Jüri Põld* and *Harri Salmann*.

[55] ECtHR judgment of 19 January 2016, *Kalda v. Estonia*, application no. 17429/10.

the right to obtain information. The judgment clearly states that in the opinion of the ECtHR, Article 10 of the Convention cannot be interpreted as imposing a general obligation to provide prisoners with access to the Internet or specific Internet pages, although the national court (Supreme Court) of Estonia did not properly assess whether the restriction in that concrete case was proportionate (*e.g.* producing the documents requested by the prisoner in paper form, as opposed to limited access to certain online databases). Yet, the judgment was also accompanied by a dissenting opinion[56] demonstrating how controversial this topic is. The outcome of the case was also important for the solution of other cases pending before the ECtHR concerning the scope of Internet access of prisoners[57].

After a 'victory' in Strasbourg, *Kalda* requested reopening of the case in Estonia. The Administrative Law Chamber of the Estonian Supreme Court referred the case again to the General Assembly of the Supreme Court (Supreme Court Grand Chamber or Supreme Court *en banc*)[58].

The Grand Chamber of the Supreme Court agreed with the position expressed in the Administrative Law Chamber's ruling of 22 February 2017 that there are grounds for re- opening this case (Article 240 Section 2 subsection 8 of the Code of Administrative Court Procedure) regarding court decisions on ensuring access to the websites of the Riigikogu and the Chancellor of Justice. The Supreme Court *en banc* found that unlike the websites of the Riigikogu and the Chancellor of Justice, there are no grounds for review in the case of the website www.coe.ee, the reason being that as this website no longer exists, and the important information previously published on it (translations and summaries of ECtHR judgments) are now available in the electronic State Gazette of Estonia, the appeal was dismissed with regard to this website.

The Supreme Court in its full composition argued: The existence of grounds for review does not necessarily mean that the appeal filed with the administrative court to allow access to the websites must be upheld. The Supreme Court further noted that although the ECtHR found a violation of Article 10 ECHR in this case, it did not hold that access to the disputed websites must be guaranteed to detainees in all cases. Rather, the ECtHR noted that although the security and economic considerations cited by the Estonian authorities for restricting access to the websites could be considered relevant, the courts did not sufficiently analyse the security risks allegedly arising from granting access to the websites in question. The ECtHR found that the

[56] Dissenting opinion of judge *Kjølbro*.

[57] *E.g.* ECtHR judgment of 17 January 2017, *Jankovskis v. Lithuania*, application no. 21575/08, §§ 36, 49, 54.

[58] Decision of the Administrative Law Chamber, 20 December 2016, case 3-3-2-1-16 to refer the case to the full composition of the Administrative Law Chamber and of the full composition of the Administrative Law Chamber to refer the case to the Grand Chamber of the Supreme Court, 22 February 2017, case 3-3-2-1-16.

reasons given in the Estonian courts' decisions and the government's arguments about the complexity and cost of monitoring internet use were not specific enough to justify the proportionality of refusing access. The Supreme Court and the state failed to fully demonstrate that allowing access to the three websites in question would have entailed significant additional costs. Furthermore, when reviewing the case *en banc,* the Supreme Court shared the position of the Ministry of Justice and the respondents that the security risks and resource costs associated with expanding Internet access to prisoners, as referred to in the *en banc* 2009 decision, were still relevant at the time of reopening the case. Therefore, the Supreme Court found that it may not be possible to completely mitigate all risks even with computers adapted by the prison service. At the same time, merely referring abstractly to potential risks and the complexity and cost of supervision does not constitute grounds for rejecting the appeal. The case was remanded to the first-instance court for a fresh decision, once again accompanied by a range of dissenting opinions[59].

The rights to Internet access were consequently guaranteed to detainees by a legislative amendment that entered into force on 1 August 2019[60], with the case terminated by the court of first instance on the ground that the situation had been remedied[61].

Later, the courts upheld *Kalda's* appeal and repealed the restriction that prevented prisoners serving sentences in closed prisons from accessing the Supreme Court's website where, among others, Supreme Court decisions and the online edition of the Official Gazette (State Gazette) are published.

The Supreme Court, again *en banc*, decided another case concerning *Romeo Klada's* access to further Internet websites and satisfied the complaint[62]. This case

[59] Dissenting opinion of president *Priit Pikamäe*, joined by justices *Peeter Jerofejev*, *Lea Kivi*, *Indrek Koolmeister*, *Villu Kõve*, *Jaak Luik*, *Malle Seppik* ja *Tambet Tampuu*. Concurring opinion of justice *Jüri Põld* and concurring (additional opinion) of justice *Jaak Luik*.

[60] Amendments to the Imprisonment Act of 13 February 2019, RT I, 27 February 2019,12, entered into force on 1 August 2019. The text of Article 31[1] "Prisoners are not permitted to use the internet, except on computers adapted for this purpose by the prison service, which allow access to official legal databases, the court decisions register, the Riigikogu website and the Chancellor of Justice website under the supervision of the prison service. Prisoners are prohibited from accessing any part of the website that allows electronic communication".

[61] In its ruling of 19 July 2019, the administrative court of first instance asked the appellant to indicate whether he agreed to the termination of administrative case no. 3-07-2639. On 2 August 2019, *Romeo Kalda* informed the court that he did not agree to the termination of the proceedings. He wished to move on to an appeal for a declaratory judgment and asked the court to declare the restriction of access to the disputed websites and the prohibition of their use unlawful, as he wished to file claims for damages against prisons, yet the courts closed the case and Supreme Court did not accept the appeal (31 March 2020).

[62] The Administrative Chamber of the Supreme Court referred the case again to the Grand Chamber of the same court, see decision 17 August 2022, case 3-18-477 (3-18-477/61). The Supreme Court

concerned access to the case-law of the Supreme Court. The Supreme Court declared the first sentence of Article 311 of the Imprisonment Act (in the version in force since 1 August 2019) unconstitutional and invalid insofar as it excluded prisoners serving sentences in closed prisons from accessing the Supreme Court website and the online edition of the Official Gazette. It also declared Article 311 of the Imprisonment Act, in the version in force from 24 July 2009, to 31 July 2019, unconstitutional insofar as in that it excluded prisoners serving sentences in closed prisons from accessing the section of the Supreme Court and the online edition of the Official Gazette.

The Legislature again amended the law, which currently states that a prisoner is not permitted to use the Internet except for the purpose of accessing a website on devices adapted for that purpose by the prison service, and for the purpose of using a service or other Internet solution required by the prisoner in accordance with the purposes of this Act, provided that the prisoner has secure technical capacities and is under supervision (thus not limiting it to a list of websites). The list of websites can, however, be specified via regulation by the minister, who can also specify the conditions, procedure and security requirements for the use of the necessary services and Internet solutions made available to a prisoner via the Internet. In order to ensure the rights of a prisoner, the prison service has the right to process their facial image or fingerprint data with the consent of the prisoner. Where a prisoner refuses to consent to the processing of the personal data referred to above, the prisoner shall be authenticated by an official of the prison service[63].

With regard to the procedural aspects of the case-law concerning prisoners' Internet access, which is far richer at the national level than the *Kalda* case alone (other complaints also by the same applicant, *etc.*), it is worth noting that the Supreme Court, despite accepting in principle the reopening of cases in administrative, criminal and civil matters after a judgment made by the ECtHR where the conditions of procedural courts are met, does not foresee the reopening of a case in constitutional review proceedings. The Constitutional Review Chamber of the Supreme Court has held that the current law does not, in fact, provide for any possibility of reviewing final court decisions rendered in constitutional review proceedings[64]. A dissenting justice noted, however, that it may also be necessary to review a final court decision made in constitutional review proceedings where it becomes apparent that state power has not been exercised on the basis of the Constitution and laws in conformity with it (Article 3 of Estonian Constitution), that rights and freedoms have been

en banc judgment followed on 15 February 2023, case 3-18-477 (3-18-477/73) and was accompanied again by dissenting opinions (justices *Velmar Brett*, *Hannes Kiris*, *Kai Kullerkupp*, *Saale Laos*, *Ivo Pilving*, *Paavo Randma*, 3-18-477/74).

[63] Article 31^1 of the Imprisonment Act.

[64] Judgment of Constitutional Review Chamber of the Supreme Court, 7 November 2014, case 3-4-1-32-14, § 26.

restricted in contravention of the Constitution, and that such restrictions are not necessary in a democratic society and distort the nature of the rights and freedoms concerned (Article 11 of the Estonian Constitution)[65]. The dissenter was of the opinion that this would also be grounds for allowing access by prisoners to the websites www.oiguskantsler.ee and www.riigikogu.ee, which were at the time also restricted by Tartu Prison and Viru Prison. The arguments of this dissent would also serve in the reopening of a case concerning ECtHR judgments and interpretation of the ECHR.

Another example, once again *Kalda*…

The same applicant also contested the visiting conditions in Viru prison. The case concerned short-term visits with his spouse where he requested to be in the same room, not separated by a glass partition, and not have to communicate via an internal telephone, even though the legislation gave prison authorities a certain degree of discretion. *Romeo Kalda* filed a complaint with the ECtHR against the Republic of Estonia, alleging a violation of Article 8 ECHR on the grounds that the prison did not allow him short-term visits with his spouse without a glass partition, while the prison allowed him to have long-term visits with his spouse without such a physical barrier.

On 1 March 2022, the ECtHR issued a judgment in this case[66], stating in essence that the authorities did not provide sufficient and context-based justification for why security threats justified the restriction, and finding that Estonia had violated Article 8 ECHR and should pay the applicant €5,000 in non-pecuniary damages. The Administrative Law Chamber of the Supreme Court reopened the case[67], stressing that there are grounds for reversal: If the appeal is not granted, the incorrect court decisions would remain in force. The Supreme Court continued that, in particular, the circuit court's assessment of the justification for the restriction could have a negative impact on the applicant's ability to exercise his rights in the future. The circuit court found that the prison had sufficiently justified the applicant's dangerousness and that separating him from his spouse with a glass partition would have been lawful even if the prison had exercised its discretion. Although the court's position would not be binding on the prison when deciding on the applicant's new request (Article 177, Section 1 of the Code on Administrative Court Procedure), the prison would still be able to rely on the court decision that had entered into force regarding the permissibility of restricting the applicant's rights. The Supreme Court further explained that the courts should also assess the circumstances established in the grounds

[65] Concurring (additional) opinion of justice *Jaak Luik* to the judgment of the Supreme Court *en banc*, 30 June 1027, case 3-3-2-1-16.

[66] ECtHR judgment of 1 March 2022, *Kalda v. Estonia*, application no. 35245/19.

[67] Judgment of the Administrative Law Chamber of the Supreme Court, 11 July 2023, case 3-15-1781/66.

of the final court decision together with other evidence (Article 61 Section 4 of the Code on Administrative Court Procedure). The Administrative Law Chamber of the Supreme Court concluded that the annulment of the decisions of the administrative and circuit courts would allow the violation established in the ECtHR decision to be remedied, and therefore the administrative case should be re-examined.

However, in a third attempt before the ECtHR concerning the ban of voting rights of prisoners in Estonia, the life-sentence prisoner *Romeo Kalda* was unsuccessful[68].

§ 7. Some problematic issues: deadlines; reopening in case of a friendly settlement

Seventh, my next point concerns certain problematic aspects of reopening. As already noted, reopening is not possible in Estonian constitutional review proceedings. It has also been suggested that prescribed time limits may render the reopening of a case problematic, especially in terms of legal security and efficiency. The deadline for requesting a reopening as stated above according to the procedural code is six months after a judgment of the ECtHR, which is considered to be sufficient to realise the rights at stake and corresponds to the previous deadline, now shortened to four months for filing an application before the ECtHR after exhausting final domestic remedies. However, according to Article 241 Section 4 of the Code of Administrative Court Procedure, no petition may be filed – and any such petition must be returned by the court – if more than five years have elapsed since the judicial disposition whose review is sought entered into effect. No petition for review (request for reopening) may be filed on the ground that the party did not participate in – or was not represented in – the proceedings, or in a situation concerning the judgments of ECtHR once ten years have elapsed from the time when the judicial disposition entered into effect.

Another important issue in light of the ECtHR's decisions on the review of domestic court cases is the possibility or impossibility of suspending the enforcement of a court judgment that is in force in the case under review. This is particularly important in criminal cases, where it is often a matter of keeping a person in custody[69].

[68] It is sometimes said in Estonia that "three is a rule of court". In this vein, the third case brought before the ECtHR by the applicant *Romeo Kalda* dealt with prisoners voting rights, ECtHR judgment of 6 December 2022, *Kalda v. Estonia (No. 2)*, application no. 14581/20. The ECtHR analysed the case in the light of Article 3 of Protocol No. 1 and confirmed the thorough assessment by domestic courts of the proportionality of the statutory blanket voting ban as applied specifically to the applicant, a life-sentence prisoner convicted of several serious offences, which is why according to the ECtHR the margin of appreciation was not overstepped in this case.

[69] See in detail *L.-M. Lehiste*, Euroopa Inimõiguste Kohtu lahendite teistmine Eesti õiguskorras (ECtHR judgments as the basis of reopening cases in the Estonian legal order), master theses, supervised

It is also of practical relevance how to proceed where an application concerning Estonia is pending before the ECtHR and similar cases are, in parallel, brought before the Supreme Court of Estonia. This also relates to the sharing of information on what kind of applications are pending before the ECtHR.

A further question is whether it is possible to reopen a case in Estonia after a friendly settlement has been reached in the ECtHR between the Estonian government and the applicant. This was addressed by the Constitutional Review Chamber of the Supreme Court in a decision where the Chamber noted that neither the Constitution nor the Convention contain a fundamental right that would require that a final court judgment be reviewed on the basis of a friendly settlement concluded under the Convention[70]. In the opinion of the Supreme Court, no contrary conclusion can be drawn from the practice of the ECtHR. The Supreme Court believed that the purpose of a friendly settlement between the person who has lodged a complaint with the ECtHR and the state is to resolve the matter definitively. Pursuant to Article 37(1)(b) ECHR, the application shall be struck out if the case has been settled. According to Article 39(3) ECHR, the case shall be struck out of the list of cases upon reaching a friendly settlement. Thus, the Supreme Court deducted that the striking out of a case based on a friendly settlement means that the case has been finally resolved. Article 39(4) ECHR stipulates that the Committee of Ministers of the Council of Europe shall supervise the execution of the decision confirming the friendly settlement, which is done in a similar manner to the monitoring of the execution of a regular ECHR judgment. In the opinion of the Supreme Court, the purpose of concluding a friendly settlement is precisely to ensure that after the final resolution of the case, the applicant will have no further claims against the state in relation to that case. In this regard, the Supreme Court referred to several ECtHR judgments confirming friendly settlements, according to which if the applicant agrees to the settlement, there is an agreement that the violation can be remedied by fulfilling the friendly settlement[71]. However, the exact nature of the violation may remain officially and publicly undetermined. The Supreme Court also found that the government representing Estonia in concluding a friendly settlement within the ECtHR cannot promise in the friendly settlement that the applicant will have grounds for filing an appeal or that their appeal will be heard by the Supreme Court, as the government does not have the authority to assume such an obligation on behalf of the court

by Prof. *Julia Laffranque*, available online at: https://dspace.ut.ee/server/api/core/bitstreams/d4982288-b3f2-412e-843c-3ac005543937/content (date of access: 14.10.2025).

[70] Judgment of the Constitutional Review Chamber of the Supreme Court, 22 February 2011, case 3-4-1-18-10.

[71] See list in § 16 of the judgment: Friendly settlements in cases *M.V. v. Estonia*, application no. 21703/05; *Pervushin v. Estonia*, application no. 54091/08, 2 March 2010; *Nõgisto v. Estonia*, application no. 40163/08, 5 October 2010.

system. If the applicant concludes a friendly settlement with the government, they agree that their case will not be reviewed again in Estonia. The purpose of concluding a friendly settlement is to save time and money both domestically and at the ECtHR level. Reopening the proceedings in this case would be contrary to this objective. However, the Supreme Court added that pursuant to Article 37 ECHR, the ECtHR will continue to examine the case if this is necessary to comply with the human rights set out in the Convention, meaning that if the ECtHR finds the agreement to be sufficient to close the case, then the ECtHR does not believe that the state should do anything else (including reopening the case) to guarantee fundamental rights.

§ 8. Other important aspects of the enforcement of an ECtHR judgment by a national judge

Eighth, the last remark I would like to make in my address concerns other important aspects (besides the reopening of cases and hinting for the need for changes to the legislator and executive) of enforcement of an ECtHR judgment by a national judge.

Thereunder, I mean both formal and informal dialogue between judges (meetings, conferences, networks, platforms, associations, advisory opinions of the ECtHR), and training as well as the mentality of judges.

In general, Estonia is making every effort to comply with the decisions of the Strasbourg court quickly and carefully. From a practical perspective, changes have been made to various legislations. The enforcement of the ECtHR judgment *Kochetkov v. Estonia*[72] by Estonian authorities was brought as an example by the Parliamentary Assembly of the Council of Europe: "Impact of the European Convention on Human Rights in States Parties: selected examples"[73].

The relationship – a Bermuda triangle: between the national Constitution, the ECtHR, and, for Member States of the EU, EU law, is complicated. In the questionnaire preparing for today's conference an issue was raised, namely: If the standard of the protection of human rights in EU law itself or derived from the case-law of the CJEU is lower than the standard set by the ECHR or by the case-law of the ECtHR, which one would you follow in the case at hand?

This raised the question whether such a situation could arise, or whether the reverse might also occur. According to the CFR, the ECHR constitutes a minimum standard of protection of fundamental rights, thus when Member States of the EU

[72] ECtHR judgment of 2 July 2009, *Kochetkov v. Estonia*, application no. 41653/05.

[73] CM/ResDH(2013)9, PACE AS/Jur/Inf (2016) 04, 8 January 2016 ajinf doc 04 2016, Overview prepared by the Legal Affairs and Human Rights Department on request of Mr *Pierre-Yves Le Borgn'* (France, SOC), Rapporteur on the implementation of judgments of the ECtHR.

apply and implement EU law, they can also set higher standards of protection, just as the EU itself may do through secondary legislation[74].

According to the Estonian answers to this questionnaire, there is no case-law concerning that issue, so it is difficult to say how the Supreme Court of Estonia would decide in this matter[75]. However, considering the fact that the aim of the Supreme Court is to ensure the highest standard of protection of human rights, in this concrete case the Supreme Court would use the case-law and/or regulations that ensure the highest standard, that is the ECHR and the case-law of the ECtHR in the case described. Nevertheless, in addition, the obligation to ensure the full effect of EU law should also be born in mind. Many cases concerning administrative law in Estonia do indeed require application and sometimes interpretation of EU law which partly has become extremely technical.

The role of the ECtHR would be better performed should the EU itself already be part of the Convention. National judges can, in turn, also help to facilitate dialogue between two European courts: ECtHR and CJEU.

The dialogue between national courts and the ECtHR contributes greatly to succeeding the enforcement of an ECtHR judgment at the national level: this dialogue should be part of the DNA of both jurisdictions; it should be grounded in mutual respect of each other's authority and field of competence, and in trust, which is in turn based on shared responsibility and subsidiarity.

In this respect, events such as the conference today and the annual seminars marking the opening of the judicial year at the ECtHR are ideal places to share best practices, just as is done at the horizontal level among administrative judges of the Member States of the EU within the framework of the Association of Councils of State and Supreme Administrative Jurisdictions of the EU[76].

[74] According to Article 51 of the CFR, the provisions of the Charter are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. Article 53 of the Charter states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

[75] Estonian Supreme Court Administrative Law Chambers answers to the questionnaire: "The 75th anniversary of the ECHR and administrative court judges" Conference in Warsaw, 1–2 October 2025 Questionnaire.

[76] Website of the Association available online at: https://www.aca-europe.eu/index.php/en/ (date of access: 16.10.2025).

The Superior Courts Network of the ECtHR[77] – an unprecedented framework of cooperation between the international and national judiciaries, as well as the Court's Knowledge Sharing platform (ECHR-KS)[78], which is accessible to all legal practitioners, are extraordinary tools to promote the enforcement of ECtHR judgments by national judges. These tools – as well as excellent documents prepared by the registry and jurisconsult's research department of the ECtHR, are all directly or indirectly a means of training offered professionally in European law to all lawyers including judges by the Academy of European Law (ERA) in Trier[79].

However, the strongest source of dialogue is the dialogue *via* case-law and court judgments, as well as via Protocol No. 16 ECHR[80] (request of advisory opinion)[81].

The Administrative Law Chamber of the Supreme Court has so far never requested an opinion of the ECtHR, despite the requests to ask for an advisory opinion the Chamber has received from the parties of the case. However, colleagues from the Criminal Law Chamber tried, but didn't succeed, with their request for an advisory opinion. Namely, on 19 February 2024, the ECtHR decided to reject the request for an advisory opinion submitted by the Criminal Law Chamber of the Supreme Court of Estonia[82].

I would like to stress that to enforce a judgment of the ECtHR you have to understand that judgment, which is also why reasoning both at the ECtHR level as well as by national judges is crucial and makes a difference in accepting the judgment, even when not agreeing with it.

Last, but not least, the enforcement of an ECtHR judgment by a national judge depends on a moral duty shared by all judges in Europe. Administrative judges deal on a daily basis with important legal issues arising between individuals and state authorities. They should have, by design, a global picture of fundamental rights protection in Europe, and they should know the law well and how it could be further

[77] Online at: https://www.echr.coe.int/superior-courts-network (date of access: 16.10.2025).

[78] Online at: https://ks.echr.coe.int/web/echr-ks (date of access: 16.10.2025).

[79] See information online at: https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=ansicht&_aktion=detail&schluessel=era (date of access: 16.10.2025).

[80] Council of Europe Treaty Series – No. 214. Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms. Strasbourg, 2.09.2013, entered into force 1 August 2018.

[81] Ratification Act of the Protocol No. 16 ECHR, adopted 7 June 2017, published RT II, 16 June 2017, 3. According to Article 2 of the ratification act: In accordance with Article 10 of the Protocol, the Republic of Estonia declares that the court referred to in Article 1(1) of the Protocol in Estonia is the Supreme Court.

[82] As of 16 October 2025, the ECtHR has delivered 7 advisory opinions and rejected requests for four advisory opinions, while one advisory opinion is currently pending. For further information, see https://www.echr.coe.int/advisory-opinions (date of access: 16.10.2025).

developed with dignity, self-restraint and self-esteem. To return to the idea expressed by *Celsus*: judges are artists of goodness and justice, for law is both a science and an art.

The British novelist and playwright, *Enid Bagnold*, said that judges don't age, time decorates them[83] – there could not be a better conclusion to my contribution.

[83] *Enid Bagnold*, The Chalk Garden Act II (1953).

Bettina Maurer-Kober*

The Convention as a Tool for Judicial Review by an Administrative Court Judge – the Austrian Perspective

§ 1. Introduction

A. Austria's ratification of the ECHR

As is well known, the European Convention of Human Rights (signed in 1950 and entering into force in 1953) is a product of the post-war period in Europe, with its origins closely linked to those of the Council of Europe. Following the conclusion of the State Treaty of Vienna in 1955, which saw the Republic of Austria regain its full sovereignty, Austria joined the Council of Europe shortly thereafter (1956)[1] and ratified[2] the ECHR in 1958 – just in time for the Convention's fifth, and the Council of Europe's eighth, anniversary. Although Austria is not among the states that initiated the Convention's creation, it is one of the first states to have ratified it and has now been a member of the ECHR for more than 65 years.

Furthermore, by ratifying the Convention, Austria was one of the few states at that time to recognise the right to individual application and the jurisdiction of the Convention bodies (the European Commission of Human Rights[3] and the

* Vice-President of the Supreme Administrative Court of Austria, dr.

[1] Federal Law Gazette (BGBl.), No. 121/1956.

[2] For an overview of the status of ratification of the CoE treaties and their additional protocols, cf. https://www.coe.int/en/web/conventions/full-list. For an overview of the states that have ratified the ECHR, cf. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005.

[3] It was a body of the CoE and existed from 1953 until the end of October 1998.

European Court of Human Rights), enabling them to commence their work a year later, in 1959.

B. The ECHR´s status in the Austrian legal system

Austria holds a special position among the member states of the ECHR. While in most of these states the Convention ranks between the constitution and ordinary law, or even only at the level of ordinary law, in Austria it enjoys constitutional status, which was granted to it in 1964 (with retroactive effect) by a special federal constitutional law[4], placing the ECHR upon the same hierarchical level in the Austrian legal system as domestic constitutional law, including fundamental rights that are part of the original Austrian Constitution.

The Austrian Constitution does not contain a complete and uniform catalogue of fundamental rights, but rather is composed of the fundamental rights catalogue of the 1867 Constitution, individual articles of the 1920/1929 Constitution, various constitutional laws, and special constitutional provisions in a wide variety of laws. Against this background, the ECHR became an important supplement to the fundamental rights guarantees in Austrian constitutional law[5].

§ 2. The ECHR and the administrative judiciary

In Austria, the fundamental and human rights guaranteed by the ECHR are directly applicable due to their constitutional status, and thus serve as a benchmark for administrative judges. When applying ordinary laws or reviewing administrative decisions, judges have to apply the fundamental rights guaranteed by the Convention in the same way they apply the fundamental rights determined by (the other) Austrian constitutional law[6]. In addition, like administrative authorities, Austrian administrative judges must interpret and apply national law in a manner that aligns with the ECHR. If this is not possible and a national legal provision is deemed unconstitutional itself due to a violation of the ECHR, an application for a constitutional review can be lodged with the Austrian Constitutional Court.

Therefore, it can be concluded that the ECHR is a direct tool for the application and review of law by Austrian administrative judges, on par with all other Austrian constitutional law.

[4] Art. II item 7 Federal Constitutional Law of 4 March 1964, amending and supplementing the provisions of the Federal Constitutional Law (in the 1929 version) concerning State Treaties, Federal Law Gazette (BGBl.), No. 59/1964.

[5] In this context it must be noted that the principle of favouring the individual (the 'principle of favourability') under Art. 53 ECHR applies.

[6] Cf. *Pabel*, "50 Jahre Österreich in der Europäischen Menschenrechtskonvention – eine Bilanz", in *Pabel/Vašek*, Menschenrechte 1848/1958 (2020) 189.

Even more remarkable, though, is the ground-breaking reformatory role the ECHR has played for the Austrian legal order. First and foremost, it triggered a fundamental reorganisation of the Austrian administrative jurisdiction.

A. Article 6 ECHR and the Administrative Court Reform 2012

For more than 140 years, the administrative legal system in Austria consisted of several instances of administrative authorities and bodies, and a review of legality by the (Supreme) Administrative Court. This system had some weaknesses, as the administrative procedure did not provide for an obligatory public hearing and the Administrative Court primarily had to decide on the basis of the facts established by the administrative authorities.

It soon became clear from the case-law of the ECtHR (Swiss cases of *Belilos*[7] and *Weber*[8]) that this model was not in line with the requirements of the Convention, especially as set out by Arts. 6 and 13, as well as Art. 4 of the 7th Additional Protocol, and that Austria's reservations regarding Arts. 5 and 6 ECHR could no longer be upheld[9].

In response to these developments, in 1991 the Austrian constitutional legislator introduced Arts. 129a *et seq.* into the Federal Constitutional Law, thereby establishing Independent Administrative Panels that qualified as independent tribunals according to Art. 6 ECHR. They were to decide on appeals against administrative sanctions as well as in a wide variety of other administrative matters assigned to them by the respective laws[10].

However, it was by no means accepted that this would meet the requirements of the ECHR, also because it did not solve the problem of over-lengthy proceedings, a direct consequence of the overburdened system. Almost 20 years later, after

[7] ECtHR, 29 April 1988, no. 10328/83, *Belilos v. Switzerland*. In summary, the case concerned the permissibility of Swiss reservations and the right to a decision by an independent court on a criminal charge. The ECtHR found a violation of Art. 6(1) ECHR because the power of the Federal Court, when dealing with a public-law appeal (the only one available in the instant case), was limited to ensuring there was no arbitrariness and did not re-examine the questions of fact or law.

[8] ECtHR judgment of 22 May 1990, *Weber v. Switzerland*, no. 11034/84. In summary, this judgment also concerned the right to a decision by an independent court on a criminal charge. The complaint was based on the fact that the President of the Criminal Cassation Division issued his decision in written form, following a summary investigation and without a hearing. The ECtHR found a violation of Art. 6(1) ECHR.

[9] In this context see also the judgments of the Austrian Constitutional Court, VfSlg. 10291/1984 or VfSlg. 11500/1987. Finally, in its judgment of 3 October 2000, *Eisenstecken v. Austria*, application no. 29477/95, the ECtHR declared Austria's reservation to Art. 6 ECHR invalid.

[10] Cf. *Kley*, "Art. 6 EMRK als Rechtsschutzgarantie gegen die öffentliche Gewalt" (1993) 86; *Grabenwarter*, "Die EMRK in der Rechtsprechung des Verfassungsgerichtshofes" (2019) 2.

intense and comprehensive reform debates on all levels, the Austrian Constitution was amended fundamentally.

Coming into effect on 1 January 2014, the so-called Administrative Court Reform 2012 introduced a two-tier administrative court system that provides for nine regional administrative courts of first instance in the federal provinces (*Länder*) and two federal administrative courts (one dealing with federal matters and one dealing with fiscal matters), which have full jurisdiction on the merits in all administrative matters when deciding on appeals against decisions of administrative authorities. This jurisdiction extends to establishing facts: The courts are obliged to establish all necessary facts ex officio within the scope of the inquisitorial procedure (*Amtswegigkeitsprinzip*), conduct the necessary taking of evidence, and subsequently decide the matter anew based on those findings. The Supreme Administrative Court remains the final instance reviewing the judgments of the administrative courts of first instance and securing a uniform application of the law[11].

In conclusion, it can be stated that this administrative judicial system now in place is actually the result of a long period of dialogue between Austria and Strasbourg.

B. The Convention as a tool for administrative jurisdiction

Returning to the main topic, it has to be noted that the ECHR forms an integral part of the daily work of administrative judges at both first instance and the Supreme Administrative Court.

This can be illustrated by two observations regarding how this tool is being used:

a) Many provisions of ordinary law refer directly to the Convention's guarantees of fundamental rights, meaning administrative judges must interpret these provisions by applying the ECHR and the ECtHR case-law directly.

Examples of this can be found in the area of asylum and immigration law, particularly with regard to removals or deportations which are only admissible if they are not in violation of Art. 3 or Art. 8 ECHR[12], or in the procedural code

[11] As before, in addition to the petition for review ('Revision') to the Supreme Administrative Court, it is still possible to lodge an appeal with the Constitutional Court if the complainant claims an infringement of their rights under constitutional law.

[12] *E.g.* Sec. 50 § 1 of the Foreign Police Act, which stipulates that if the removal of a foreign national would violate Art. 2 or 3 ECHR or Protocol No. 13 concerning the abolition of the death penalty, then the removal is inadmissible.

According to Sec. 9 of the Federal Alien and Asylum Office Procedural Law, a return decision, expulsion order or ban on residence is only admissible if it is urgently required to achieve the objectives set out in Art. 8(2) ECHR.

Under Sec. 5 of the 2005 Asylum Act, when determining whether an asylum seeker can be transferred to another EU Member State under the Dublin system due to jurisdictional reasons, the asylum

for Administrative Courts, where it is stipulated that, despite a party's request for an oral hearing, such a hearing may be dispensed with only under certain conditions, one explicitly being that Art. 6 ECHR does not preclude dispensing with the hearing[13].

b) Furthermore, the ECHR is also applied directly by the Supreme Administrative Court in its interpretation of legal provisions[14]. This can be illustrated by two exemplary cases, in which the Supreme Administrative Court ruled with direct reference to the ECHR.

- Art. 2 ECHR (lethal use of force):

  In a case concerning the Use of Firearms Act, the Supreme Administrative Court examined the lawfulness of the state authorities' use of lethal force during a police operation in which a rampaging driver was shot. The court pointed out that based on Art. 2 ECHR and ECtHR case-law, referring to the case of *McCann and Others v. UK*[15], it is necessary to consider not only the actions themselves and their strict proportionality to the aim of protecting lives, but also the planning and control of the operation. In this case, the assessment of the organisation of the police operation with a view to organisational negligence was derived directly from Art. 2 ECHR (VwGH, 18 November 2010, 2006/01/0083).

- The freedom of expression under Art. 10 ECHR, which eventually led to the adoption of the Freedom of Information Act, thus also showing the reformatory power of the Convention:

On 1 September 2025, after long debates in the Austrian Parliament, the new Freedom of Information Act and accompanying constitutional provisions came into force[16], with public authorities now required to publish information of general in-

authorities must also consider Arts. 3 and 8 ECHR. In the event of an imminent violation of these provisions, they must make use of the sovereignty clause stipulated in the Dublin system (see, for instance the decisions of the Supreme Administrative Court, VwGH, 24 April 2025, Ra 2024/18/0150, regarding Art. 3 ECHR; VwGH, 22 April 2021, Ra 2021/18/0096, regarding Art. 8 ECHR), which means that Austria may not refuse its responsibility for examining an application for international protection, even if another Member State would be responsible according to the Dublin Regulation criteria.

[13] Sec. 24 and 44 of the Administrative Court Procedures Act.

[14] This stems from the fact that all the laws that the administrative judge has to apply must be interpreted in accordance with the ECHR due to its direct applicability.

[15] In the case of *McCann and Others v. UK* (ECtHR judgment of 27 September 1995, application no. 18984/91) involving IRA terrorists who had planned an attack on Gibraltar, the ECtHR ruled that based on the guarantees of Art. 2 ECHR, even if the use of weapons was justified the state could be accused of organisational negligence if organisational deficiencies led to the use of weapons becoming necessary.

[16] Freedom of Information Act (IFG), Federal Law Gazette (BGBl) I No. 5/2024. Not all provisions of the IFG entered into force on September 1, 2025. Which provisions have come into or are no longer

terest on their own initiative. At the same time, the obligation of official secrecy was removed from the Austrian Constitution, all corresponding laws were repealed, and citizens were granted the right of access to information[17].

An important impetus for this seminal change from the concept of secrecy to transparency was the case-law of the ECtHR, especially, the Grand Chamber judgment of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*[18], where the ECtHR ruled that the right to freedom of expression, as set out in Art. 10 ECHR, also encompasses a right to access information under certain conditions.

Given the constitutional status of the Convention in Austrian law, it was only a matter of time for this case-law to be adopted by the Austrian Courts. The Supreme Administrative Court did so in a case that involved a journalist submitting a request for information to the Vienna Municipal Authority under the Vienna Information Disclosure Act. Referring to *Magyar Helsinki Bizottság v. Hungary,* in its decision of 29 May 2018 (Ra 2017/03/0083), the Court held that the scope of the right to information under the Information Disclosure Act must be assessed in the light of Art. 10 ECHR as interpreted by the ECtHR. If confidentiality obligations prevent the disclosure of information, a balancing of interests is to be carried out. Moreover, if providing information would otherwise be too cumbersome or costly, direct access to documents could be granted.

The next court to follow this ECtHR case-law was the Austrian Constitutional Court. Departing from its previous case-law, the Constitutional Court held that Art. 10 ECHR grants a constitutionally guaranteed right of access to information under certain conditions, as a national constitutional norm[19].

Finally, the Austrian Supreme Court followed suit[20].

The development of case-law and legislation in this area of law shows that Austria is in a constant dialogue with the ECHR and the ECtHR's related jurisprudence, and that the ECHR, as a reformatory tool, has a significant influence on changes in the Austrian legal system.

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in force can be found in Sec. 20 of the Freedom of Information Act (https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20012537&FassungVom=2025-09-01).

[17] Only in exceptional cases information may be withheld (*e.g.* if disclosure would endanger public order and security or prevent significant economic or financial damage); Austrian Parliament, "Vom Amtsgeheimnis zur Informationsfreiheit: Steiniger Weg mit vielen Hürden", available at: https://www.parlament.gv.at/aktuelles/pk/jahr_2025/pk0750 (accessed 2 September 2025).

[18] ECtHR [GC] judgment of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, application no. 18030/11.

[19] VfGH, 4 March 2021, E 4037/2020.

[20] For an overview of the case-law on this, see *Lehofer*, "Gerichte preschen bei Informationsfreiheit vor", Die Presse, 1 June 2023.

§ 3. Concluding remarks

As can be seen at this conference, the 75th anniversary has provided a valuable opportunity to recognise the significance of the ECHR.

However, incorporating the ECHR into the Austrian Constitution and its subsequent impact on the Austrian legal system presents a unique challenge. Although the ECHR forms part of our constitutional order, it is not a 'super-constitution'. The Austrian Constitutional Court has ruled that the ECHR cannot override other parts of the Austrian Constitution. Nevertheless, it can be employed to interpret and apply other laws, including administrative laws, in a manner that promotes human rights[21].

This highlights the dual nature of the ECHR in our legal system: it is both a constitutional guarantee and a powerful interpretative tool.

In a system where the Contracting States and the ECHR share responsibility for safeguarding human rights, and with a view to the crises we are facing in society today, the ECHR plays a pivotal role particularly in protecting democracy and the rule of law – against all odds.

In times where democratic institutions face growing pressure, the role of courts as defenders of fundamental rights has never been more important.

Administrative judges are not only arbiters of legality, but also protectors of constitutional and human rights with the ECHR as one of the principal instruments in that role.

[21] VfSlg. 11500/1987; *Grabenwarter/Pabel*, "Europäische Menschenrechtskonvention"[7] (2021), Sec. 3, § 1 *et seq*.

Barbara Pořízková*

Universal Human Rights and National Specificities: Judicial Dialogue and the Margin of Appreciation – the Czech Perspective

§ 1. Introduction

This article examines the scope and limits of the margin of appreciation in the adjudication of national administrative courts, with a particular focus on the Czech judiciary's engagement with the European Convention on Human Rights. While Czech judges are constitutionally bound to apply both domestic law and the Convention, they do not possess a discretionary margin akin to that afforded to national legislatures. Once the Convention is deemed applicable, judges must follow the jurisprudence of the European Court of Human Rights, subject only to factual distinguishing.

This does not mean, however, that national courts are unable to reflect domestic legal specificities. Through judicial dialogue, national judges can engage with Strasbourg jurisprudence in a way that respects constitutional identity while contributing to the evolution of human rights standards. This dialogue is not merely interpretive – it can be reformative.

The article illustrates this dynamic through the case of *T.H.*, which concerned gender recognition and the legal requirement of surgery for changing gender markers in official records. The case journeyed through the Czech administrative and constitutional courts before reaching Strasbourg, where the ECtHR acknowledged both the violation of Article 8 and the evolving domestic jurisprudence, exemplifying how judicial dialogue can foster mutual influence, rather than unilateral imposition, in the protection of fundamental rights.

* Vice-President of the Supreme Administrative Court of the Czech Republic, JUDr.

Ultimately, there needs to be a space for principled exchange – where national courts and ECtHR collaborate to ensure that human rights remain responsive to both shared norms and local realities.

§ 2. Margin of appreciation

This contribution addresses the scope and limitations of the margin of appreciation as exercised by judges within the administrative judiciary. As a long-serving member of the Czech Supreme Administrative Court, I find the question of how the Convention ought to be applied by national administrative courts both intellectually compelling and legally intricate, one that merits thorough examination.

At the outset, it is essential to clarify what is meant by the term margin of appreciation. The Convention, together with other international treaties ratified by the Czech Parliament and binding upon the Czech Republic, forms an integral part of the Czech legal order[1]. Pursuant to the Czech Constitution, judges are bound not only by domestic legislation but also the Convention[2].

Moreover, the jurisprudence of the ECtHR is binding upon Czech courts. The obligation to take it into account in the domestic application of the Convention is not only an international legal obligation of the Czech Republic,[3] but also a domestic obligation arising from the Czech Constitution.[4] This binding force extends beyond the implementation of individual judgments rendered against the Czech Republic; it encompasses the broader normative authority of the Court's jurisprudence, including decisions issued in cases involving other member states. A failure to engage with relevant ECtHR case-law in judicial reasoning – particularly where a party explicitly invokes such jurisprudence – may constitute a violation of the right to a fair trial under the Czech Charter of Fundamental Rights and Freedoms.[5]

The concept of *margin of appreciation* is used to express, in accordance with the principle of subsidiarity of international judicial review, deference to member states' legislatures. Within the Czech constitutional framework, however, judges do not possess a comparable discretion in the domestic application of the Convention. From the perspective of a Czech administrative judge, the Convention is either applicable to the case at hand, or it is not. Once its applicability is established, the judge is obliged to follow the relevant jurisprudence of the ECtHR.

[1] Article 10 of the Czech Constitution.

[2] Article 95(1) of the Czech Constitution.

[3] Article 46(1) ECHR.

[4] Article 1(2) of the Czech Constitution.

[5] *J. Kmec*, *M. Bobek*, Vnitrostátní aplikace Úmluvy, [in:] Evropská úmluva o lidských právech. 1st edn. (eds. *J. Kmec et al.*), 2012, p. 152.

While judges may, in certain circumstances, refrain from applying specific precedents or limit their application through the method of distinguishing, such differentiation occurs at the level of factual analysis rather than legal interpretation. Consequently, where the facts of a case are materially analogous to those addressed in ECtHR precedent, the national judge is generally bound to adhere to the established jurisprudence and is essentially devoid of any discretion to depart from that which has been set down.

§ 3. National specifics

Does this mean that national judges are entirely precluded from taking domestic specificities into account in their decision-making? Such a conclusion would be both inaccurate and reductive. Indeed, national judges retain the capacity to engage in judicial dialogue, a mechanism that allows for the reconciliation of international human rights standards with domestic legal traditions and societal particularities.

Dean Spielmann, former President of the ECtHR, aptly described judicial dialogue between Strasbourg and national courts as 'the golden key' to a desirable future for human rights protection in Europe[6]. National judges are guided by the normative framework of the Convention, yet they must also remain attentive to the constitutional identity, institutional constraints, and socio-legal context of our respective jurisdictions.

It is important, however, to distinguish between judicial dialogue and the margin of appreciation. The latter presupposes a range of acceptable solutions as defined by the Strasbourg Court, within which national authorities may operate, while the judicial dialogue, by contrast, entails a more dynamic and reciprocal process – one that may involve challenging the conclusions of the ECtHR, even while remaining formally bound by its jurisprudence.

A recent illustration of this dynamic can be found in the case of *T.H.*, adjudicated by the Czech Supreme Administrative Court and subsequently reviewed by the ECtHR[7]. This case exemplifies the delicate balance national administrative judges must strike between fidelity to the Convention and adherence to domestic constitutional principles, and demonstrates how Strasbourg responds to state-specific legal and policy concerns.

The *T.H.* case concerned the refusal by Czech authorities to amend the applicant's personal identification number (the so-called birth number), which encodes

[6] *D. Spielmann*, Whither Judicial Dialogue? Sir Thomas More Lecture Lincoln's Inn, 12 October 2015. Available at: https://www.juridice.ro/wp-content/uploads/2015/10/Speech_20151012_Spielmann_Sir_Thomas_More_Lecture.pdf.

[7] ECtHR judgment of 12 June 2025, *T.H. v. Czech Republic*, application no. 33037/22.

gender, on the grounds that the applicant had not undergone gender reassignment surgery. The applicant had repeatedly requested a change to either a neutral or female identifier.

This litigation unfolded shortly after the ECtHR's judgment in *A.P., Garçon and Nicot v. France*, which held that requiring sterilisation surgery as a precondition for legal gender recognition violates Article 8 ECHR[8]. Nevertheless, the Czech first-instance administrative court dismissed the applicant's claim, expressing scepticism toward the *Garçon* judgment and highlighting the persuasive dissenting opinion of Judge *Ranzoni*[9]. The court also noted the absence of consensus among Council of Europe member states and criticised what it perceived as an uncharacteristic departure from judicial restraint by the Strasbourg Court[10], ultimately concluding that the interest in maintaining reliable and consistent civil status records outweighed the applicant's right to gender self-determination[11].

On appeal, the Supreme Administrative Court upheld the lower court's decision, devoting substantial attention to a critical engagement with the *Garçon* ruling[12]. It asserted that the precedential force of ECtHR jurisprudence has limits and, in this instance, the Court had overstepped[13]. The case then proceeded to the Czech Constitutional Court, which declined to review the constitutionality of the surgical requirement, focusing instead on the format of birth numbers and their gender-identifying function, which it deemed constitutionally compliant[14]. The decision was deeply contested within the Constitutional Court, and although the majority of the fifteen-member plenary favoured granting the motion, it failed to obtain the necessary qualified majority of nine votes to repeal the statutory provision.

Subsequently, the applicant lodged a complaint with the ECtHR. Between the filing of the application in June 2022 and the delivery of the *T.H.* judgment in June 2025, the composition of the Czech Constitutional Court underwent significant changes. In a separate case involving a different applicant, the reconstituted Court departed from its earlier jurisprudence and – relying heavily on ECtHR case-law – declared the statutory surgical requirement unconstitutional[15]. Although the Court

[8] ECtHR judgment of 6 April 2017, *A.P., Garçon and Nicot v. France*, applications nos. 79885/12, 52471/13, 52596/13.

[9] Judgment of the Municipal Court in Prague of 14 May 2018, *T.H. v. Ministry of Interior*, Case No. 3 A 153/2017–35, § 40.

[10] *Ibid.*

[11] *Ibid.*, §§ 39 and 41.

[12] Judgment of the Supreme Administrative Court of 30 May 2019, *X v. Ministry of Interior*, Case No. 2 As 199/2018–37, §§ 61–92.

[13] *Ibid.*, §§ 65–67.

[14] Decision of the Constitutional Court of 9 November 2021, Case No. Pl. ÚS 2/20, §§ 25–63.

[15] Decision of the Constitutional Court of 24 April 2024, Case No. Pl. ÚS 52/23, §§ 82–113.

granted Parliament until June 2025 to enact new legislation, no such reform was adopted, resulting in the only remaining condition for legal gender recognition in the Czech Republic being a medical certificate confirming transsexualism[16].

In *T.H.*, despite finding a violation of Article 8 ECHR, the ECtHR acknowledged this shift in Czech case-law and legislation. Noting that the second Constitutional Court's judgment demonstrates the importance of judicial dialogue in a system based on shared responsibility, it highlighted both the possibility of surgery-free transition as well as the respect for the prevailing binary approach to gender within Czech society, as referred to by the Czech administrative courts[17].

While *T.H.* undoubtedly reflects Strasbourg's corrective function in relation to domestic legal norms that contravene Convention principles, it would be mistaken to regard the judgment as monologic. On the contrary, the ECtHR made a visible effort to engage with the reasoning of Czech courts, signalling a willingness to accommodate national perspectives within the broader framework of Convention compliance.

Indeed, the dialogue was reciprocal. The second Constitutional Court's ruling illustrates that national courts are not merely passive recipients of Strasbourg jurisprudence but can actively shape its development. This mutual influence fosters a multi-layered conversation that integrates legal reasoning with national policy considerations. In my view, such outcomes should be the aspiration in every 'hard case' that reaches Strasbourg. Behind each of these cases lie complex, and often contentious, deliberations across the national judicial hierarchy. It is encouraging that, in *T.H.*, the ECtHR acknowledged these deliberations rather than dismissing them.

This example illustrates that regardless of how we understand the margin of appreciation afforded to national courts, it seems clear that it is not a shield for national governments and courts to retreat behind, nor is it a *carte blanche* for Strasbourg to impose uniform solutions. Rather, it is the space within which a genuine judicial dialogue unfolds: one that respects domestic constitutional identities while ensuring fidelity to the Convention's common standards. As national administrative judges, our responsibility is to participate in this dialogue with openness and intellectual integrity, confident that our reasoning will be heard, considered, and, at times, reflected in Strasbourg's jurisprudence. In this mutual exchange lies both the promise and the duty of European human rights protection: a system in which courts listen, learn, and collaborate to ensure that fundamental rights remain living instruments, responsive to the evolving needs and values of all individuals.

[16] See Sections 21 to 23 of the Specific Health Services Act (No. 373/2011).

[17] *T.H. v. Czech Republic*, § 59.

§ 4. Conclusion

The relationship between national administrative courts and the ECtHR is not defined by rigid hierarchy, but by a nuanced interplay of legal authority, constitutional identity, and mutual respect. While Czech judges are bound by the Convention and its interpretation by the Strasbourg Court, they are not mere executors of external jurisprudence. Through judicial dialogue, they retain the capacity to engage critically, reflect domestic specificities, and contribute to the development of European human rights law.

The *T.H.* case exemplifies this dynamic, demonstrating that national courts can challenge, refine, and ultimately influence Strasbourg's approach, fostering a reciprocal exchange rather than a one-directional imposition. This process underscores that the margin of appreciation is not a shield for national discretion nor a tool for uniformity, but a space for principled engagement.

In this shared responsibility lies the strength of the European human rights system. National judges must approach this dialogue with openness and rigor, knowing that their reasoning can shape not only domestic jurisprudence but also the broader contours of Convention jurisprudence. The objective is not to achieve perfect staleness, but rather to facilitate meaningful conversation—one that ensures fundamental rights remain responsive to both common standards and diverse constitutional traditions.

Gediminas Sagatys*

The Execution of European Court of Human Rights Judgments by National Judges

§ 1. Introduction

As correctly noted at a multi-stakeholder workshop held in Warsaw (Poland) in 2019, a judgment of the European Court of Human Rights is not the end. The Court cannot strike down national laws that might result in the violation of human rights, and cannot single-handedly ensure that a person who is unlawfully detained is released from prison. Nor does the Court have the power to change domestic judicial practice. It is the respondent State that must adopt measures to provide redress to the victim of a human rights violation established by the Court and to ensure that the violation is not repeated[1].

Under the Convention system, it is not the ECtHR but rather the political institution, the Committee of Ministers, that oversees the execution of judgments pursuant to Article 46 § 2 of the Convention. The role of the Court in this process is supplementary, primarily limited to *interpretation* and *infringement proceedings* under Articles 46 § 3, 46 § 4, and 46 § 5 of the Convention. Consequently, the delivery of the Court's judgment marks the commencement of a new phase of dialogue between the High Contracting Party and the institutions of the Council of Europe. This dialogue occurs within the framework of the State's obligation to effectively protect the rights and freedoms enshrined in the Convention, and in accordance with the State's acceptance of the Court's jurisdiction, as outlined in Articles 1, 19, 32, 34 and 46

* Judge of the European Court of Human Rights, dr.

[1] Workshop "A Strasbourg Court judgment is not the end" held in Warsaw on 5 November 2019, organised by the European Implementation Network and Helsinki Foundation for Human Rights: https://www.einnetwork.org/news-2019/2019/11/14/implementation-of-strasbourg-court-judgments-a-share-responsibility-mt2t6.

of the Convention. This dialogue is conducted within the scope of the Court's judgment, including any individual and/or general measures provided therein.

§ 2. Who holds the responsibility at the national level?

As correctly pointed out by the former President of the Court, *Siofra O`Leary*, there is no single constitutional model of execution of ECtHR judgments at the domestic level. Instead, there is a wide variance of models depending on how the Convention is incorporated in the national legal order and whether one or a plurality of actors, such as the government, the judiciary, local authorities or even the legislative branch need to be implicated[2]. However, regardless of the model of relations between the domestic and the international system, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and, pursuant to Article 27 of that Convention, it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the ECHR. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, *i.e.* all its bodies, including the Constitutional Court. Thus, it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution)[3].

It goes without saying that building a coherent domestic model of execution of the ECtHR judgments with clearly defined competences between different branches of State power is not always an easy task, and one that might take time. A good example of the division of competences comes from my home country – Lithuania.

In its judgment of 6 January 2011 in the case *Paksas v. Lithuania*[4], the Court found a violation of the applicant's right to free elections under Article 3 of Protocol No. 1 to the Convention on account of the "permanent and irreversible" nature of the applicant's disqualification from standing for parliamentary elections, resulting from his prior removal from the presidential office following impeachment proceedings. The judgment triggered a debate at the national level as to whether it should serve as a basis for the Constitutional Court of the Republic of Lithuania (the Constitutional Court) to re-interpret its earlier ruling of 25 May 2004[5], where it had

[2] *Siofra O`Leary*. Execution of ECtHR judgments and the Rule of Law. Speech at the Conference on the Role of the Judiciary in Execution of Judgments of the European Court of Human Rights. Riga, 21 September 2023: https://www.echr.coe.int/documents/d/echr/speech-20230921-oleary-conference-role-judiciary-execution-riga-eng.

[3] The European Commission for Democracy Through Law. Opinion No. 832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2016)018-e.

[4] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-102617%22]}.

[5] https://lrkt.lt/en/court-acts/search/170/ta1269/content.

declared that such disqualification stemmed from the Constitution of the Republic of Lithuania. However, the Constitutional Court refused to re-interpret its own jurisprudence, ruling on 5 September 2012[6] that "the aforesaid judgment of the ECtHR means that the provisions of Article 3 of Protocol No. 1 of the Convention insofar as they imply the international obligation of the Republic of Lithuania to guarantee the right of a person, whose mandate of a Member of the Seimas has been revoked under procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath, as well as a person who has been removed under procedure for impeachment proceedings for a gross violation of the Constitution and a breach of the oath from the office of the President of the Republic, the President and a justice of the Constitutional Court, the President and a justice of the Supreme Court or the President and a judge of the Court of Appeal, to stand in elections for a Member of the Seimas, are incompatible with the provisions of the Constitution, *i.a.* the provisions of Paragraph 2 of Article 59 and Article 74 thereof". In the same ruling the Constitutional Court indicated that "an obligation stems from Paragraph 1 of Article 135 of the Constitution (…) to remove the said incompatibility by adopting (an) appropriate amendment(s) to the Constitution".

The Constitutional Court's ruling of 5 September 2012 provided some much-needed clarity. Firstly, it elaborated on the place of the Convention within the national legal system[7]. Secondly, it signalled the general unwillingness of the Constitutional Court to re-interpret the official constitutional doctrine, even in the light of an adverse ECtHR judgment. Such an outcome might appear rather unfortunate for the prospect of smooth execution of the ECtHR judgments, but three important points should be made in this regard. First, in its ruling of 5 September 2012, the Constitutional Court did not provide a new interpretation of the Constitution but simply repeated the interpretation which had already been provided in its previous ruling of 25 May 2004, meaning that the interpretation relied on in 2012 was not developed for the purpose of preventing or complicating the enforcement of the ECtHR judgment. Second, in its ruling of 2012, the Constitutional Court emphasised the constitutional nature of the State's obligation to resolve the incompatibility of the Constitution with the Convention. Third, the Constitutional Court clearly indicated that the incompatibility must be resolved in a certain way – by adopting (an) appropriate amendment(s) to the Constitution. In other words, the Constitutional Court not only recognised that the obligation to put an end to the human rights violation

[6] https://lrkt.lt/en/court-acts/search/170/ta1055/content.

[7] The basic principles concerning the place of the Convention within the national legal system had been laid down in the Constitutional Court`s conclusion of 24 January 1995 on the compliance of Articles 4, 5, 9 and 14 as well as Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania (see https://lrkt.lt/en/court-acts/search/170/ta990/content).

established by the Court flowed from the Constitution itself, but also clarified the appropriate means for the fulfilment of this obligation.

It must, however, be noted that it took the national legislature ten years following the Constitutional Court`s ruling of 2012 to implement its constitutional obligation to amend the Constitution in line with the ECtHR judgment in *Paksas*[8]. Meanwhile, the Supreme Administrative Court of Lithuania (SACL) was dealing with a dispute arising from the Central Electoral Commission's (CEC) refusal of 8 September 2020 to register a person whose mandate as a Member of the Seimas had been revoked six years earlier following impeachment proceedings for grossly violating the Constitution and breaching the oath. During the proceedings the SACL even requested an Advisory Opinion from the ECtHR which was delivered on 8 April 2022[9]. On 29 June 2022, the SACL upheld the SEC's decision in its final ruling[10].

One might wonder: what would have happened had the legislature failed to implement its constitutional duty to amend the Constitution? To prepare for such situations, in cases where, according to domestic constitutional settings, the action of the legislature is required to execute the ECtHR judgment, the comprehensive model of execution should entail, among others, the possibility to condemn the legislature's inaction, to provide effective redress to the victim of the violation, and to ensure that the violation is not repeated. Two relevant examples from the Lithuanian legal system, illustrating the process of creation of the domestic model of execution of the ECtHR judgments, are presented below.

The first example relates to the execution of the ECtHR judgment of 11 September 2007 in the case *L. v. Lithuania*[11], where the ECtHR found a violation of the Convention on account of the lack of implementing legislation regulating the conditions and procedure for gender reassignment and for changing the relevant data in official documents. The Court held that "the respondent State, in order to satisfy the applicant's claim for pecuniary damage, is to pass the required subsidiary legislation to Article 2.27 of its Civil Code on gender reassignment of transsexuals". No

[8] The constitutional amendment adopted on 21 April 2022 by the Seimas, in response to the Court's judgment, entered into force on 22 May 2022. In line with these amendments, any person removed from office or whose mandate as a member of the Seimas has been revoked by the Seimas through impeachment proceedings will not be subjected to a "permanent and irreversible" ban from standing for parliamentary elections but will be able to stand for elections to the Seimas after a period of "at least ten years" (see https://www.coe.int/en/web/execution/-/lithuania-constitutional-amendment-implementing-echr-judgment).

[9] Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-7306062-9963179%22]}.

[10] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=53a5acc5-2307-4ff8-bf73-021b958c21aa.

[11] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-82243%22]}.

legislative steps have followed since then, although the ordinary courts did step in. Firstly, the Supreme Administrative Court of Lithuania developed case-law establishing that the State's failure to act – namely, its failure to create appropriate legal conditions for the treatment of transsexualism – should be regarded as unlawful inaction within the meaning of Article 6.271 of the Civil Code. The Court further held that the failure to establish appropriate legal grounds for the treatment of the condition (*i.e.* the failure to adopt relevant legislation) may be assessed in terms of compensation for non-pecuniary damage (see the ruling of the Supreme Administrative Court of Lithuania of 29 November 2010[12]). Secondly, the courts of general competence developed consistent case-law, according to which one's gender identity may be legally recognised through a court procedure, the main requirements for such recognition being a psychiatric diagnosis and the applicant's self-identification with a particular gender (*e.g.* decisions of District Court of Vilnius City of 7 April 2017[13], 25 September 2018[14], *etc.*). This provided a prospect of redress to the victim of the human rights violation established by the Court in *L. v. Lithuania* and, most importantly, ensured that the violations of such type are not repeated. Encouraged by these developments, in 2021 Lithuania's Minister of Justice signed an order that introduced, for the first time, an administrative procedure for transgender persons to change their legal name at the civil registry office upon presenting proof of a psychiatric diagnosis[15].

The second example concerns recognition of same-sex partnerships by Lithuanian courts, relying on ECtHR judgments adopted against other States. A *res interpretata* effect of the Court's judgments for the courts and authorities of States other than those that were party to the proceedings is one of the most important tools reinforcing subsidiarity, also limiting the number of applications before the Court[16]. In this regard, the Constitutional Court`s ruling of 17 April 2025[17] serves as a good example. By relying *i.a.* on the principles established in the ECtHR judgments concerning other countries (the judgment of 17 January 2023 in *Fedotova and Others v. Russia*, applications nos. 40792/10, 30538/14 and 43439/14; the judgment of 23 May 2023 in *Buhuceanu and Others v. Romania*, applications nos. 20081/19 and

[12] http://www.infolex.lt/tp/181514.

[13] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=8e1c8a82-195f-462c-ac29-03faf042379a.

[14] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=4abc0de2-83dd-495b-9324-84935ddf86c8.

[15] *Andrė Jurgaitė*. Legal gender recognition in Lithuania: steps towards ensuring respect for the private life of transgender persons // https://www.einnetwork.org/ein-voices/2022/5/2/legal-gender-recognition-in-lithuania-steps-towards-ensuring-respect-for-the-private-life-of-transgender-persons.

[16] https://www.echr.coe.int/w/conference-the-role-of-the-judiciary-in-execution-of-judgments-of-the-european-court-of-human-rights-1.

[17] https://lrkt.lt/en/court-acts/search/170/ta3133/content.

20 others; the judgment of 1 June 2023 in *Maymulakhin and Markiv v. Ukraine*, application no. 75135/14; the judgment of 12 December 2023 in *Przybyszewska and Others v. Poland*, applications nos. 11454/17 and 9 others), the Constitutional Court ruled that the absence of a law on same-sex partnerships, the adoption of which had been delayed, created an unconstitutional legal vacuum. The Constitutional Court also explicitly held that until the parliament passes such a law, same-sex couples may seek legal recognition of their partnerships through the courts. Just a few months later, the first decisions of the Lithuanian ordinary courts recognising same-sex partnerships were rendered and entered into force[18].

Research shows that, overall, appellate and higher courts in Europe have been more willing to adjust to the ECtHR's case-law than governments, legislatures and administrative officials[19]. To some extent, the judiciary can compensate for legislative inaction in areas that are considered "politically inconvenient". What might be politically inconvenient, however, still requires action consistent with the State's obligations under international law. The branches of State power need to reach a shared understanding of who among them holds the ball, even if this ball sometimes appears to be a hot potato. Such collaboration may yield significant synergy and benefits to all involved. Based on this, it may be concluded that in the context of the enforcement of the Court's judgments, a model of enhanced dialogue and shared responsibility between the judiciary and other branches of State power – rather than a strict separation of powers – could offer the State a more effective means of ensuring compliance with its international obligations under the Convention. Such a model, rooted in good faith and cooperation, can offer more effective means of ensuring compliance with the Convention and contribute to the broader protection of human rights.

§ 3. When the ordinary courts become involved: jurisprudential and non-jurisprudential forms of Action

All the cases discussed above concerned situations in which, for various reasons, it took some time for the national authorities to determine which branch of State power – legislative, executive or judicial – bore the primary responsibility for the execution of the ECtHR judgments.

When the execution of the Court's judgment clearly falls within the competence of the ordinary courts, the measures required may involve both *jurisprudential* and

[18] Vilniaus meras pasveikino pirmąją Lietuvoje tos pačios lyties asmenų porą su partnerystės pripažinimu: https://vilnius.lt/naujienos/vilniaus-meras-pasveikino-pirmaja-lietuvoje-tos-pacios-lyties-asmenu-pora-su-partnerystes-pripazinimu.

[19] *Dia Anagnostou*, Alina Mungiu-Pippidi. Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter. *European Journal of International Law*, Volume 25, Issue 1, February 2014, pp. 205–227, https://doi.org/10.1093/ejil/chu001.

non-jurisprudential forms of action. The *jurisprudential* form primarily encompasses dealing with questions of reopening of domestic proceedings following ECtHR judgments and/or adjusting the domestic case-law to the human rights standards provided in the ECtHR jurisprudence.

In the former context, I recall at least two cases in which, acting as a judge of the Supreme Court of Lithuania (SCL), I adjudicated on legal questions regarding the reopening of domestic proceedings following ECtHR judgments.

The first case concerned the reopening of domestic civil proceedings following the ECtHR judgment in the case *Naku v. Lithuania and Sweden* of 8 November 2016[20]. In that judgment, the ECtHR found a violation of Article 6 § 1 of the Convention on the grounds that the Lithuanian courts had failed to secure the applicant's right of access to a court in proceedings brought against the Embassy of Sweden. Following the judgment, the applicant submitted a request for the reopening of the civil case that had been concluded by a final ruling of the SCL on 6 April 2007[21]. The central legal issue before the SCL dealing with the request for the reopening of proceedings was whether the statutory non-renewable five-year time-limit for lodging a request for the reopening of proceedings should be applied strictly in the circumstances where the proceedings before the ECtHR had lasted longer than five years. In its ruling of 25 August 2017[22], the SCL interpreted the relevant provisions of national law in the light of the State's general obligations under the Convention, in particular the duty to ensure the effective execution of ECtHR judgments, as provided by Article 46. Taking into account the specific circumstances of the case and the length of the proceedings before the ECtHR, the SCL held that the strict application of the five-year limitation period would be incompatible with the State's obligations under the Convention, accordingly granting the applicant's request and reopening the civil proceedings. It is noteworthy that following this ruling, the national legal framework was amended to remove the non-renewable five-year time-limit in cases concerning the execution of ECtHR judgments. Under the current regulation, a request for the reopening of proceedings must be lodged within three months from the date on which the ECtHR judgment becomes final.

The second case concerned the request for the reopening of civil proceedings in a case concerning non-pecuniary damage after the ECtHR judgment in *Vasiliauskas v. Lithuania* of 20 October 2015[23]. In that case the Court found a violation of Article

[20] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-168382%22]}.

[21] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=644892fd-b9ec-4d88-8731-c59c85f5aaef.

[22] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=f1c76605-db64-433a-a65d-4f0499fc943b.

[23] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158290%22]}.

7 of the Convention, because the applicant's conviction for genocide could not have been foreseen at the time of the killing of Lithuanian partisans during the period after World War II. The legal question was whether the Court`s award of pecuniary damage had fully compensated the applicant for the losses he had sustained as a result of the partial implementation of the national court`s judgment, whereby he had been required to pay compensation to the victims of killings jointly with another defendant. The answer to this question required the SCL to deconstruct and interpret the text of the ECtHR judgment. The SCL ultimately decided not to reopen the civil proceedings, ruling on 24 October 2016 that, by virtue of the ECtHR judgment, *restitutio in integrum* had been achieved in respect of *Vytautas Vasiliauskas* (and his successors in title). Accordingly, there was no legal basis to reconsider the issue of compensation for the expenses that he had incurred in the enforcement of the domestic court's decision in the civil case.

In addition to questions concerning reopening of proceedings, the *jurisprudential* form of action might also entail other questions. For instance, the SCL had to decide whether the ECtHR judgments against the Russian Federation, awarding just satisfaction to the victims, could be enforced in Lithuania under domestic rules of civil procedure on the recognition and enforcement of foreign judgments[24]. This, again, required the interpretation of national law in the context of the State`s obligations under the Convention.

Another field of *jurisprudential* form action is the adjustment of domestic case-law to the human rights standards provided in the ECtHR jurisprudence. As correctly noted by former President of the SCL *Gintaras Kryževičius*, there is no doubt that the effectiveness of the implementation of the Convention at the national level depends primarily on the proactive approach and engagement of the domestic courts. In Lithuania, the majority of problems identified by the ECtHR were caused by deficiencies in the domestic courts' practice (both due to the absence of such practice and its defects), and far less frequently by legal regulation that could be considered defective in terms of the Convention. In addition, even when some aspects of the domestic legal regulation are found to be inconsistent with the provisions of the Convention or when gaps in the legal regulation are identified, in certain cases such occurrences may be rectified through the development of an appropriate court practice[25]. In this respect, a good example of problems relating to human rights being resolved through

[24] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e61a852c-a979-43de-bdc8-77ce34b800c5.

[25] *G. Kryževičius*, The main challenges of the implementation and direct application of the European Convention of Human Rights in the case-law of the Supreme Court of Lithuania. Speech at the Conference on the Role of Supreme Courts in the Protection of Human Rights. Riga, 2 May 2012: https://www.at.gov.lv/files/uploads/files/docs/conferences/protectionconf/human%20rights_riga_2012%20april_kryzevicius_lt.doc.

the courts' practice can be found in the SCL's jurisprudence regarding the annulment of administrative acts and related transactions in cases brought by prosecutors defending the public interest, especially concerning the restoration of property rights. In a ruling of 12 April 2012, the SCL significantly refined its jurisprudence in that respect, emphasising that the State must bear the primary burden of restitution where its authorities had unlawfully restored property rights, whereas private individuals – especially good-faith acquirers – should face only minimal negative consequences. Thus, the SCL established that in cases where land of national importance had been returned to individuals in violation of the law, and those individuals had later sold it, the good-faith purchasers must not be required to return the money they had received. Instead, restitution must be applied only between the State and the last owner of the property in issue, who must be entitled to receive compensation corresponding to the property's purchase price[26]. Through this ruling, the SCL advanced the protection of individual rights, reinforcing the principles of legal certainty, fairness and State accountability, which harmonised the Lithuanian practice with the European human rights standards, ensuring that restitution cases are resolved swiftly, justly and without imposing an undue burden on citizens acting in good faith.

Based on the above examples of *jurisprudential* form of action, several conclusions regarding the interaction between international human rights adjudication and national judicial practice may be drawn.

First, the national judge must engage in a meticulous reading and interpretation of the ECtHR judgment that forms the basis of the request for the reopening of proceedings. This process involves a critical deconstruction of the judgment to identify and understand: (a) the actual content and scope of the ECtHR judgment – namely, the precise nature of the violation found, the reasoning underpinning it, and any indications provided regarding individual or general measures required for execution; and (b) the necessity and proportionality of reopening the domestic proceedings – that is whether reopening is an appropriate and necessary measure to remedy the specific violation established by the ECtHR, or whether alternative measures would suffice to achieve *restitutio in integrum*. By following these principles, the national judge not only ensures compliance with the Convention system but also safeguards the integrity and autonomy of the domestic legal order, ensuring that the reopening of proceedings serves its intended function.

Second, each decision rendered by domestic courts based on an ECtHR judgment contributes to the development of the national jurisprudence in this specific field, making it essential that such decisions form part of a coherent and comprehensive

[26] https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=79f696da-4001-4281-ad60-9917e60e91d9.

body of case-law. Consistency ensures legal certainty, predictability and respect for the rule of law, and also demonstrates the State's good faith compliance with its international obligations under Article 46 ECHR, which requires the execution of ECtHR judgments.

As previously noted, the enforcement of the Strasbourg Court`s judgments might also entail *non-jurisprudential* form of action by national judges, especially when it comes to adopting measures necessary to remedy violations of so called "structural human rights"[27]. These might include, for example, participation of the judiciary in decision-making processes concerning the reshaping of judicial and non-judicial bodies and structures, as well as changing or implementing certain administrative practices within the courts.

In this context, a notable example of the execution of an ECtHR judgment can be found in the case of *Kaminskiene v. Lithuania* (judgment of 12 January 2021), in which the Court found that the applicant's right to a fair trial had been breached because she had not been informed about the composition of the selection panels of the Lithuanian Supreme Court that were responsible for deciding whether to accept her appeals on points of law. As a result, the applicant was deprived of the opportunity to raise her concerns regarding the potential impartiality of two specific judges who were part of the selection panels, preventing her from effectively challenging the composition of the panel at the domestic level[28]. To execute the ECtHR judgment in this case, a dedicated section was created on the Lithuanian Supreme Court's official website providing public information regarding the designation of judges who serve as members of selection panels for a specified period[29]. By doing so the Lithuanian authorities addressed the core issue identified by the ECtHR: lack of transparency concerning the composition of the judicial bodies involved in deciding whether to accept appeals on points of law. This has not only ensured greater transparency but also enhanced the fairness and accountability of the judicial process, in line with the requirements set out by the Strasbourg Court.

§ 4. Conclusions

In conclusion, while the path to the full execution of ECtHR judgments is often complex and may take time, it is clear that a dynamic and collaborative approach between all branches of State power is essential for ensuring the implementation of human rights standards. National courts play a critical role not only in interpreting

[27] *M. Leloup*, The Concept of Structural Human Rights in the European Convention on Human Rights, Human Rights Law Review, Vol. 20, Issue 3, September 2020, pp. 480–501: https://doi.org/10.1093/hrlr/ngaa024.

[28] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207133%22]}.

[29] https://lat.lt/teismo-lankytojams/teiseju-atrankos-kolegijos/83.

and applying the law but also in fostering an environment where respect for international human rights obligations is actively pursued. The lessons drawn from the Lithuanian experience underscore the importance of judicial independence, transparency and a shared commitment to the principles of the Convention in achieving effective remedies for victims of human rights violations.

Anja Seibert-Fohr*

The Margin of Appreciation in the European Court of Human Rights' Practice

§ 1. Introduction. The subsidiarity principle as the underlying rationale

The margin of appreciation is a fundamental concept in the jurisprudence of the European Court of Human Rights. In order to understand its underlying rationale, it is necessary to consider the principle of subsidiarity, according to which States have the primary responsibility to secure the rights and freedoms guaranteed in the Convention. The Court "only" adopts a supervisory role, subsidiary to domestic protection. Although having been formally incorporated into the preamble of the Convention by Protocol No. 15[1], the subsidiarity principle has been firmly entrenched in the Court's case-law since the 1970s[2]. An early example is the *Handyside* judgment of 1976, in which the Court acknowledged that in the absence of a European consensus, State authorities are in principle better placed than international judges to determine the measures necessary to secure Convention rights and freedoms in their own countries, particularly in areas such as moral issues. The Court explained its approach as follows:

* Judge of the European Court of Human Rights, prof. dr.

[1] The Preamble reads: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

[2] ECtHR judgment of 18 June 1971, *De Wilde, Ooms and Versyp v. Belgium*, applications nos. 2832/66, 2835/66, 2899/66, § 93, Series A no. 12; ECtHR judgment of 8 June 1976, *Engel and Others v. the Netherlands*, applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, §§ 59, 72, 100, Series A no. 22; ECtHR judgment of 21 February 1975, *Golder v. the United Kingdom*, application no. 4451/70, § 45, Series A no. 18; ECtHR judgment of 7 December 1976, *Handyside v. the United Kingdom*, application no. 5493/72, § 48, Series A no. 24.

"[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. […] Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. Nowadays, these are controversial bioethical issues, such as the question whether the donation of embryos obtained through in vitro fertilisation to stem-cell research can be prohibited"[3].

In the meantime, the subsidiarity principle has found expression in respect of various aspects of the Court's judicial tasks, both in terms of the admissibility and the merits of an application[4]. At the admissibility stage, the Court exercises restraint by accepting complaints only if and in so far as they have been previously brought to the attention of the domestic judiciary. The exhaustion of local remedies requirements is codified as an admissibility criterion in Article 35, § 1[5]. The purpose of this rule is not just to prevent an uncontrolled influx of cases, but to allow a better understanding of the particular facts of a case and its context. Accordingly, the Court held in the *Duarte Agostinho* case that it is not a court of first instance and that it does not have the capacity to adjudicate on large numbers of cases requiring the finding of basic facts[6]. Such fact-finding may be relevant, for example, for substantive issues, such as the question whether an applicant can claim to be a victim[7]. In the *Duarte Agostinho*

[3] *Handyside v. the United Kingdom*, § 48.

[4] See *e.g.* ECtHR [GC] judgment of 1 July 2014, *S.A.S. v. France*, application no. 43835/11, § 129, ECHR 2014 (extracts).

[5] Article 35: Admissibility criteria:

"1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken".

[6] See ECtHR [GC] decision of 9 April 2024, *Duarte Agostinho and Others v. Portugal and 32 Others*, application no. 39371/20, § 228–229: "(…) It does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (…). The Court notes that there is a significant lack of clarity as regards the applicants' individual situations, which makes it difficult to examine whether they satisfy the victim-status criteria (…). In the Court's view, this lack of clarity can be explained, in particular, by the applicants' failure to comply with the obligation to exhaust domestic remedies, a condition of admissibility closely linked to the question of victim status, particularly in the case of general measures such as those related to climate change".

[7] *Ibid.*, § 229.

case the applicants had filed an application with the Court without first turning to the national jurisdiction.

In its jurisprudence on the merits, the Court exercises restraint in its findings of fact and in its interpretation and application of national law, known as the fourth instance doctrine. Furthermore, under the margin of appreciation principle, the Court leaves States some leeway when it comes to the balancing of competing rights or interests. This leeway is even broader when it comes to the determination which measures are necessary to remedy a violation, since the national authorities are much better suited to choose the means most appropriate and effective within the context of the domestic system.

Turning more specifically to the margin of appreciation and how it works in practice, I will first explain when the Court applies this concept. In the second step, I will address how the Court determines the breadth of this margin. Finally, I will describe the mechanisms through which the Court assesses whether a State has remained within its margin of appreciation.

§ 2. Areas of application

The Court applies the margin of appreciation primarily in its proportionality analysis with respect to those rights that may be limited for specific reasons[8], such as the freedom of assembly or the right to private and family life, and the protection against non-discrimination, to name just a few of these rights. For example, in the context of Article 10, the Court has recognised that States have a certain margin of appreciation when assessing whether an interference with the freedom of speech is necessary[9]. The Court applies the margin of appreciation also in respect of governmental decision-making processes concerning complex issues of environmental and economic policy, such as in the context of the planning of infrastructure such as airports[10]. The margin is also applied in case of a conflict of competing rights[11]. Moreover it also

[8] Articles 8–11 ECHR (Right to family life and privacy, freedom of religion, speech and association). See also Article 1, 2, 3 of the Protocol No. 1 (property, education, free elections). For free elections and the refusal to register the applicant as a candidate in parliamentary elections due to the failure to pay an electoral deposit see ECtHR judgment of 28 March 2006, *Sukhovetskyy v. Ukraine*, application no. 13716/02, § 65, ECHR 2006-VI. See also ECtHR judgment of 7 May 2013, *Shindler v. United Kingdom*, application no. 19840/09, §§ 100, 202, regarding the right of non-resident citizens.

[9] See *e.g.* ECtHR [GC] judgment of 5 April 2022, *NIT S.R.L. v. Moldova*, application no. 28470/12, § 177; ECtHR [GC] judgment of 15 October 2015, *Perinçek v. Switzerland*, application no. 27510/08, §§ 196–197; and ECtHR [GC] judgment of 16 June 2015, *Delfi AS v. Estonia*, application no. 64569/09, § 131.

[10] ECtHR judgment of 13 December 2012, *Flamenbaum and Others v. France*, applications nos. 3675/04 and 23264/04, § 136.

[11] This applies, for example, if an individual seeks an injunction against a newspaper regarding the reporting on issues related to their private life.

applies when a risk assessment is required from the national authorities, for example, in expulsion and extradition cases[12].

States also enjoy a margin of appreciation when it comes to selecting the appropriate means to fulfil their positive duties of protection, which became relevant in the *Verein Klimaseniorinnen v. Switzerland* case, where the Court recognised that States enjoy a margin of appreciation when combatting climate change. Finally, the Court has accorded the Contracting States a margin in delineating the precise scope of individual rights, such as determining whether the life of the foetus is protected by Article 2[13].

§ 3. The breadth of the margin of appreciation

Once the Court has determined that a respondent State enjoys a margin of appreciation, the question arises how much leeway needs to be accorded to the respondent State. The leeway left to States depends on various factors, namely the importance of the right affected, the subject matter[14] and degree of interference, the existence of a European consensus[15], and the importance of the reasons for the interference, *i.e.* the importance of the countervailing public interest. Read together these criteria determine the degree of deference given to the national legislature, the executive and the judiciary.

The judgment in the *Klimaseniorinnen* case demonstrates how this works in practice. In this case the Court referred to the severity of the consequences of climate change, including the grave risk of irreversibility, the scientific evidence regarding the urgency of combatting the adverse effects of climate change, and the scientific, political and judicial recognition of a link to the enjoyment of human rights[16]. The Court therefore concluded that climate protection should carry considerable weight in the weighing-up of competing considerations[17], with the importance of the subject matter playing a special role in order to determine the State's margin of appreciation in fulfilling its positive duty of protection. Accordingly, the Court accorded States a reduced margin of appreciation as regards the need to take action by adopting

[12] See *e.g.* ECtHR [GC] judgment of 26 September 2023, *Yüksel Yalçınkaya v. Türkiye*, application no. 15669/20.

[13] ECtHR [GC] judgment of 8 July 2004, *Vo v. France*, application no. 53924/00, § 82, ECHR 2004-VIII.

[14] Deference is applied, for example, in respect to the adoption of socio-economic measures.

[15] *Handyside v. the United Kingdom*.

[16] ECtHR [GC] judgment of 9 April 2024, *Verein KlimaSeniorinnen Schweiz et al v. Switzerland*, application no. 53600/20, § 542.

[17] *Ibid.*, § 442.

reduction targets[18]. However, in the choice of means designed to achieve their objectives, States enjoy a wide margin of appreciation[19].

This also applies to social and economic policy issues. In these areas, if the national authorities have undertaken a balancing exercise in conformity with the Court's case-law, it would require strong reasons for the Court to substitute its views of that of national courts[20].

An example of the importance of the right at stake and the degree of consensus in Europe as criteria for the margin of appreciation is the judgment in *Fedotova v. Russia.* The Court was called upon to determine the scope of the national authorities' margin of appreciation with respect to the legal recognition of same-sex partnerships, for which purpose it considered the importance of the recognition of such partnerships for the applicant's personal and social identity. Moreover, it found an ongoing trend in Europe towards the legal recognition of same-sex partnerships in order to find that the margin of appreciation was significantly reduced regarding the legal recognition and protection of same-sex partnerships. However, taking into account that there was no similar consensus in Europe as to same sex marriages, the Court left States a more extensive margin in choosing the concrete means of legal recognition.

In interference cases, the Court considers not only the importance of the right affected but also the purpose of the interference. For example, matters of healthcare policy are considered best assessed by the national authorities, who therefore enjoy a wide margin of appreciation[21]. In *Communauté genevoise d'action syndicale v. Switzerland*, a case that concerned the ban on demonstrations during the initial phase of the Covid 19 pandemic, the Court stressed that in the light of the unprecedented and highly sensitive context of the pandemic, it was all the more important to first give national authorities the opportunity to strike a balance between competing private and public interests, and between the competing rights protected by the Convention, taking into account local needs and conditions, as well as the relevant public-health situation[22].

[18] When assessing whether a State has remained within its margin of appreciation the Court examines whether the competent domestic authorities had due regard to the need to adopt general measures with a specific target timeline for achieving carbon neutrality, had set out intermediate GHG emissions reduction targets, kept them updated, acted in good time, and whether the State party has complied with the reduction targets. *Verein KlimaSeniorinnen Schweiz et al v. Switzerland*, § 550.

[19] *Ibid.* § 572.

[20] ECtHR [GC] judgment of 7 February 2012, *Von Hannover v. Germany (no. 2)*, applications nos. 40660/08 and 60641/08, § 107, ECHR 2012.

[21] ECtHR judgment of 1 September 2022, *Thörn v. Sweden*, application no. 24547/18, § 46; ECtHR [GC] judgment of 27 November 2023, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, application no. 21881/20, § 160.

[22] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, § 163.

Another example in which the breadth of the margin was determined by the purpose of the interference is *Sanchez v. France*. In this case the Court had to deal with a fine imposed on an elected politician for failing to delete Islamophobic comments made by third parties from his Facebook "wall", which he was using in support of his election campaign. While the fine constituted an interference with the right to freedom of expression, the Court, in assessing its necessity, referred to the respondent State's margin of appreciation. In order to determine its breadth, the Court had regard to the subject-matter of the speech. Whereas free political speech enjoys a particularly high degree of protection, meaning that the authorities' margin of appreciation in assessing the "necessity" of a contested measure in this context is particularly narrow, hate speech directed against a particular group on account of its origin or religion does not enjoy this level of protection, and State authorities enjoy a broader margin of appreciation[23].

Without going into more detail, I hope that the above-mentioned cases demonstrate that the breath of the margin of appreciation is determined by concrete factors which the Court regularly takes into account to determine whether the margin is narrow or broad.

§ 4. Determining whether a state has remained within its margin of appreciation

In order to review whether the authorities have stayed within their margin of appreciation, the Court does not take the place of the competent national authorities but rather reviews the compatibility of their decision with the relevant Convention right. In other words, the primary role of the national authorities goes hand in hand with European supervision, allowing the Court to give the final ruling[24].

Once the Court has determined that a State enjoys a margin of appreciation, there are different mechanisms to test whether a State has remained within its margin. If States have a broad margin of appreciation, the Court will intervene only if the balancing exercise undertaken at the national level is arbitrary or beyond the confines of

[23] ECtHR [GC] judgment of 15 May 2023, *Sanchez v. France*, application no. 45581/15, § 156: "The question of statements directed at particular groups on account of their origin or religion is nothing new (...). Where the remarks in question incite violence against an individual or a public official or a sector of the population, the State authorities enjoy a broader margin of appreciation in assessing the 'necessity' of a given interference with the right to freedom of expression (…). In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention".

[24] See *e.g. NIT S.R.L. v. Moldova*, § 177; *Perinçek v. Switzerland*, §§ 196–197; and *Delfi AS v. Estonia*, § 131.

reasonableness[25]. Apart from this rather modest substantive test, the Court considers the extent to which national authorities have engaged with the Convention principles in their balancing exercise. In the above-mentioned case of *Sanchez v. France,* the Court found that the domestic courts had reasoned their decision to fine the applicant and had proceeded with a reasonable assessment of the facts by examining whether the applicant had been aware of the posts, and therefore concluded that there had not been a violation of the right to freedom of expression.

If the margin of appreciation is narrow, the Court has to consider whether the authorities exercised their discretion 'reasonably, carefully and in good faith', whether an interference was 'proportionate to the legitimate aim pursued', and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. For this purpose, the Court has to examine whether the national authorities applied standards in conformity with the principles embodied in the relevant Convention articles and, moreover, that they relied on an acceptable assessment of the relevant facts.[26]

A. The criteria-based review

The Court has set up certain criteria that need to be taken into account by the domestic courts when making their assessment[27]. The list of criteria that the Court considers important for balancing depends obviously on the subject matter of the case[28]. If the domestic courts have applied these criteria, the Court will not substitute its own judgment for that of the national courts unless there are strong reasons for doing so.

A classic example of this criteria-based guidance is the so-called *Springer* test, which the Court uses in publication cases with a need to balance between the right to private life and the freedom of expression[29]. In such cases the Court examines whether the national court has considered several aspects that it considers important for the balancing. The relevant criteria are: the subject of the news report and

[25] The Court applies the standard of manifest unreasonableness and manifest lack of reasonable foundation.

[26] ECtHR [GC] judgment of 29 March 2016, *Bédat v. Switzerland*, application no. 56925/08, § 48.

[27] For the criteria for the expulsion against settled migrants due to criminal activity, see *e.g.* ECtHR [GC] judgment of 18 October 2006, *Üner v. the Netherlands*, application no. 46410/99, §§ 57–58, ECHR 2006-XII and for the criteria for the expulsion of convicted foreign nationals see *e.g.* ECtHR [GC] judgment of 23 June 2008, *Maslov v. Austria*, application no. 1638/03, §§ 71–72 (in respect of young adults), ECHR 2008.

[28] For the criteria relevant for targeted surveillance, see ECtHR [GC] judgment of 4 December 2015, *Roman Zakharov v. Russia*, application no. 47143/06, § 23, ECHR 2015. See ECtHR [GC] judgment of 5 September 2017, *Barbulescu v. Roumanie*, application no. 61496/08, § 121 for the assessment whether an employer was entitled to monitor an employees' email usage in the workplace.

[29] *Von Hannover v. Germany (no. 2)*, § 107, ECHR 2012; ECtHR [GC] judgment of 7 February 2012, *Axel Springer AG v. Germany*, application no. 39954/08, §§ 89–95.

whether it has contributed to a debate of public interest, whether the report concerned a public person, the person's prior conduct, and finally the content, form and consequences of the publication. If the domestic courts have applied these criteria, the Court will not substitute its judgment for that of the national courts unless there are strong reasons for doing so.

In environmental cases, which are primarily dealt with under Article 8, the Court recognises the complexity of the issues involved and claims only a subsidiary role, whereas national authorities have the primary responsibility to secure the rights recognised in the Convention[30]. It does not therefore engage in its own proportionality assessment, but examines whether the procedure was adequate and gave due consideration to individual rights affected[31]. For this purpose, the Court closely considered the procedural safeguards and how the views of the individuals were taken into account[32], allowing the Court to determine whether due weight was accorded to the rights affected and whether the authorities properly balanced the competing individual rights and the interests of the community as a whole[33]. In order to strike a fair balance, the decision-making process must involve investigations and studies to which the public must have access[34], and the individuals concerned must be able to participate effectively in the relevant proceedings and have their arguments examined[35].

A similar approach is applied under Article 8 in expulsion cases where the Court also recognises a certain margin of appreciation. For example, in *Ndidi v. the United Kingdom,* the Court had to consider the deportation order against a settled migrant due to his involvement in criminal activity, holding that where domestic courts have carefully examined the facts, applied relevant human rights standards in accordance with the Convention and its case-law, and adequately balanced personal interests against public interest, it would not substitute its own assessment of the merits including its proportionality assessment for that of the competent national authorities unless there were strong reasons for doing so[36].

[30] *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland*, §§ 542–541.

[31] *Flamenbaum et al v. France*, § 137: "[I]l faut que le processus décisionnel débouchant sur des mesures d'ingérence soit équitable et respecte comme il se doit les intérêts individuels protégés par l'article 8".

[32] *Ibid.* § 137 "Il y a donc lieu d'examiner l'ensemble des éléments procéduraux, notamment le type de politique ou de décision en jeu, la mesure dans laquelle les points de vue des individus ont été pris en compte tout au long du processus décisionnel, et les garanties procédurales disponibles".

[33] ECtHR decision of 4 June 2024, *Büttner and Krebs v. Germany*, application no. 27547/18, § 73 with reference to ECtHR [GC] judgment of 8 July 2003, *Hatton and Others v. the United Kingdom*, application no. 36022/97, § 99, § 128, ECHR 2003-VIII and *Flamenbaum et al v. France*, § 138.

[34] *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland*, § 539.

[35] *Ibid.* § 539.

[36] ECtHR judgment of 14 September 2017, *Ndidi v. the United Kingdom*, application no. 41215/14, § 76.

The downside of this process-based review[37] is that the Court may find a violation if an interference with Convention rights was not properly assessed at the domestic level in accordance with the principles set out in the Court's case-law[38]. It may then conclude that in the absence of any balancing exercise when the policy was created, the State went beyond its margin.[39] In such cases the procedural failure to balance is sufficient to find a violation irrespective of the potential outcome of the balancing exercise.

The procedural requirements are not an end in themselves. In its decision on shortcomings in the planning of the Berlin airport, the Court recognised that procedural requirements seek to ensure to balance the competing interests at stake and act within their margin of appreciation[40]. Therefore, the Court held in *Büttner and Krebs v. Germany* that it will not find a violation if the domestic courts can demonstrate later that the authorities took into account and balanced the relevant rights, and if they rule out that the procedural defect has influenced the outcome of the balancing exercise to the detriment of the individual applicant[41]. However, if this cannot be demonstrated, the Court will find a violation.

Alternatively, instead of finding a violation because of the absence of an adequate balancing exercise at the national level, the Court may also conduct its own assessment. For example, in the Case of *Otite v. the UK*, where the national authorities had failed to balance the competing rights and interests by reference to the case-law of the Court, the Court conducted its own assessment and found that the strength of the applicant's family and private life in the UK did not outweigh the public interest in his deportation[42].

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[37] *J. Gerards*, Procedural Review by the ECtHR: A Typology, [in:] Procedural Review in European Fundamental Rights Cases (eds. *J. Gerards*, *E. Brems*), Cambridge 2017, p. 127; *O.M. Arnardóttir*, The 'procedural turn' under the European Convention on Human Rights and presumptions of Convention compliance, International Journal of Constitutional Law, Vol. 15, iss. 1, 1 January 2017, p. 9–35; *P. Popelier*, The Court as Regulatory Watchdog: The Procedural Approach in the Case-Law of the European Court of Human Rights, [in:] The Role of Constitutional Courts in Multilevel Governance (eds. *P. Popelier*, *A. Mazmanyan, W. Vandenbruwaene*), Intersentia 2013, p. 249.

[38] ECtHR judgment of 27 September 2022, *Otite v. the United Kingdom*, application no. 18339/19, § 42–45.

[39] ECtHR [GC] judgment of 4 December 2007, *Dickson v. the United Kingdom*, application no. 44362/04, §§ 82–85, ECHR 2007-V; ECtHR judgment of 26 November 2015, *Annen v. Germany*, application no. 3690/10, §§ 70–74; ECtHR judgment of 26 January 2017, *Terentyev v. Russia*, application no. 25147/09, §§ 22–25; ECtHR judgment of 7 November 2017, *Moskalev v. Russia*, no. 44045/05, § 42–45.

[40] *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland* [GC], § 539.

[41] *Büttner and Krebs v. Germany*, § 73.

[42] *Otite v. the United Kingdom*, § 56.

B. Process-based review of national legislation

While the just-described criteria-based review is focused mainly on the balancing exercise undertaken by domestic courts, the Court also applies a process-based approach *vis-à-vis* the legislature. Though there is no room for *in abstracto* review of legislation, a concrete limitation in an individual case may still be based on a statutory provision. The Court will therefore review whether the domestic parliament has adequately taken account of the rights negatively affected by its legislation[43].

In this review, the Court accords the legislative branch a margin of appreciation, for example if parliament deals with complex and novel or controversial societal or moral issues, such as bioethics. An example for this approach can be found in *Parrillo v. Italy,* which concerned the donation of embryos obtained through in vitro fertilisation to stem-cell research that was prohibited by Italian law[44]. Another example is *Lambert v. France,* which concerned the withdrawal of life-sustaining treatment in which the Court examined *i.a.* the legislative framework[45].

In such instances, the Strasbourg Court considers the scope and quality of the parliamentary process[46], examining whether the parliament has openly and in good faith engaged in the balancing of conflicting interests[47]. It also considers the scope, form and quality of the legislative process in order to assess whether a limitation of a Convention right was necessary in a democratic society. Moreover, the Court considered whether legislation was based on an extended process of consultation and debate[48].

[43] If the measure was subject to judicial review, the Court will also consider the latter. *E.g.* ECtHR [GC] judgment of 5 June 2015, *Lambert v. France*, application no. 46043/14, §§ 169 *et seq*. See also ECtHR judgment of 20 June 2017, *Bayev v. Russia*, applications nos. 67667/09, 44092/12, 56717/12 § 63.

[44] ECtHR [GC] judgment of 27 August 2015, *Parrillo v. Italy*, application no. 46470/11, ECHR 2015. The Court acknowledged that the drafting of the relevant statute had included extensive discussions taking account of different scientific and ethical opinions, and had been subject to several referenda and concluded that the State had remained within its margin of appreciation.

[45] *Lambert v. France*.

[46] *A. Donald*, *P. Leach*, Parliaments and the European Court of Human Rights, Oxford 2016, p. 113–140.

[47] ECtHR [GC] judgment of 22 April 2013, *Animal Defenders International v. the United Kingdom*, application no. 48876/08, § 108, ECHR 2013, *Parrillo v. Italy*, § 183–188, § 197, ECHR 2015, *Lambert v. France*, §§ 150 *et seq.*, 181; *Reports of Judgments and Decisions* 1998-V. See also *S.A.S. v. France*, § 154, ECHR 2014; ECtHR judgment of 11 July 2017, *Dakir v. Belgium*, application no. 4619/12, § 54–57; ECtHR judgment of 11 July 2017, *Belcacemi and Oussar v. Belgium*, application no. 37798/13, § 54.

[48] *Animal Defenders International v. the United Kingdom*, § 108, ECHR 2013. In this case an NGO had been denied the possibility to advertise on TV and radio due to a ban on political advertising. The Court found parliamentary and judicial review to be pertinent and exacting, taking into account the European Court's case-law. In the absence of a European consensus the government had more room for manoeuvre. The Court found the reasons given to justify the ban to be convincing and therefore compatible with Art.10. See also *S.A.S. v. France*, § 149, ECHR 2014 (extracts). ECtHR [GC] judgment

However, the choice of means remains with the national parliament, and the Court will not question whether the legitimate aim could have been achieved through different means[49].

Another example for this process-based review is *L.B. v. Hungary,* which concerned the publication of the applicant's identifying data including his address on a tax authority website portal for failing to fulfil his tax obligation[50]. The publication was foreseen in a statutory law. The Court held that since parliament had not considered the necessity of this measure, and since data protection considerations had played little role in the drafting of the law, the State had failed to demonstrate that the legislature had sought to strike a fair balance. Accordingly, there had been a violation of Article 8 ECHR.

§ 5. Conclusion

While the ECHR stands for a unitary commitment to the protection of the rights enshrined therein, the task to implement it and to secure the rights is primarily allocated to the domestic level, whereas oversight is a shared endeavour. The subsidiarity principle allocates judicial competences vertically, although without rendering these competences exclusive. The concrete distribution is neither uniform nor static but depends on the level of domestic protection. Properly understood, therefore, subsidiarity and its implementation via the margin of appreciation doctrine allows for a complementary system of human rights protection, in which each jurisdiction has its fair share. Though States enjoy a margin of appreciation unless the core rights are at stake, and while domestic courts play an important role in the oversight, their findings are subject to the supervisory jurisdiction of the ECtHR. For this reason, the dialogue with national jurisdictions is of particular importance.

Since the margin of appreciation allows some leeway vis-à-vis the domestic level, domestic courts in turn are expected to engage in the necessary balancing exercise, and it would be inappropriate for them not to exercise this task. Subsidiarity, properly understood, is not a privilege, but a responsibility, meaning it is only consistent for domestic courts not to resort to this concept when applying the Convention. This is essential for the effective protection of the rights enshrined therein.

of 6 October 2005, *Hirst v. the United Kingdom (no. 2)*, application no. 74025/01, § 79–80 ECHR 2005-IX.

[49] *Animal Defenders International v. the United Kingdom*, § 108–110, ECHR 2013.

[50] ECtHR [GC] judgment of 9 March 2023, *L.B. v. Hungary*, application no. 36345/14.

Kateřina Šimáčková*

Administrative Judges as Protectors of Human Rights and Allies of the European Court of Human Rights

The seventy-fifth anniversary of the European Convention on Human Rights allows us to recount our successes and mistakes; to plan the next steps in our mission to protect fundamental rights, the rule of law, and democracy; and to reflect on what we as judges are responsible for and what, by contrast, does not fall within our responsibility to address. In this context, it is necessary to consider the role of administrative judges, whom I regard as protectors of human rights and therefore allies of the European Court of Human Rights (ECtHR) in its task of interpreting the ECHR as best as possible.

Even when I was a practising lawyer and academic in the field of constitutional law, I was strongly in favour of administrative justice, aware that the work of administrative judges was necessary for the protection of the rule of law and the separation of powers in the state. Through their daily work – in ordinary judgments on value added tax, traffic fines, competition limits, social allowances, police interventions, and the regulations of demonstrations or radio and television broadcasting – administrative judges draw clear lines limiting the arbitrariness of administrative authorities and explain what is in the public interest and when it should take precedence over the rights of individuals. Administrative judges are also responsible for identifying the absolute core of the rights of individuals with which the state cannot interfere[1].

* Judge of the European Court of Human Rights, President of the V Section, JUDr. PhD, Masaryk University, Brno.

[1] In countries with a Germanic and Austro-Hungarian legal tradition, the advent of the rule of law – Rechtstaat – represented opposition to the police state – Polizeistaat – which meant that the state could not exercise state power over its citizens except within the framework of the law. The second step was the creation of administrative courts to monitor whether administrative authorities or police officers comply with the law and do not apply the legal rules arbitrarily.

The work of administrative courts currently guarantees the proper functioning of public administration and respect for the freedom and for fundamental rights in the practical lives of ordinary people and institutions.

From my own experience, I can say that being an administrative judge is a somewhat more technical and perhaps less glamorous role than serving on a Constitutional Court or the ECtHR, but ultimately it may also be more useful. Their existence and honest work on a daily basis creates greater legal certainty, keeps the executive powers of government within its limits, and seeks and explains the correct balance between different public interests and the rights and interests of individuals. The role of administrative judges is irreplaceable, with their independent and impartial decision-making indispensable and essential for the protection of the rule of law and the legitimate interests of individuals.

When States designed the European Convention more than seventy-five years ago, they seemed reluctant to allow the ECtHR to exercise control over administrative justice – Article 6, which regulates the right to a fair trial, focuses on protecting fair trials in criminal and civil proceedings. However, despite this delineation of types of justice protected under Article 6, it would appear that civil proceedings under Article 6 can and should include in principle the proceedings before administrative justice as illustrated by the judgment *Ringeisen v. Austria*[2].

Furthermore, in many European countries at that time, the judiciary in administrative matters was not nearly as developed or specialised as many are today.

The Convention does not provide for the protection of economic and social rights, with the protection of property, elections, and education part of later separate protocols. Nevertheless, particularly regarding the issue of individuals in conflict with public authorities, the cases dealt with by administrative courts and the ECtHR often overlap.

Furthermore, I remember how important the ECtHR judgment in *Lauko v. Slovakia* from 1998 was for the establishment of administrative justice, not only in Slovakia but also in Czechia. The facts of the case are that *Mr. Lauko*, who was fined 500 Slovak korunas, then argued that he did not have access to judicial review of this fine and that this was a violation of his right of access to a court under Article 6 ECHR[3].

The Government disputed the applicability of Article 6 § 1 to the proceedings before local and district offices, since in their view they did not involve the determination of a 'criminal charge' against the applicant; it involved an offence of a minor

[2] ECtHR judgment of 16 July 1971, *Ringeisen v. Austria*, § 94, application no. 2614/65.

[3] ECtHR judgment of 2 September 1998, *Lauko v. Slovakia*, 2 September 1998, Reports of Judgments and Decisions 1998-VI.

nature, that could not lead to imprisonment, and which was not described as criminal by the Slovakian legislation, legal theory and practice. The Government also pointed to the fact that the penalty imposed on the applicant was not severe, equal to one-twentieth of the average monthly income. The ECtHR disagreed with the Slovak government's position and explained that while entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the ECHR, it is essential that the person concerned has an opportunity to challenge any decision made against his fundamental rights before a tribunal that offers the guarantees of Article 6 ECHR[4].

At the time this judgment was issued, full administrative justice, which would provide judicial review of all administrative decisions concerning human rights, had not been introduced either in Czechia or Slovakia. This was one of the catalysts that led to legislative developments, leading to the current fully developed, independent and, in my opinion, strong and influential administrative judiciary in both countries.

Not only in misdemeanour cases, but also in disciplinary proceedings, it is primarily administrative courts that have gained greater powers to review administrative decisions in disciplinary matters concerning the protection of the rights of civil servants, following the development of the ECtHR case-law. This occurred following the *Engel* case[5], which established the criteria for mandatory judicial review in this sphere.

When discussing the addition of tasks to administrative courts based on the ECtHR judgments, we cannot overlook the issue of the concurrence of criminal sanctions and administrative penalties; that is various administrative sanctions imposed concurrently, or even in addition to criminal sanctions. This opens up the broad topic of *ne bis in idem* and the interpretation of Article 4 of Protocol No. 7 (the right not to be tried or punished twice). In its judgment in *Zolotuchin v. Russia*[6], the ECtHR placed a heavy burden on administrative courts to respond to the lack of national legislation in this area, with the ECtHR subsequently clarifying the criteria for preventing double punishment in its Grand Chamber judgment in *A.B. v. Norway*[7].

It is clear that similar issues must also be addressed by the Court of Justice of the European Union (CJEU), for example in the case of *bpost SA v. Autorité belge de la concurrence* – where the Court synthesised the conclusions of the ECtHR judgments with EU law, which itself contains numerous regulations of various public interests

[4] *Ibid*.

[5] ECtHR judgment of 8 June 1976, *Engel and Others v. The Netherlands*, applications nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72.

[6] ECtHR [GC] judgment of 10 February 2009, *Sergey Zolotuchin v. Russia* [GC], application no. 14939/03.

[7] ECtHR [GC] judgment of 15 November 2016, *A.B. v. Norway* [GC], applications nos. 24130/11 and 29758/11, § 130.

that may be implicated when punishing conduct that infringes on various interests protected by national or EU law[8].

The Grand Chamber of the ECHR is currently dealing with the case of *Jesus Pinhal v. Portugal* with the aim of clarifying this complex issue of concurrent administrative and criminal penalties and the *ne bis in idem* principle provided for in the ECHR[9].

This brings me to another consideration, namely that it is often administrative judges who are faced with the complex task of harmonising national legislation, protecting fundamental rights at the national level, EU law, and the case-law of the ECtHR. A very interesting illustration of this is the issue of privacy protection, especially where state or EU supervisory authorities have intervened in antitrust cases involving corporations. A pertinent example of this is the Czech case of *Delta Pekárny* before the ECtHR[10] or the case of *the Deutsche Bahn* before the CJEU[11].

National administrative courts face a difficult task in the area of immigration and asylum law, which involves significant interaction between the ECtHR, EU law, and national administrative courts. Many decisions of national administrative courts are based on the ECtHR judgments, while the ECtHR, in turn, draws heavily on high-quality decisions of national courts in this area. This is a separate topic, one currently linked to the issue of democratic backsliding, the rise of populism, and the instrumentalisation of national and international courts in situations where some governments are unable to take effective and fair action in the sphere of migration regulation.

Finally, I would like to mention an area of the ECtHR case-law that shows how the ECHR and the ECtHR can be useful to national judges and courts. The idea is that our case-law, especially in recent years, points out that the protection of fundamental rights is illusory if people cannot turn to independent and impartial courts that will protect them from the overreach of executive power. The conclusion drawn from the case-law of the ECtHR and the CJEU is that a fair trial cannot be protected

[8] Judgment of the Court (Grand Chamber) of 22 March 2022, *bpost SA v. Autorité belge de la concurrence* C-117/20, EU:C:2022:202. Of further interest is Advocate General *Michal Bobek's* opinion, which criticizes the aforementioned judgments of the ECHR.

[9] ECtHR judgment of 8 October 2024, *Jesus Pinhal v. Portugal*, applications nos. 48047/15 and 2276/20. The case concerns three sets of proceedings brought against the applicant by the criminal-law authorities, the Securities Market Commission and the Bank of Portugal, respectively, for criminal and administrative offences committed during the financial crisis while he was Vice-Chairman of the Board of Directors of a commercial bank.

[10] ECtHR judgment of 2 October 2014, *Delta Pekárney A.S. v. The Czech Republic*, application no. 97/11.

[11] Judgment of the Court (Second Chamber) of 18 June 2015, *Deutsche Bahn AG and Others v. European Commission* C-583/13 P, EU:C:2015:404.

without safeguarding the independence of national judges – an independence that is threatened, among other things, by attacks from political powers[12].

Similarly, the principle of subsidiarity within the ECHR system is devoid of any meaningful impact if the Member States do not secure in law and practice the existence of independent, impartial and effective courts to safeguard fundamental rights[13]. Within the auspices of protecting the independence of the judiciary we must also protect independent and strong judges[14].

I believe that the judges of the ECtHR and national administrative judges remain allies in their common interest in protecting fundamental rights, respecting important public interests, and ensuring the legitimacy of judicial decisions. We are aware that the principle of subsidiarity means that we have a shared responsibility to protect fundamental rights under the ECHR.

Our alliance is particularly evident in our mutual efforts to protect the legitimacy, independence and impartiality of the judiciary and seek the best legal solutions through mutual dialogue.

[12] *E.g.* ECtHR [GC] judgment of 15 March 2022, *Grzęda v. Poland* [GC], application no. 43572/18; ECtHR judgment of 6 July 2023, *Tuleja v. Poland*, applications nos. 21181/19 and 51751/20; ECtHR judgment of 16 June 2022, *Żurek v. Poland*, application no. 39650/18.

[13] *F. Krenc*, *F. Tulkens*, "L'indépendance du juge. Retour aux fondements d'une garantie essentielle d'une société démocratique" in Chenal, R. et al. (eds.), Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi, Wolf Legal Publishers, Oisterwijk, 2019, p. 397; *R. Spano*, "The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary", European Law Journal, Vol. 27, Hoboken, New Jersey, 2021, p. 223.

[14] *K. Šimáčková*, Protection of the Rule of Law and Judicial Independence trough the Protection of the Rights of Judges before the European Court of Human Rights. In Eunited in diversity. The Rule of Law and Constitutional Diversity. Luxembourg: Publications Office of the European Union, 2024, p. 87–96. ISBN 978-92-829-4514-8. Available from: https://doi.org/10.2862/958327.

Maciej Szpunar*

The Convention as a Tool for Judicial Review by an Administrative Court Judge, Seen from the Perspective of EU Courts

It is a privilege to take the floor again and contribute to this panel on the role of the Convention as a tool for judicial review by administrative courts.

As I underlined in my opening remarks, the Convention has been – and continues to be – a cornerstone of fundamental rights protection in Europe. It has not only shaped but often led to changes in the laws and administrative practices of state-parties. Through the case-law of the ECtHR, the Convention has, over the decades, influenced not only national courts, but also the two Courts of the European Union (CJEU and GCEU).

At first glance, the title of this panel might prompt a straightforward observation: EU Courts do not conduct judicial review *on the basis of the Convention*.

So long as the European Union has not acceded to it, the Convention does not constitute a formal source of EU law. This holds true, in particular, when the Court of Justice wears its 'administrative court hat'. The interpretation of EU law and the review of EU legislation must therefore be carried out in the light of the Charter of Fundamental Rights (CFR or the Charter).

And yet, the Convention and its interpretation by the ECtHR has been, and remains, an important influence on the EU legal order.

Since the beginning, the Convention has served as an **influential source for the development of general principles of EU law**. For example, in the *Johnston* case, the Court of Justice drew on the constitutional traditions common to Member States, as well as Articles 6 and 13 of the Convention, in order to recognise the principle of

* First Advocate General of the Court of Justice of the European Union, prof. dr hab., University of Silesia; ORCID: 0000-0001-7035-0805.

effective judicial protection as a general principle of Community law.[1] This was, of course, long before the adoption of the CFR.

The special place of the Convention within the EU legal order is now enshrined in **Article 6(3) TEU**, which affirms that "fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Since the entry into force of the Charter, whose drafting was significantly inspired by the Convention, the Convention has guided the EU courts in **interpreting the Charter**.[2]

The formal mechanism for ensuring consistency is found in Article 52(3) of the Charter, which establishes the Convention as the "**minimum level of protection**". Where Charter rights correspond to those guaranteed by the Convention, their meaning and scope may never fall below the level of protection guaranteed by the Convention. Although this might at first sight appear to be a straightforward exercise, the task becomes difficult when there are conflicting fundamental rights and a balance must be struck between them.

It is in light of this 'minimum protection' mechanism, and of the *Bosphorus* principle of equivalent protection, that we should read the frequent cross-references made by the Court of Justice and the General Court to the Convention, as interpreted by the Strasbourg Court.

In order to illustrate the guiding role of the Convention, let me briefly recall the scope of the Charter.

First and foremost, all EU institutions and bodies are bound to respect the Charter, which thus serves as a benchmark for reviewing the legality of EU acts. In this context, the EU Courts have often relied on the interpretation of Convention rights by the ECtHR – particularly when applicants themselves invoke those rights or cite case-law from Strasbourg in support of their pleas.

A recent and important example of this is *RT France v. Council*, in which Russia Today France sought the annulment of the temporary prohibition on broadcasting imposed by the Council, alleging the infringement *i.a.* of freedom of expression. In examining this plea, the General Court drew on the strict principles established in the case-law of the ECtHR to assess whether media freedom can be limited through restrictive measures and whether such limitation was justified.[3] In particular, it drew on the case *NIT S.R.L. v. Republic of Moldova*, handed down three months earlier, in which the Grand chamber of the Strasbourg court established general principles

[1] *Johnston*, 222/84, § 18.

[2] See the preamble of the Charter.

[3] *RT France v. Council*, T-125/22, §§ 131–140 and 146.

for striking a proper balance between political pluralism in the media and editorial freedom.

More frequently, however, the Charter is invoked when Member States implement EU law within the meaning of Article 51(1) of the Charter. National courts increasingly submit preliminary references asking whether national measures comply with EU law and, in particular, with the Charter. These preliminary references often cite the Convention alongside the Charter[4] – and sometimes the Convention alone.[5]

Yet this does not mean that fundamental rights are always at the heart of the questions referred, nor that the Court will necessarily engage in a full review of EU legislation in light of those rights.

Allow me to highlight a few examples of how the Court of Justice has drawn upon the Convention and its interpretation by the ECtHR.

Firstly, the Court of Justice uses the Convention as interpretative guidance to clarify the **meaning and scope of fundamental rights** enshrined in the Charter, and to define the limits to those rights, by applying the 'minimum protection' mechanism.

This is particularly evident when novel questions arise concerning Charter rights. A prime example of this is the interpretation of Article 8 of the Convention on the right to respect for private and family life, which corresponds to Article 7 of the Charter.

For instance, in a case concerning investigations by tax authorities into abusive VAT practices, the Court of Justice relied on case-law from Strasbourg to hold that the interception of telecommunications and the seizure of emails constituted an interference with the right guaranteed by Article 7 of the Charter.[6] More recently, the Court of Justice was guided by the Convention in recognising the protection of a person's gender identity, both for the exercise of free movement and residence rights[7], and for the rectification of data relating to gender identity on a public register.[8]

Secondly, in order to respect the 'minimum protection' mechanism, **limitations to fundamental rights** cannot disregard the standards of the Convention.[9] This applies both to the EU legislator and to national authorities when implementing EU law.

[4] See, for instance, *Vivacom Bulgaria*, C-369/23, on the principle of 'nemo iudex in causa sua' in actions for compensation for damage arising from the judicial functions of the administrative courts.

[5] See, for instance, *TL*, C-242/22 PPU, on the right of defence in criminal proceedings. The Court of Justice reformulated the question by replacing Article 6 ECHR with Article 47 and Article 48(2) CFR.

[6] *WebMindLicenses*, C-419/14, §§ 71–72.

[7] *Mirin*, C-4/23, §§ 64–66.

[8] *Deldits*, C-247/23, §§ 45–48, with reference to *Mirin*, C-4/23.

[9] See Explanations to the Charter under Article 52.

Although outside the field of administrative law, the *Real Madrid* case provides a recent and noteworthy illustration of this. Here, the Court of Justice held that the enforcement of a judgment of a court of a Member State must be refused for reasons of 'public policy' if it gives rise to a manifest breach of freedom of the press, as guaranteed by Article 11 of the Charter. In its reasoning, the Court devoted more than ten paragraphs to the case-law from Strasbourg, demonstrating a clear commitment to aligning its interpretation of the Charter with that of the Convention. In particular, the Court drew on the ECtHR's strict approach to limitations on freedom of expression in the sensitive fields of political speech and matters of public interest.[10] Allow me to add a brief digression: in my view – it is the most important decision of the Court from the point of view of the future accession of the EU to the ECHR!

Yet, as Article 52(3) of the Charter states, the 'minimum protection' mechanism does not prevent the Court of Justice from recognising a **higher standard of protection under EU law**, which is binding both for the EU institutions and the Member States.

Here lies the crucial distinction. The Strasbourg Court acts as a 'judicial monitoring mechanism' for the Convention, reviewing the conduct of a defendant State in relation to an individual's rights in a given case. By contrast, the Court of Justice must examine fundamental rights within the broader EU legal framework, having regard to the requirements of **primacy, uniformity and effectiveness** of EU law.[11] For this reason, the parameters of the scrutiny exercised by the two Courts may sometimes differ. Moreover, the Court of Justice may not explicitly refer to the Convention as interpreted by the Strasbourg Court, even though the case raises fundamental rights issues.

For instance, in data protection cases, when the Court is called to interpret specific EU legislation in the light of fundamental rights, it has to take into account the high degree of protection established by the EU legislator. Similarly, in the area of freedom, security and justice, such as in arrest warrant or asylum law cases, the Court of Justice has to consider the principle of mutual trust between the Member States that underpins this area of EU law.

Thirdly, the Court of Justice has also borrowed from the Convention at a **methodological** level. The ECtHR, as we know, understands the Convention as a 'living instrument', an approach that has been explicitly transposed to the Charter. In a case concerning animal protection in the context of ritual slaughter, the Court held that 'the Charter must be interpreted in the light of present-day conditions and of the

[10] *Real Madrid Club de Fútbol*, C-633/22, §§ 53–65, in particular §§ 53 and 61.

[11] See, in that regard, *Siofra O'Leary*, Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg, Cambridge Yearbook of European Legal Studies 20 (2018), p. 9 and 25.

ideas prevailing in democratic States today'[12]. In its judgment, the Court underlined the growing importance of animal welfare in light of evolving societal values when assessing the proportionality of national legislation[13]. Although not yet a systematic approach, this example demonstrates the **continuing influence** of the Convention system on the interpretation of the Charter.

I should like to add here, however, that even if the Court has not always been explicit on this point, it has, in substance, always interpreted EU law in general, and the internal market freedoms in particular, in the light of present-day circumstances. It consistently interprets EU law in a way that reflected the economic and social reality of the day[14].

The visibility of the judicial dialogue, made clear by explicit references to Strasbourg case-law, is, in my view, particularly important for guiding national courts and authorities within the **multi-level system of fundamental rights protection**. All Member States are bound by the Convention and by the jurisdiction of the ECtHR. From their perspective, navigating between cases governed by the Charter – which are subject to the primacy of EU law – and those governed by domestic law under the supervision of the Convention can be challenging. The frequent references to both the Charter and the ECtHR in preliminary references confirms that national courts are aware of the need for consistency.

Conversely, this dialogue is not a one-way street. The ECtHR has also referred to the case-law of the Court of Justice – for instance, in the field of judicial independence[15]. Despite their different procedural systems and competences, the two Courts are engaged in a mutual exchange.

Such areas of convergence should be welcomed, especially with a view to the **EU's accession** to the Convention – which inevitably must take into account the specific features of the EU legal order. In this regard, I would like to highlight a recent case on the admissibility of judicial review in Common Foreign and Security Policy matters, one of the very issues of concern in the opinion of the Court of Justice on the first draft accession agreement[16]. Two points should be underlined. First, the Court reasoned that the limitation of its jurisdiction in Foreign and Security Policy matters can be reconciled both with Article 47 of the Charter and with Articles 6 and 13 of the Convention[17].

[12] *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, § 77, with reference to ECtHR, *Bayatyan v. Armenia* [GC], 7 July 2011, § 102 and the case-law cited.

[13] *Ibid*.

[14] See my Opinion in Joined Cases C-360/15 and C-31/16, Visser, point 3.

[15] See, for instance, ECtHR [GC] judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, application no. 26374/18, §§ 138 and 139.

[16] See Opinion 2/13 (Accession of the European Union to the ECHR), §§ 249–257.

[17] *KS and Others v. Council and Others*, C-29/22 P and C-44/22 P, §§ 70–81.

Second, by clarifying the scope of its jurisdiction under Article 275 TFEU, the Court held that acts and omissions in this field that were 'not directly related to political or strategic choices' are subject to judicial review[18]. In this way, the EU Courts retain jurisdiction to ensure the protection of fundamental rights in this sensitive field[19].

In conclusion, the case-law of the Court of Justice demonstrates a commitment to take due account of the rights enshrined in the Convention, as interpreted by the ECtHR, when similar questions arise under the Charter.

Regardless of the Convention's formal status in the EU legal order, the Charter sets it as the minimum threshold of protection.

After all, the Convention and the Charter share a common purpose. As their preambles remind us, the protection of fundamental rights is based, in both systems, upon respect for the core values of democracy and the rule of law.

[18] *Ibid.*, §§ 116–117.

[19] See further Felix Ronkes Agerbeek, EU Accession to the European Convention on Human Rights: A New Hope, European Papers 9 (2024), p. 712–713.

Skirgailė Žalimienė*

The Convention as a Tool for Judicial Review by an Administrative Court Judge – the Lithuanian Perspective

In this timely discussion of the role of the European Convention on Human Rights in the work of an administrative court judge, I should first of all note that the Supreme Administrative Court of Lithuania has an established reputation as a pro-active court. For a number of years already, it has been the position of our court that judicial activism is necessary for the purpose of ensuring human rights protection in the modern administrative justice.

Protection of fundamental human rights and freedoms is a constant priority of the Court since its establishment. The Court usually deals with violations of human rights and fundamental freedoms when adjudicating cases in the sphere of adequate protection of the right to property, the right to respect for private and family life, the freedom of assembly and association, the right to a fair trial. When ensuring justice and protection of fundamental rights, the Supreme Administrative Court relies on the Constitution and international standards, *i.e.* the Universal Declaration of Human Rights, provisions of international agreements such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the fundamental rights catalogue of EU law, *i.e.* the Charter of Fundamental Rights of the European Union[1].

* President of the Supreme Administrative Court of Lithuania, prof. dr.

[1] *S. Žaltauskaitė-Žalimienė*, Fundamental Rights of the European Union: The Jurisprudence of the Supreme Administrative Court of Lithuania, [in:] European Union Law and Lithuanian Administrative Justice. A collection of scholarly articles to commemorate a 20 year anniversary of the Supreme Administrative Court of Lithuania (eds. *S. Žaltauskaitė-Žalimienė, M. Treigė*), Vilnius 2023, p. 107.

Specifically, as regards the ECHR, it may be applied directly when deciding cases and, in the event of a conflict with national laws, has priority[2]. Notably, in a number of cases concerning the freedom of assembly the Supreme Administrative Court of Lithuania obliged municipalities to provide for conditions for peaceful assemblies even when local authorities sought to restrict the organisation of such events, as in the case of LGBTQI+ community events or other civic protests. These court decisions demonstrated the capacity of the judiciary to actively protect the fundamentals of democracy and ensure that local authorities use their discretion without abusing it. For example, in its decision of 7 May 2010 in an administrative case regarding the march "For Equality", locally known as the "Gay Parade" case[3], the Supreme Administrative Court directly applied Article 11 ECHR and relied on the jurisprudence of the ECtHR in the case of *Bączkowski and Others v. Poland*[4]. The Court annulled interim measures applied by the court of first instance to suspend the validity of the order authorising the march, after finding that the interim measures were neither appropriate nor proportionate in relation to the aim pursued and taking into account the positive duties of the State to ensure effective use of the freedom of assembly by minorities.

An active role of the court manifests itself *i.a.* in not staying confined to the protection of rights in concrete disputes. In addition to that, it contributes to the building of a sustainable legal environment in which human rights are respected, protected and promoted. An active court is a court that reacts to new legal challenges, comes up with new interpretations of existing legal norms in applying them to changing societal realities.

In practice, judicial activism of the Supreme Administrative Court of Lithuania is often expressed by means of seeking an authoritative interpretation of the constitutional Lithuanian or European standards in the respective courts, which comprises requests for an opinion of the Constitutional Court of the Republic of Lithuania, the CJEU and also the ECtHR.

[2] See, *e.g.* decision of 11 February 2003 of the Supreme Administrative Court No. 259/03, decision of 14 April 2008 No. A-575-164/08, where the Court concluded that through direct application of the ECHR and jurisprudence of the ECtHR, the Republic of Lithuania implements the decision of the ECtHR and does not perform unlawful activities that manifest in non-implementation of the decision.

[3] In a 7 May 2010 decision in administrative case No. AS-822-339/10, the Supreme Administrative Court of Lithuania decided that although the case was on the lawfulness of provisionary measures, it was necessary to examine the case on its merits. If the disputed regarding the lawfulness to organise a march "For Equality" had not been examined on its merits by the scheduled day of the march, the suspension of the validity of the permission to organise the march would have denied an essential condition for the effective use of the right of assembly, based on the practice of the ECtHR.

[4] ECtHR judgment of 3 May 2007, *Bączkowski et al. v. Poland*, application no. 1543/06.

One could inquire which theoretical version of judicial activism it is in our case. How far does this judicial activism go, and at which point does it become deference, non-interventionism and judicial self-restraint? What guides the Supreme Administrative Court of Lithuania in its choices? Obviously, the court does not make the law, as it respects the powers of the legislature. And yet the court is often confronted with situations in which it has to apply a legal norm or principle in the absence of legal acts specifying, elaborating and providing the necessary clarity regarding that norm or principle. What additional guiding principles should the court then keep in mind in order not to overstep the sensitive boundary between judicial activism and deference?

Quite recently in the academic discussion, the theoretical conception of deliberative constitutionalism was supplemented by that of deliberative judicial review. As *Ignacio Giuffré*, a scholar in Spain and New Zealand, put it[5], deliberative constitutionalism gives people an active role in deliberating about rights, among themselves as well as between them and the state. In the same vein, deliberative judicial review, by respecting and promoting democratic deliberation, offers better protection of rights, as well as greater impartiality and legitimacy. While the standard of democratic deliberation admits that the final decision in some cases lies with parliament, its objective is broader. According to this standard, legitimacy and impartiality do not depend exclusively on the parliamentary majority, but also depend on a dialogue between the political branches and society, which demands more from courts than a passive role *vis-à-vis* the decisions taken by parliamentary majorities. It requires courts to take an active role in respecting and promoting democratic deliberation.

The spectrum of cases in which our court has acted pro-actively is broad, encompassing cases regarding the recognition of same-sex marriage in the context of issuing temporary permits of residence, ensuring full protection of the migrants' access to court even in the state of emergency, and prohibition of detention of migrants on the grounds of their illegal presence in the territory of the state even in the situation of a large influx of migrants, among others. It may be too bold to suggest that our court in all those cases specifically follows the rationale of strengthening democratic deliberation. However, our case-law on the matter of elections definitely shows how the Supreme Administrative Court of Lithuania, taking an active stance, serves the needs of enabling such democratic deliberation.

Notably, in 2024, a year of European Parliament elections but also to the national parliament and of the President of the Republic of Lithuania, the number of complaints against the Central Electoral Commission of Lithuania doubled compared to previous years. The Supreme Administrative Court examined questions related to

[5] *I. Giuffré*. Deliberative Judicial Review. Federal Law Review. 2025;53:e2. doi:10.1017/fed.2025.2.

the transparency of the electoral procedure and the contents of the candidates' electoral programmes. The court held that the electoral programme by an entity receiving public funding has to be in line with constitutional values and cannot question Lithuania's geopolitical stance or its EU and NATO membership[6]. We also had to examine issues related to the status of former KGB employees in the electoral context, a subject-matter which had been previously examined by the ECtHR in cases against Lithuania[7].

The most obvious example of the activist attitude of the Supreme Administrative Court of Lithuania in electoral cases is from the year 2020, when relying on Protocol No. 16 to the ECHR the court lodged a request for an advisory opinion of the ECtHR regarding the impeachment legislation of Lithuania. That question arose in a pending case brought by a former member of the Lithuanian Parliament, Ms *N.V.*, who had been impeached in 2014 and wished to stand in the parliamentary elections in October 2020.

The Constitutional Court had found that Ms. *N.V.* had breached the parliamentary oath of office and grossly violated the Constitution by failing to attend many sittings of the Seimas following her fleeing Lithuania pending criminal proceedings brought against her. Those criminal proceedings had been brought in the context of the role she had played as a judge in very high-profile custody proceedings in Lithuania. She challenged the Central Electoral Commission's refusal before the Supreme Administrative Court, arguing that it had failed to take into account the legislation on impeachment, in the light of the ECtHR's judgment in the case of *Paksas v. Lithuania*[8]. In the *Paksas* judgment, the ECtHR held that the permanent and irreversible disqualification of a former President of Lithuania from taking a seat in the Seimas following impeachment proceedings had been disproportionate, in violation of Article 3 of Protocol No. 1 to the Convention. The Lithuanian law in question had not been changed following the European Court judgment, and the Supreme Administrative Court of Lithuania needed guidance on how to assess the compatibility of the law on impeachment, as applied by the Central Electoral Commission after the *Paksas* judgment, with Article 3 of Protocol No. 1 to the Convention. The political discussion in Lithuania surrounding the change of impeachment legislation was a heated one and the Supreme Administrative Court sought an objective legal opinion on the matter.

[6] Supreme Administrative Court of Lithuania, decision of 4 April 2024 No. AB-5456-3-66-3-00021-2024-9 in administrative case No. R-16-463/2024.

[7] Supreme Administrative Court of Lithuania, decision of 27 September 2024 No. AB-13793-3-66-3-00060-2024-2 in administrative case No. eR-50-629/2024.

[8] ECtHR judgment of 6 January 2011, *Paksas v. Lithuania.* In the *Paksas*, application no. 34932/04.

The European Court of Human Rights delivered its response to the request made by the Supreme Administrative Court of Lithuania on 8 April 2022[9]. Overall, the ECtHR gave the following opinion:

"The criteria that are relevant in deciding whether or not a ban on the exercise of a parliamentary mandate in impeachment proceedings has exceeded what is proportionate under Article 3 of Protocol No. 1 should be objective in nature and allow relevant circumstances connected not only with the events which led to the impeachment of the person concerned, but also – and primarily – with the functions sought to be exercised by that person in the future, to be taken into account in a transparent way. They should therefore be identified mainly from the perspective of the requirements of the proper functioning of the institution of which that person seeks to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned".

More specifically, this comes down to evaluating the objective impact that the person's potential membership of the institution concerned would have on the latter's functioning, with regard to such considerations as the past and current behaviour of the person who has been removed from office in impeachment proceedings and the nature of the wrongdoing which led to their impeachment, but also – and more importantly – the institutional and democratic stability of the institution concerned, the nature of the latter's duties and responsibilities, and the likelihood of the person in question having the potential to significantly disrupt the functioning of that institution, or indeed of democracy as a whole in the State concerned. Aspects such as that person's loyalty to the State, encompassing their respect for the country's Constitution, laws, institutions and independence may also be relevant in this respect. It is in the light of all those aspects that a determination should be made as to the appropriate and proportionate length of a ban precluding persons who have been removed from office in impeachment proceedings from being eligible for any function to which the ban applies.

Notably, in April 2022 a constitutional amendment was adopted (and entered into force on 22 May 2022) by the Lithuanian Parliament in response to the Court's judgment in *Paksas.* In line with this amendment, any person removed from office or whose mandate as a member of the Seimas has been revoked by the Seimas through impeachment proceedings will not be subjected to a "permanent and irreversible" ban from standing for parliamentary elections, but will be able to stand for elections to the Seimas after a period of "at least ten years".

[9] ECtHR Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, 8 April 2022, request No. P16-2020-002.

The Supreme Administrative Court, having received the response of the European Court of Human Rights to its request for an advisory opinion, on 29 June 2022 delivered its judgment[10] regarding the applicant who had complained about her inability to run for a seat in the 2020 parliamentary election.

As the ECtHR noted in its advisory opinion, the Constitutional Court of Lithuania had established that the applicant, by failing to attend parliamentary sittings, had breached the parliamentary oath and grossly violated the Constitution. The fact that a person had left the Republic of Lithuania, was a suspect in criminal proceedings, was being sought by the authorities and might be hiding from a pretrial investigation in order to avoid criminal liability could not constitute important and justifiable reasons in themselves for the person's failure to attend the sittings or to give notice of their inability to attend the sittings in question. On the basis of the Constitutional Court's conclusion, in 2014 the Seimas voted to revoke the applicant's (Ms *N.V.'s*) mandate as a member of parliament.

On the basis of a request by the Lithuanian authorities, in February 2018 Ms *N.V.* was arrested in the United States. In April 2018 the United States State Department took a decision to extradite her to Lithuania. Ms *N.V.* was extradited to Lithuania on 6 November 2019. On 8 July 2021 the Panevėžys Regional Court found her guilty of hindering the activities of a bailiff, resistance against a civil servant, and of causing minor bodily harm. Ms *N.V.* was sentenced to one year, nine months and six days' imprisonment, but, having taken into account the time she had already spent in pretrial detention, it was held that she had already served the sentence.

In 2020 Ms *N.V.* asked to be registered as a candidate in the Seimas elections scheduled to take place in October that year. Thus, the applicant did not seek to become a member of the parliament in the parliamentary election of 2016, first experiencing negative consequences of election restriction only in 2020. The applicant sought to exercise this right following her involuntary return to Lithuania as a result of extradition. The Supreme Administrative Court noted that in assessing the proportionality of the restriction of the applicant's rights they could not ignore that the applicant first experienced negative consequences related to the inability to participate as a candidate in parliamentary elections only 6 years after her impeachment had passed. Prior to that she had been abroad and there is no evidence to suggest that she had actively participated in Lithuania's political or social life during her time away.

The evidence showed that the applicant's behaviour was incompatible with the respect for the national Constitution, laws and institutions, while such respect, as indicated by the ECtHR, is an important aspect in assessing the proportionality of

[10] Supreme Administrative Court of Lithuania, decision of 29 June 2022 in administrative case No. R-1-602/2022.

the restriction of electoral rights imposed on a particular person. In her complaint regarding the refusal to register her as a candidate, Ms *N.V.* formally stated that the ECHR did not permit unlimited restrictions of electoral rights, but failed to indicate any relevant circumstance permitting an individual assessment of her situation and potentially leading to a conclusion that a restriction imposed on her in 2020 was disproportionate.

Although the Lithuanian Parliament, following the ECtHR finding in *Paksas* regarding the incompatibility of Lithuanian impeachment legislation with the Convention, failed to promptly adopt the necessary constitutional amendments, the negative consequences actually suffered by the applicant did not last for long. Moreover, the applicant's behaviour leading to her impeachment and following her impeachment did not meet the standard of a careful and prudent person respecting the national Constitution, laws and institution, and could not lead to a conclusion that the circumstances that had formed the basis for the restriction of her electoral rights had disappeared. Case materials and the publicly available information corroborated the conclusion that after the impeachment procedure in 2014, the applicant's level of respect for the national Constitution, laws and institutions remained unchanged.

According to the Constitution, all institutions executing state power should be composed only of citizens who without reservations obey the Constitution adopted by the Nation, and who, while in office, unconditionally follow the Constitution, law and the interests of the Nation and the State of Lithuania. The facts of the case and the legal regulation corroborate the conclusion that failure to apply to Ms *N.V.* the prohibition to participate as a candidate in the parliamentary election would have violated the requirements of the constitutional system and democracy, as well as the requirements for members of Parliament. In light of this, the court concluded that the restriction of electoral rights imposed on the applicant complied with its underlying rationale and was proportionate.

The case decided by the Supreme Administrative Court demonstrates, above all, that the judiciary is able to take an activist attitude in the case of the failure of legislature to bring domestic legislation in line with the ECHR by seeking guidance from the European Court and interpreting the domestic legislation based on the criteria provided by that court. Secondly, it also shows that the judiciary acts cautiously, strictly following the interpretation of the Convention provided by the European Court and does not in any way attempt to limit the scope of national legislative discretion in regulating the matter of elections, as it leaves it to the Parliament to define any specific conditions regarding the time limits of applicable restrictions. By taking this cautious and deferent approach, the Supreme Administrative Court sees its role as an active guardian of the rights of an affected individual, but not as that of a lawmaker. In this way, our court shows respect for the constitutional principle of the

division of power and the constitutional mechanisms, ensuring democratic deliberation for the purpose of devising legislative standards acceptable to the Nation and duly adopted by the Parliament.

In electoral cases in particular, the role of the court in democratic deliberation is to participate in the constitutional dialogue by way of its jurisprudence, emphasising existing standards and limits, protecting democratic processes and institutions, and essentially inviting all constitutional actors to avail themselves of the tools of democratic deliberation, to engage into meaningful discussion of the required legal standards, and to adopt the necessary laws.

General Conclusions

Krzysztof Wojtyczek*

National Administrative Courts as Guardians of the European Convention on Human Rights

To mark the 75th anniversary of the European Convention on Human Rights, the Polish Supreme Administrative Court organised an international conference of administrative courts in Warsaw in order to share their experience in the implementation of the Convention. This treaty, as interpreted and applied by the European Court of Human Rights, regulates a growing number of questions in this area, becoming an important source of law invoked by the national administrative courts. The State interference with rights very frequently has the form either of a legal act (in the broadest sense) of the administration or of an administrative factual action performed by the administration. In this context, the administrative courts that perform the review of these acts and actions (and also inactions and omissions of the administration) have become the primary guardians of the Convention against excessive State interference or unjustified State inaction.

Given the diversity of issues arising at the legal interface between the ECHR and national administrative law, the organisers of the Warsaw Conference decided to select a few general issues concerning the application of the ECHR by domestic courts. In order to prepare the conference, the Polish Supreme Administrative Court devised a questionnaire, which was sent to all eleven participating courts, each of which submitted a written report in response, with a twelfth report prepared by the Polish Supreme Administrative Court. The organisers of the conference further proposed to discuss three selected topics in greater depth, in thematic panels, through oral presentations:

(i) the ECHR as a tool for judicial review of administration;

* Judge of the European Court of Human Rights from 2012 to 2024, prof. dr hab., Jagiellonian University in Kraków; ORCID: 0000-0002-6948-6016.

(ii) the enforcement of ECtHR judgments by national administrative courts;

(iii) the margin of appreciation and national administrative courts.

These issues were debated with the participation of many ECtHR judges, an Advocate General at the CJEU – *M. Szpunar*, the President of ACA-Europe – *M. Pikramenos*, as well as representatives of the national administrative courts invited to the conference, who presented their reports.

The general conclusions from the written reports that were prepared before the conference by the 12 participating courts in reply to the questionnaire were presented in a separate general report, published in the legal periodical "Zeszyty Naukowe Sądownictwa Administracyjnego"[1]. The purpose of this report is to draw general conclusions from the reports presented orally at the conference in Warsaw in the three thematic panels. Part I of the report presents the backdrop of the general repartition of roles between the ECtHR and the national courts, while the three subsequent parts draw general conclusions concerning the three above-mentioned issues, debated in the thematic panels.

§ 1. The allocation of functions between the ECtHR and domestic courts

In order to explain the relevance of the ECHR in the field of administrative law, it is necessary to address the more general question of the allocation of functions between the ECtHR and the domestic courts, which is defined not so much by the letter of the Convention but rather by principles set forth in the case-law of the ECtHR. The approach of the ECtHR in respect of the allocation of powers between it and the domestic courts is based upon a few fundamental principles presented below.

Firstly, the function of establishing facts belongs (almost) exclusively to domestic courts. The ECtHR has adopted the following stance on this issue:

The Court must also be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (…). As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (…). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (…)[2].

[1] *K. Wojtyczek*, Stosowanie Europejskiej Konwencji Praw Człowieka przez sądy administracyjne, ZNSA 2025, Vol. 21, No. 6.

[2] ECtHR judgment of 24 March 2011, *Giuliani and Gaggio v. Italy*, application no. 23458/02, § 180.

Under this approach, the function of gathering evidence has been almost completely outsourced to national courts. Administrative courts, provided that they comply with the requirements of jurisdiction set forth in the ECtHR case-law in respect of factual issues[3], may in turn base their judgments on the factual findings of the administrative bodies that examined the case before a complaint was lodged to an administrative court.

Secondly, in a similar vein, the interpretation of domestic law belongs almost exclusively to domestic courts. The ECtHR has expressed the following views in this respect:

49. The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (…). Its role is to verify whether the effects of such interpretation are compatible with the Convention (…).

50. That being so, save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (…). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (…)[4].

More generally, in proceedings before international courts, questions of domestic law are factual issues, subject to evidentiary rules similar to those applicable to other factual questions. The principle *iura novit curia* does not apply to domestic law but its content has to be proven with available evidence, in particular with official texts of law and existing domestic case-law.

Concerning both facts and domestic law, the ECtHR relies on the factual findings and interpretive decisions of domestic courts, and intervenes only in exceptional situations of arbitrariness. The ECtHR may reinterpret the available factual elements in the light of the Convention standards, highlight the importance of some of them such as the vulnerability of a specific party or the fact that some evidence or information is available only to the authorities, and attribute a particular value to it in order to reassess its significance for the purpose of application of the Convention.

Lacunae in factual findings at the domestic level usually play against the victims of human rights violations. In the proceedings before the ECtHR, the situation is significantly different, as there is a set of presumptions – established in the ECtHR

[3] ECtHR judgment of 6 November 2018, *Ramos Nunes De Carvalho E Sá v. Portugal*, applications nos. 55391/13, 57728/13, 74041/13.

[4] ECtHR judgment of 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*, application no. 13279/05.

case-law – which usually operate in favour of the applicants[5]. Lacunae in domestic factual findings are thus often filled with the help of presumptions in favour of the applicants.

Thirdly, the function of balancing colliding values and interests belongs primarily albeit not exclusively to domestic courts[6]. The ECtHR has summarised its opinion on this issue in the following terms:

(…) when exercising its supervisory function, the Court's task is not to take the place of the national courts but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (…). Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (…)[7].

In this domain, the latitude left to the domestic authorities is somewhat narrower, with the Strasbourg review notably stricter and more active than in respect of factual findings and the interpretation of domestic law. In the balancing exercise, it is essential for domestic courts to identify all the values and interests at stake, with particular attention to those underpinning the Convention provisions and, in particular, the values highlighted in the ECtHR case-law. Only then can they assess their weight and determine the optimal trade-off, in line with the methodology set out in the Strasbourg Court's case-law.

Fourthly, while the first and the primary guardians of the Convention are the domestic courts[8], fully empowered to interpret and apply the Convention, the ultimate interpreter of this instrument is the ECtHR. The domestic courts should follow the interpretation of the Convention established in the case-law of the ECtHR, and it is important to point out that the Convention is interpreted in the process of judicial dialogue[9]. The Strasbourg Court remains open to the arguments of the domestic courts and is always ready to refine or modify its approach if necessary for better pro-

[5] On this question see: *A.-B. Caire*, Relecture du droit des présomptions à la lumière du droit européen des droits de l'homme, Paris, Pedone, 2012.

[6] Compare, *I. Jelić*, The European Convention on Human Rights as a Tool for Judicial Review by an Administrative Court Judge, in the instant volume.

[7] ECtHR judgment of 27 June 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, application no. 931/13, § 164.

[8] See *A. Adamska-Gallant*, The Execution of the Judgments of the European Court of Human Rights in the Context of the Subsidiarity Principle, in the instant volume.

[9] See *M. Szpunar*, The Convention as a Tool for Judicial Review by an Administrative Court Judge Seen from the Perspective of the EU Courts, in the instant volume; *M. Pikramenos*, opening statement, in the instant volume; *B. Pořízková*, Universal Human Rights and National Specificities: Judicial Dialogue and the Margin of Appreciation – the Czech Perspective, in the instant volume; *K. Šimáčková*, Administrative Judges As Protectors of Human Rights and Allies of The European Court of Human Rights,

tection of the different values underlying the Convention. The following quote from the ECtHR case-law may illustrate this dialogue:

The Court agrees in this context with the Government's view that the reform of the German preventive detention system was conducted and put in practice against the background of a dialogue between this Court and the Federal Constitutional Court (see in particular the Court's judgments in the cases of M. v. Germany, Jendrowiak, cited above; Schmitz v. Germany, no. 30493/04, 9 June 2011; Glien and Bergmann, cited above; and the judgments and decisions of the Federal Constitutional Court of 4 May 2011, file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10, cited above, of 15 September 2011; file no. 2 BvR 1516/11, cited above of 6 February 2013; file nos. 2 BvR 2122/11 and 2 BvR 2705/11 of 11 July 2013; file nos. 2 BvR 2302/11 and 2 BvR 1279/12, cited above, and of 29 October 2013, file no. 2 BvR 1119/12)[10].

Under the approach adopted by the ECtHR, the minor premise of the legal syllogism belongs almost exclusively to domestic courts. The major premise of the legal syllogism (namely, the determination of the applicable legal rules of the Convention) is a matter of shared responsibility between the Strasbourg and domestic courts, although the last word in this respect lies with the ECtHR. Similarly, the conclusion of the legal syllogism in this case – the authoritative finding whether the Convention has been respected or violated – is also a matter of shared responsibility, with the predominant role of the Strasbourg Court. The issue of how to remedy a violation is in principle left to the respondent State, acting under the supervision of the Committee of Ministers of the Council of Europe.

Victims of rights violations have to assert their rights in domestic proceedings and exhaust the available domestic remedies while raising all the relevant rights issues in these proceedings. Under the requirement of exhaustion of domestic remedies, the question of whether rights protected by the Convention have been respected is first decided by the domestic courts. The Strasbourg Court may be required to revisit this question, but it will have to begin this reassessment by examining the views expressed by the domestic courts. If the task of implementing the Convention has been performed by the domestic courts, duly taking into account the ECtHR case-law, the latter will have no choice but to confirm the domestic judicial decision. In this context, in the proceedings before the ECtHR, the role of the Government Agent is to emphasise the quality of work by the domestic courts and to duly highlight all the elements (factual or legal) in the reasoning of the judicial decisions that are relevant from the perspective of the ECtHR case-law.

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in the instant volume; see also the case – quoted by *B. Pořízková*, Universal Human Rights – ECtHR judgment of 12 June 2025, *T.H. v. The Czech Republic*, application no. 33037/22, § 59.

[10] ECtHR judgment of 4 December 2018, *Ilnseher v. Germany*, applications nos. 10211/12, 27505/14, § 224.

§ 2. The ECHR as a tool for judicial review of administration

The ECHR should be understood not merely as a text, but as a set of legal rules which stem from that text and have been identified and formulated with greater precision in the case-law of the ECtHR. It is essential to carefully analyse the case-law of the ECtHR in order to correctly understand and apply the ECHR.

It should be noted that the Convention lays down both substantive and procedural standards in the field of administrative law. Concerning the substance, it establishes in particular the impassable limits of administrative action by defining the scope of permissible interference with the Convention rights. It circumscribes the exercise of administrative discretion granted to domestic administrative bodies by the domestic law[11]. It may also impose a proportionality review under the Convention, even if the domestic law leaves no choice of available means to the domestic bodies[12].

Concerning the procedure, the Convention imposes certain minimum standards of procedural fairness, including the right to be heard in administrative proceedings and the right to obtain a reasoned administrative decision[13].

Against this backdrop, the ECHR may serve different functions in the judicial review of administrative acts.

Firstly, it guides the interpretation of domestic law, both substantive and procedural. Where a domestic provision may be understood in different ways, the domestic authorities should choose an interpretation that ensures the best protection of the Convention rights and the fullest implementation of the Convention values[14].

Secondly, where a collision arises between domestic legal rules and the Convention rules, and this collision cannot be resolved through interpretation, domestic courts may – depending on the domestic constitutional provisions – either set aside the domestic rules and directly apply the Convention or initiate judicial review by the national constitutional courts[15]. In the first scenario, a domestic court, when de-

[11] See for instance: ECtHR judgment of 17 June 2008, *Meltex Ltd and Movsesyan v. Armenia*, application no. 32283/04.

[12] ECtHR judgment of 17 October 2013, *Winterstein and Others v. France*, application no. 27013/07; ECtHR judgment of 6 February 2025, *Caldarar and Others v. Poland*, application no. 6142/16; see also: ECtHR judgment of 17 September 2024, *Yaylali v. Serbia*, application no. 15887/15.

[13] ECtHR judgment of 28 June 2018, *G.I.E.M. S.R.L. and Others v. Italy*, applications nos. 1828/06, 34163/07, 19029/11; ECtHR judgment of 18 February 2025, *Objective Television and Radio Broadcasting Company and Others v. Azerbaijan*, application no. 257/12; compare, *I. Jelić*, The European Convention.

[14] See in particular *M. Đorđević*, The European Convention on Human Rights as a Tool for Judicial Review by Administrative Court Judges from the perspective of Slovenia, in the instant volume; *B. Maurer-Kober*, The Convention as a Tool for Judicial Review by an Administrative Court Judge – the Austrian Perspective, in the instant volume.

[15] See *K. Wojtyczek*, Stosowanie Europejskiej Konwencji.

ciding not to apply certain legislative provisions, may in particular conclude that only some elements in a domestic provision conflict with the Convention and set aside only these problematic elements, while applying the other elements of the provision in question.

Thirdly, the Convention may complement domestic legal rules in the area of administrative law in various ways, with Strasbourg case-law establishing specific guidance and methodology for the application of the Convention provisions in some types of situations[16]. In such cases, the domestic authorities should follow the indicated methodology and apply the relevant domestic legal rules accordingly.

Fourthly, the Convention may be used as a reference for the purpose of assessing the conformity of the domestic administrative act with the applicable legal rules, in the framework of the legality review. A violation of the Convention rule – be it substantive or procedural – may then be an autonomous reason for quashing or invalidating the domestic administrative act[17].

Fifthly, the Convention may guide the application of the available provisional measures by the domestic administrative courts in order to prevent potential irreversible harm to the persons concerned. In particular, if necessary, the administrative courts should suspend the execution of administrative acts against which complaints or appeals to administrative courts have been lodged. Conversely, provisional measures that violate Convention rights may be invalidated by a higher instance court[18].

Sixthly, the Convention may in certain situations be the sole legal basis for claims addressed to the administration, an example being claiming information from the administration upon the basis of Article 10 ECHR[19].

Seventhly, the examination of cases should take into account the standards of Article 13 with the aim of dealing with the substance of the relevant Convention complaint and providing appropriate relief for the violations of the Convention that have already occurred[20]. The mere quashing of an administrative act may not suffice to provide such redress and undo repair the moral and material damages already caused. The courts should therefore use all the available tools at their disposal, such as the power to issue injunctions should such a power exist in the domestic system.

[16] ECtHR judgment of 7 February 2012, *Von Hannover v. Germany (No. 2)*, applications nos. 40660/08, 60641/08; ECtHR judgment of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, application no. 18030/11.

[17] See the examples provided in the reports prepared by the Polish administrative judges.

[18] *S. Žalimienė*, The Convention as a Tool for Judicial Review by an Administrative Court Judge – the Lithuanian Perspective, published in the instant volume.

[19] For an example see *B. Maurer-Kober*, The Convention.

[20] See for instance ECtHR judgment of 27 September 1999, *Smith and Grady v. The United Kingdom*, applications nos. 33985/96, 33986/96, § 135; ECtHR judgment of 3 March 2007, *Bączkowski and Others v. Poland*, application no. 1543/06, § 79; compare *I. Jelić*, The European Convention.

§ 3. The enforcement of ECtHR's judgments by national administrative courts

The legal framework for the enforcement of ECtHR's judgments is defined by:

(i) Article 46 ECHR;

(ii) Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements[21],

(iii) the case-law of the Strasbourg Court.

The Rule 6 § 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, which is of particular relevance in this area, is worded as follows:

When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:

a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:

i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

Furthermore, the ECtHR has expressed the following views on these questions:

The State Party in question will be under an obligation not only to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (…). In exercising their choice of individual measures, the State party must bear in mind their primary aim of achieving restitutio in integrum (…).

These obligations reflect the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring

[21] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, CM/Del/Dec(2006)964/4.4-app4consolidated; https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000016806dd2a5%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}.

the situation which existed before the wrongful act was committed, provided that restitution is not "materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (Article 35 of the ARSIWA (…)). In other words, while restitution is the rule, there may be circumstances in which the State responsible is exempted – fully or in part – from this obligation, provided that it can show that such circumstances obtain (…)[22].

One has to add that the ECtHR, while addressing the issue of remedying the violation, usually confines itself to award a certain amount of money as "just satisfaction" in respect of non-pecuniary damage, and sometimes also awards compensation in respect of the material damage. Only in a certain cases does the Court recommend or order specific individual measures, and only in rare cases does the Court recommend or order some specific general measures. In most cases, the choice of appropriate individual and general measures is left to the State acting under the supervision of the Committee of Ministers.

Under the applicable rules, once the ECtHR has found a violation of the Convention, the State incurs the following obligations:

(i) to cease the violation;

(ii) to pay any just satisfaction awarded;

(iii) to take other appropriate individual remedial measures;

(iv) to take the necessary general measures in order to prevent similar violations of the Convention in the future.

It is not always possible to adopt the required individual measures within the existing legal framework in the respondent State, and in order to remedy an individual violation, it may sometimes be necessary to change the existing law.

Changes in domestic law may be necessary even more frequently in order to adopt the necessary general measures aimed at preventing similar violations in the future.

In this context, the courts may play the following role in the context of the execution of the ECtHR's judgments. Firstly, the ECtHR case-law does not indicate whether legislation should be changed by formal amendments or by the changes in the domestic case-law, adapting its content to the Convention standards by way of interpretation. In this context, the necessary modifications in the existing law may be introduced without formal amendments to legislation, simply by modifying the interpretation of the existing law[23]. Depending on the domestic legal framework, the supreme administrative court may either:

[22] ECtHR judgment of 29 May 2019, *Ilgar Mammadov v. Azerbaijan*, application no. 15172/13, §§ 150–151.

[23] See the examples provided by *G. Sagatys*, The Execution of European Court of Human Rights Judgments by National Judges, in the instant volume.

(i) adapt the interpretation while dealing with an individual case, if necessary in an enlarged judicial composition, thus setting a precedent – binding *de iure* or *de facto* – for the future in similar cases, or

(ii) resort to a ruling *in abstracto* with *erga omnes* effect.

An interpretive decision to prevent future violations may be necessary, in particular if the violation stems from serious divergences in the interpretation of some provisions of domestic law[24]. It is therefore necessary that the authorities that have the power to request an interpretive ruling *in abstracto* regularly follow the ECtHR's judgments and react if necessary with an appropriate request. Furthermore, research services of the apex courts should also follow the ECtHR's judgments and the flag to the judges all individual cases that raise Convention issues and call for setting a new interpretation of domestic law, more in line with the Convention.

Secondly, as noted in the Lithuanian Report, the execution of an ECtHR's judgment may require the adaption of practices within administrative courts, especially to ensure compliance with the Article 6 standards of procedural fairness[25].

Thirdly, it may be consulted by the political bodies in the process of preparation of draft legislation necessary to implement the ECtHR judgments, especially if the matter concerns the organisation of the judicial branch of the government[26].

Fourthly, in some of the States that took part in the conference, domestic legislation allows for the reopening of cases decided by administrative courts, with the exception of Austria and Slovenia. Two States go even further by allowing cases to be reopened if a similar violation has been found in another case, including one brought against another State: this is the case in Lithuania and Estonia. In Greece, the reopening of the proceedings depends on several conditions, *i.a.* the ECtHR judgment finding the violation attributable to Greek authorities is not manifestly deficient, unclear or arbitrary in its legal or factual basis, with regard to the assessment criteria in the ECtHR's own case-law (particularly that of its Grand Chamber), to CJEU jurisprudence, to the foundational principle of the ECtHR (procedural and substantive) subsidiarity, and to the Court's duty to provide adequate reasons when finding a Convention breach[27].

The reopening of an administrative case should enable the quashing of the existing administrative act and the issuance of a new one, this time in compliance with the Convention rules. However, the reopening of administrative cases does not necessarily solve all the problems faced by an applicant.

[24] On divergences in domestic law see *Nejdet Şahin and Perihan Şahin v. Turkey*, quoted above, and ECtHR judgment of 19 December 2018, *Molla Sali v. Greece*, application no. 20452/14.

[25] *G. Sagatys*, The Execution.

[26] *Ibid*.

[27] *M. Pikramenos*, opening statement, in the instant volume.

Firstly, the previous administrative act may have produced some practical effects that will not automatically disappear upon its quashing. Removing these practical effects may require some specific actions by the authorities, some of which may be practically irreversible. In such situations, only appropriate pecuniary compensation can alleviate the applicant's problems.

Secondly, an administrative act may address legal situations of several parties with conflicting interests[28], whereby only the party unsatisfied with the result will lodge an application to the ECtHR whereas the other parties may have an interest in maintaining the administrative act that was issued. In such situations, reopening the case and quashing the administrative act may detrimentally affect the legitimate interests of the other parties involved.

§ 4. Margin of appreciation and administrative courts

Protocol No. 15 has added the following recital to the Preamble to the Convention:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

This new recital reflects the existing case-law of the ECtHR on the margin of appreciation, developed since the 1970s[29]. As stated in the *travaux préparatoires* (The Explanatory Report to Protocol No. 15): *It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case-law*[30].

One may add that the introduction of this recital, on the one hand, prevents the Court from abandoning this doctrine and, on the other hand, should be understood as an invitation to further enhance and develop its scope. Under the clear wording of the preamble, it is the High Contracting Parties that enjoy the margin of appreciation. In other words, the margin of appreciation is granted to the competent domestic bodies, which may rely upon it when applying the Convention.

The following quote illustrates the approach adopted in this respect by the ECtHR:

[28] Por. *A. Adamska-Gallant*, The Execution.

[29] On this question see *A. Seibert-Fohr*, The Margin of Appreciation in the European Court of Human Rights' Practice, in the instant volume, as well as the publications referred to therein.

[30] Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24.VI.2013, https://rm.coe.int/1680a5278a.

In implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (…).

Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (…).

There will also usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (…)[31].

The margin of appreciation operates in particular with respect to two elements:

(i) the interpretation of the Convention provisions;

(ii) the analysis, under the proportionality principle, especially the identification of legitimate aims and the balancing of values[32].

The margin of appreciation may come into play in the interpretation of the Convention, provided that the interpretation by a domestic court does not contradict the interpretation established by the ECtHR. Such a situation arises in particular where there is no ECtHR case-law on a specific question or if the existing case-law defines very general and vague standards as guidance to the domestic authorities.

The reliance upon the margin of appreciation in the process of interpretation of the Convention may be illustrated with the judgment in the case of *Correia De Matos v. Portugal*[33], concerning the interpretation of Article 6 ECHR. The issue under consideration was whether Article 6 excludes a prohibition of self-representation by an indicted person in criminal proceedings. The Court, when interpreting the Convention provision, answered this question in the negative, invoking the margin of appreciation. The Court provided *i.a.* the following explanation in that regard:

The decision whether to allow an accused to defend himself or herself in person without the assistance of a lawyer or instead to assign a lawyer to represent him or her falls within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence (…)[34].

[31] ECtHR judgment of 16 July 2014, *Hämäläinen v. Finland*, application no. 37359/09, § 67.

[32] See: *A. Korbmacher*, Scope and Limits of the Margin of Appreciation Exercised by Administrative Judges – the German Perspective, in the instant volume.

[33] ECtHR judgment of 4 April 2018, *Correia De Matos v. Portugal*, application no. 56402/12.

[34] § 123.

The second situation may be illustrated by the following quote:

124. The Court observes that, in accordance with their case-law, the national courts ***carefully balanced*** *the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. (…)*

125. The Court also observes that the national courts ***explicitly took account of the Court's relevant case-law.*** *Whilst the Federal Court of Justice had changed its approach following the Von Hannover judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.*

126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision[35].

As noted by *A. Korbmacher*[36], and illustrated by the above example, the ability to effectively rely on the margin of appreciation depends on the quality of the domestic court's reasoning and the fact of duly taking into account ECtHR case-law.

The principle of proportionality is derived from the "necessary in a democratic society" clause in articles 8 to 11 but may also apply under provisions without such a clause, such as Article 1 of Protocol No. 1 and Article 3 of Protocol No. 1.

The participants to the conference raised the question whether domestic courts can invoke the margin of appreciation doctrine when applying the Convention[37]. The answer to this question should be in the affirmative. Reliance on the margin of appreciation implies deference not only to national legislatures but also to national judiciaries[38].

The margin of appreciation doctrine is part of the Court's case-law and forms part of the guidance provided by it to the domestic authorities. In order to apply the Convention, the domestic authorities should analyse the relevant Court's case-law[39], including its stance on the scope of the margin of appreciation in a particular domain. The fact that the Court leaves a broad margin of appreciation in respect of some types of cases is an important parameter for the domestic courts, with no reasons not to take this parameter into account and not to address it explicitly in the

[35] ECtHR judgment of 7 February 2012, *Von Hannover v. Germany* (No. 2), applications nos. 40660/08, 60641/08 (emphasis added).

[36] *A. Korbmacher*, Scope and limits.

[37] *B. Pořízková*, Universal Human Rights.

[38] A different view was expressed – in the context of the Czech legal system – by *B. Pořízková*, Universal Human Rights.

[39] *B. Pořízková*, Universal Human Rights.

reasoning of the domestic judicial decisions. Similarly, the domestic courts should take into account the narrow scope of the margin of appreciation in some areas and display particular vigilance in the application of the Convention in these areas. More generally, domestic courts should explicitly establish the scope of the margin of appreciation left to them and support their findings in this respect by persuasive arguments, which should take into account the existing case-law. It is then the task of the Government Agent to highlight these findings and arguments, and to further develop and strengthen the defence of the margin of appreciation in the submissions before the ECtHR.

The concept of margin of appreciation is the main tool used to give the domestic authorities some discretion in the application of the Convention, although it is not the only one. Tools such as autonomous notions, the living instrument idea, European consensus, strong international trends, the context of other applicable international rules, the obligations stemming from EU law, *etc*. may also be used to broaden the scope of possible interpretive options left to domestic judges.

§ 5. Conclusion

The dialogue between domestic courts and the ECtHR takes place through several channels. Firstly, judges speak to each other through judicial decisions[40]. The dialogue may further take place within the framework of Protocol No. 16, with the mechanism of advisory opinions requested from the ECtHR by apex domestic courts[41]. Another important channel consists of international conferences and multilateral meetings of judges, such as the official opening of the judicial year in Strasbourg or the present conference in Warsaw marking the 75th anniversary of the ECHR. Official visits of judges to partner courts and bilateral meetings are also an important tool, with speeches, academic lectures delivered by judges, and their publications complementing this list. Statements occasionally issued by the courts and press releases may also come into play.

The ability of domestic courts to engage in successful interactions with the ECtHR by the way of judicial decisions depends on several factors, the most important being the quality and persuasiveness of the reasoning of the domestic judicial decisions. Domestic judges who seek to influence the Strasbourg Court and induce changes in its case-law should demonstrate their knowledge of the Strasbourg law and duly take it into account in the reasoning[42]. Domestic courts should identify all relevant values and interests at stake. The interpretive solution proposed by domestic courts should

[40] See the examples provided by *B. Pořízková*, Universal Human Rights.
[41] See *S. Žalimienė*, The Convention.
[42] Compare *B. Pořízková*, Universal Human Rights.

not be presented as an overt challenge to the authority of the ECtHR but rather as a trade-off between different Convention values — one that may be preferable to the balance adopted thus far in Strasbourg. Factors such as strong international trends or emerging consensus, or simply the general concerns with the acceptability of the case-law by the wider public on certain issues can be further invoked to reinforce the argument. Contextual interpretation in the specific, exceptional circumstances can also be an option. It is important to explore all the interpretive tools developed in the ECtHR case-law. Submissions filed by Government Agents in proceedings before the ECtHR may further contribute to the judicial dialogue by carefully highlighting all the elements (in the reasoning of domestic judicial decisions) that are relevant from the perspective of the ECtHR case-law, ensuring that the fundamental features of the domestic judicial work are not lost in the vastness of the case file.

Not only the application of the ECHR in general, but also – more specifically – the function of Convention interpretation should be seen as a matter of shared responsibility between the Strasbourg Court and domestic courts. The latter are not only the primary guardians of the Convention but should also be fully recognised as legitimate co-interpreters of the Convention. Paraphrasing a formula used by legal scholarship in a completely different context[43], one may say that the ECtHR, the CJEU, all the domestic courts and all administrative bodies in the Council of Europe Member States belong to the open community of Convention interpreters.

[43] *P. Häberle*, Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen" Verfassungsinterpretation, JuristenZeitung, Vol. 30, No 10 (1975).

Part II:

Application of the European Convention on Human Rights and Specific Domains of Administrative Law – the Polish Case-Law

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms[1] has been shaping standards for the protection of individual rights in the Republic of Poland in a binding manner for more than thirty years. It is, in accordance with the provisions of the Constitution of the Republic of Poland[2], a source of generally and directly applicable law, taking precedence over statutory legislation. In its early days, the Convention was often cited by administrative courts merely for decorum, typically in cases involving foreigners. As it seems, this may have been related to the lack of widespread access to the case-law of the European Court of Human Rights. It was published only in hard copy and in the official languages of the Court. A noticeable change came with the creation of the HUDOC database, disseminating the Court's output online to a wider audience. Translations of selected Court judgments into Polish have also contributed to the more frequent application of the Convention[3].

The administration of justice by administrative courts consists in reviewing the legality of actions taken by the public administration (Article 184 of the Constitution of the Republic of Poland, in conjunction with Article 1 of the Law on the Or-

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Polish Journal of Laws of 1993, No. 61, item 284, as amended). As per the declaration of the Government of the Republic of Poland of 7 April 1993 on the ratification by the Republic of Poland of the Convention for the Protection of Human Rights and Fundamental Freedoms (Polish Journal of Laws No. 61, item 285), it entered into force for the Republic of Poland on 19 January 1993.

[2] Article 241(1) in conjunction with Article 87(1) and Article 91(1) and (2) of the Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws of 1997, No. 78, item 483).

[3] *E.g.*, selected ECtHR judgments are translated into Polish and made available on the website of the NSA: https://www.nsa.gov.pl/orzecznictwo-etpc.php. Discussions of ECtHR judgments important to the case-law of administrative courts are published in each issue of the Supreme Administrative Court's bimonthly publication, "Zeszyty Naukowe Sądownictwa Administracyjnego". Judgments of administrative courts for which the Convention was significant are also indicated in the annual reports on the activities of administrative courts.

ganisation of Administrative Courts[4]). There can be no doubt that the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms are an independent criterion for evaluating the legality of public administration's actions. The direct application of the provisions of the Convention means that even if the challenged act complies with statute, this does not preclude that it may be annulled by an administrative court for its violation of the Convention[5]. The recognition of the Convention as a benchmark for reviewing the legality of public administration's actions is common in the case-law of administrative courts. It is impossible to enumerate the areas of administrative law in which judges of the Supreme Administrative Court and judges of regional administrative courts have referred to the provisions of the Convention. The importance of the rights and freedoms protected by its provisions has been recognised in cases involving, among others: (1) the right to a fair trial[6]; (2) inaction and excessive length of administrative proceedings[7]; (3) excessive length of administrative court proceedings[8]; (4) compensation for the deprivation of property rights under the previous political system[9]; (5) mandatory vaccination[10]; (6) the granting of international protection to foreigners[11]; (7) vital records[12], (8) freedom of thought, conscience and religion[13]; (9) right to respect for private life[14].

There are examples of ECtHR judgments in which the Court itself positively assessed the jurisprudence of the Supreme Administrative Court. They concern situ-

[4] Act of 25 July 2002 – Law on the Organisation of Administrative Courts (Polish Journal of Laws 2024, item 1267).

[5] *E.g.*, NSA judgment of 28 September 2011, II OSK 1909/10, CBOSA [*Central Database of Administrative Court Judgments*].

[6] This group of cases also includes judgments of the Supreme Administrative Court regarding the status of judges as well as their impartiality and independence. *E.g.* NSA judgments of 21 September 2021, II GOK 10/18, II GOK 13/18 and II GOK 14/18, and decisions of 7 October 2024 and 12 December 2024, III FSK 605/24, CBOSA. In these cases, the Supreme Administrative Court referred to ECtHR judgments of: 1 December 2020 in *Ástráðsson v. Iceland*, application no. 26374/18, HUDOC; 22 July 2021 in *Reczkowicz v. Poland*, application no. 43447/19, HUDOC; 8 November 2021 in *Dolińska-Ficek and Ozimek v. Poland*, applications nos. 49868/19 and 57511/19, HUDOC; 3 February 2022 in *Advance Pharma sp. z o.o. v. Poland*, application no. 1469/20, HUDOC.

[7] NSA judgments of: 28 November 2024, I OSK 1530/24; 25 March 2025, II OSK 1587/24, CBOSA.

[8] *E.g.*, NSA decision of 12 April 2022, III FPP 1/22, CBOSA.

[9] NSA judgments of: 13 June 2025, I OSK 2394/23; 30 June 2025, I OSK 2495/23, CBOSA.

[10] NSA judgment of 18 February 2025, III OSK 110/22, CBOSA.

[11] NSA judgment of 29 May 2025, II OSK 2762/24, CBOSA; NSA decisions of: 18 January 2022, II OSK 2373/21; 12 September 2024, II OSK 1631/24, CBOSA.

[12] NSA judgments of: 22 June 2021, II OSK 2608/19; 6 July 2022, II OSK 2376/19; 22 May 2025, II OSK 2155/22, CBOSA.

[13] NSA judgment of 28 May 2025, II OSK 985/22, CBOSA.

[14] NSA judgment of 22 May 2025, II OSK 1682/24, CBOSA.

ations where either national provisions leading to a violation of the ECHR[15] were in force, or legislative or executive authorities took measures violating Article 6 ECHR[16].

The ECtHR has also considered the standard of protection of individuals before Polish administrative courts. The Court's judgment in *Potocka and Others v. Poland*[17] was of great significance, as it was the first time that a violation of Article 6 ECHR was alleged on the basis of the principles of judicial review of an administrative decision. The Court found that there had been no violation of Article 6 ECHR in the case examined by the Supreme Administrative Court, because the administrative court had examined all the issues raised by the parties, both legal and factual[18]. The judicial review of administrative decisions, in order to comply with the standard set out in Article 6 ECHR for "civil matters", should therefore always include a review of the facts accepted by the authority as the basis for its administrative decision. This obligation can certainly be fulfilled in administrative cases that are considered civil cases within the meaning of Article 6 ECHR, under the procedure laid down in the Law on Proceedings before Administrative Courts[19]. However, it should be noted that in some administrative cases, the Court orders that facts arising after the final decision has been issued be taken into account[20]. Problems with ensuring the

[15] *E.g.* judgment of 14 September 2010 in *Subicka v. Poland*, application no. 29342/06, HUDOC, §§ 44–45. The Court found that the jurisprudence of the Supreme Administrative Court, which held that the time limit for filing a cassation appeal by a court-appointed attorney should run from the date on which that attorney was given access to the case files, was consistent with the standards of the Convention. The Act of 9 April 2015 amending the Law on Proceedings before Administrative Courts (Polish Journal of Laws of 2015, item 658) introduced an appropriate amendment to Article 177 of the Law on Proceedings before Administrative Courts.

[16] See judgment of 9 May 2025 in *Sadomski v. Poland*, application no. 56297/21, HUDOC, §§ 95–97. The Court pointed to the "determination of the Supreme Administrative Court in examining the case pending before it" and stated that "the Supreme Administrative Court duly fulfilled its obligation under the principle of subsidiarity" by first granting the applicant interim protection and then issuing a judgment in his favour.

[17] ECtHR judgment of 4 October 2021, application no. 33776/96, §§ 54–59.

[18] It was important to establish the competence of the Supreme Administrative Court to assess all issues raised by the parties that are relevant to the decision, because the full scope – factual and legal – of the examination of the case meets the requirements of Article 6 ECHR.

[19] Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Polish Journal of Laws of 2024, item 935, as amended).

[20] According to the ECtHR, these circumstances must be taken into account in order to meet the requirements of Article 13 ECHR in cases where there is a possibility of a violation of Article 3 ECHR if administrative courts review decisions requiring a foreigner to return or other decisions having similar effects in the form of expulsion of a foreigner from the territory of the state. For the assessment of a violation of Article 3 ECHR in the decision ordering the foreigner to leave the country, it is the factual date of expulsion that is relevant, or, if the decision has not been enforced by the time the case is examined by the ECtHR, the date of the examination of the case by the Court. It should be emphasized that the ECtHR also conducts, *ex officio*, the necessary investigations to assess whether a decision

required standard may also arise in cases concerning broadly understood administrative sanctions, to which the standards of "criminal cases" within the meaning of Article 6 ECHR should apply[21]. There can therefore be no doubt that administrative courts will have to deal with alleged violations of Article 6 ECHR raised in cases concerning administrative sanctions.

On the basis of Articles 6 and 13 ECHR, the European Court of Human Rights has not only laid down general principles for the examination of administrative cases by national courts, but also referred to specific procedural guarantees. The judgment in the case of *Poklikayew v. Poland* may serve as an example[22]. In it, the Court found that the use of materials that were not disclosed to the party by the authority at the administrative stage, based on the statutory grounds set out in Article 74 § 1 of the Code of Administrative Procedure[23] and Article 179 § 1 of the Tax Ordinance[24], violated the guarantees provided for in Article 1 of Protocol No. 7 to the Convention[25] in the case under consideration.

issued by national authorities violates Article 3 ECHR (*e.g.*, ECtHR judgment of 28 February 2008 in *Saadi v. Italy*, application no. 37201/06, HUDOC, § 133; ECtHR judgment of 17 February 2004, *Venkadajalasarma v. the Netherlands*, application no. 58510/00, HUDOC, § 63). The rules of procedure before an administrative court do not take these standards into account, because an administrative court adjudicates on the basis of the case file and reviews the legality of the challenged decision according to the facts and the law as they were on the date of the decision (Article 133 § 1 APAC) and does take evidence, except from documents (Article 106 § 3 APAC).

[21] Convention standards in matters of sanctions were defined, i.a., by ECtHR judgments of 21 February 1984, *Öztürk v. Germany*, application no. 8544/79 (HUDOC), and of 23 October 1995, *Schmautzer v. Austria*, application no. 15523/89 (HUDOC). In proceedings before the Supreme Administrative Court, alleged violations of Article 6 ECHR arise in cases involving administrative sanctions, *e.g.*, in the case of a fee for the lack of a collection network for end-of-life vehicles imposed by the Chief Inspector of Environmental Protection. The Supreme Administrative Court ruled that it is an administrative sanction and, therefore, its judicial review is subject to the standards applicable to criminal cases within the meaning of Article 6 ECHR – *e.g.*, judgments of: 5 December 2012, II OSK 2377/12; 8 January 2013, II OSK 2376/12 and II OSK 2374/12, CBOSA. However, the Supreme Administrative Court did not address the guarantees referred to in Article 6(3) ECHR in these cases, because it granted the cassation appeals on the grounds that new provisions had come into force after the commission of an act that was contrary to the applicable standards, which were less severe and which should constitute the basis for the action of the administrative authority towards the entity against which sanctions are being considered.

[22] ECtHR judgment of 22 June 2023, *Poklikayew v. Poland*, application no. 1103/16, HUDOC. The Court's position in *Poklikayew* was a continuation of its previous case-law on this issue – see the judgment of the Grand Chamber of the ECtHR of 15 October 2020, *Muhammad and Muhammad v. Romania*, application no. 80982/12, HUDOC.

[23] Act of 14 June 1960 – Code of Administrative Procedure (Polish Journal of Laws of 2024, item 572).

[24] Act of 29 August 1997 – Tax Ordinance (Polish Journal of Laws of 2023, item 2383, as amended).

[25] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Strasbourg on 22 November 1984 (Polish Journal of Laws of 2003, No. 42, item 364).

During the COVID-19 pandemic, the standards set out in Article 6 ECHR served as a reference point for assessing the examination of cases by administrative courts in camera. Recognising that the right to a public hearing is not absolute and may be subject to restrictions, the Supreme Administrative Court did not grant the allegation that the right to a fair trial guaranteed in Article 6 ECHR was violated if the parties to the proceedings were guaranteed the right to defend themselves and the opportunity to present their position in writing before the case was heard in camera[26]. With regard to the admissibility of hearing a case in camera, the standards of the right to a fair trial within the meaning of Article 6(1) ECHR were applied in conjunction with the guarantees arising from Article 45(1) of the Polish Constitution[27].

Another example of the direct application of the Convention was the assessment of the jurisdiction of an administrative court to hear a complaint against the refusal to issue a national visa to a foreigner. The Supreme Administrative Court ruled that the administrative court had jurisdiction to hear the complaint against the refusal to issue a national visa lodged by a foreigner who invoked the right to respect for family life under Article 13 in conjunction with Article 8 ECHR, despite the exclusion of that court's jurisdiction in such matters under national law – Article 5(4) APAC[28].

The significance of the Convention for the case-law of administrative courts is not limited solely to the protection of procedural standards. Due to the rights and freedoms guaranteed in the Convention, it may constitute a criterion for assessing the substantive legal content of the decision under review. An example of such use of the Convention may be found in cases where administrative courts referred to the protection of property rights in connection with the right to compensation for so-called property left beyond the Bug River[29]. The Court broadly defined the scope of the concept of property within the meaning of Article 1 of Protocol No. 1 to the

[26] *E.g.*, NSA judgments of: 30 May 2023, III OSK 6037/21; 25 April 2024, II FSK 968/21, CBOSA.

[27] *E.g.*, NSA judgment of 12 April 2022, II OSK 1652/21, ONSAiWSA [*Case-Law of the Supreme Administrative Court and of Regional Administrative Courts*] 2022, No. 5, item 75. The Supreme Administrative Court ruled that "the restriction of the right to a public hearing provided for in Article 15zzs4 of the COVID Act is admissible under Articles 45 and 31(3) of the Constitution, as it refers to an exceptional situation – a state of an epidemic threat or a state of epidemic – and thus serves to protect public health, public order, the individual rights and freedoms, as well as the performance of public authority tasks arising from Article 68(4) of the Constitution, in accordance with which public authorities shall combat epidemic diseases, balancing individual and public values in exceptional circumstances".

[28] NSA decision of 18 January 2022, II OSK 2373/21, ONSAiWSA 2022, No. 6, item 82.

[29] Cf. NSA judgments of: 18 December 2024, I OSK 1948/21; 9 November 2022, I OSK 2154/21; 7 October 2008, I OSK 1410/07; 1 December 2015, I OSK 1503/14, CBOSA.

Convention[30], recognising that it also includes claims against the State Treasury (the right to compensation for so-called property left beyond the Bug River)[31].

The Court drew attention to the obligation to balance the individual interests of the property owner and the public interest expressed in the need to protect monuments and cultural heritage in its judgment in *Potomska and Potomski v. Poland*[32]. The principles of properly balancing both interests defined by the Court in this case have become an important guideline for administrative courts[33].

In many rulings, administrative courts referred to the Convention and its protocols in connection with alleged violations of the right to respect for private and family life resulting from the failure of the Polish legal system to recognise civil partnerships and foreign same-sex marriages[34]. The administrative courts have also repeatedly pointed out the need for the direct application of the Convention in their rulings in cases where administrative decisions imposed an obligation on a foreigner to leave Poland. They noted that despite fulfilling the statutory conditions provided for in national law, a decision cannot be issued if the expulsion of a foreigner would violate the right to family and private life guaranteed in Article 8 ECHR[35].

The application of the provisions of the Convention by administrative courts may result from the clearly expressed will of the national or EU legislator. An example is the definition of the concept of "persecution", which is a prerequisite for granting international protection due to violations of the rights guaranteed in the Convention[36]. It is defined as a serious violation of human rights, in particular those

[30] Protocol No. 1 and 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Paris on 20 March 1952, and drawn up in Strasbourg on 16 September 1963 (Polish Journal of Laws of 1995, No. 36, item 175, as amended).

[31] ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, HUDOC (pilot judgment).

[32] ECtHR judgment of 29 March 2011, application no. 33949/05, HUDOC.

[33] *E.g.*, NSA judgments of: 16 April 2021, II OSK 2625/19; 9 November 2016, II OSK 254/15; 26 October 2016, II OSK 96/15; 18 September 2014, II OSK 656/13, CBOSA.

[34] *E.g.*, NSA judgments of: 27 September 2023, II OSK 1012/22; 22 June 2021, II OSK 2608/19; 28 February 2018, II OSK 1112/16; 25 February 2020, II OSK 1059/18, CBOSA.

[35] NSA judgment of 30 June 2005, II OSK 554/05, ONSAiWSA 2006, No. 4, item 114.

[36] Article 13(3) of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Polish Journal of Laws of 2025, item 223, as amended), containing the definition of persecution which a foreigner must demonstrate a well-founded fear of in order to obtain a refugee status in Poland, and Article 9(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ L 337, 20.12.2011, pp. 9–26). The concept of "persecution" is defined in these provisions as a serious violation of fundamental human rights, in particular rights that cannot be derogated from under Article 15(2) ECHR or a combination of various measures, including human rights violations that are serious enough to affect an individual in a similar way.

which may be derogated from under Article 15(2) ECHR. References to the provisions of the ECHR can also be found, for example, in Article 348(1) and (2) of the Act on Foreigners[37] which lists the prerequisites for granting residence permits on humanitarian grounds. The legislator also opted for a similar solution, i.a., in Article 1(3) of the Act of 17 June 2004 on complaints against violations of a party's right to have a case examined in pre-trial proceedings conducted or supervised by a public prosecutor and in court proceedings without undue delay[38]. According to that Article, the provisions of this Act should be applied in accordance with the standards resulting from the Convention for the Protection of Human Rights and Fundamental Freedoms.

For administrative courts to apply the Convention and the standards of protection of individual rights developed in the case-law of the ECtHR, it is equally important to enforce the judgments of the Court in cases that were examined by Polish administrative courts prior to the submission of the application. This is achieved, in particular, by the institution of reopening of court proceedings pursuant to Article 272 § 3 APAC which is individualised in nature[39]. However, the implementation of many ECtHR judgments requires legislative changes. Ensuring the effectiveness of the ECtHR's judgment is, in general, possible by taking into account the Court's position on the interpretation of the law or the assessment of jurisprudence in a specific category of cases in the adjudication process. For example, the judgment in the case of *Sieć Obywatelska Watchdog Polska v. Poland*[40] excludes – as it is incompatible with Article 10 ECHR – the refusal to grant access to information about meetings of persons performing public functions based solely on formal criteria, depending on the manner in which the applicant formulates their request, without specific justification for such a refusal. Administrative courts take into account the position of the ECtHR, according to which a request for a "calendar of meetings", regardless of its literal wording, may be classified, based on the applicant's intentions, as a request for a list of meetings held by a public figure, i.e., information that is public in nature[41]. Undoubtedly, an interpretation of legal provisions that is friendly to the Convention ensures the effectiveness of the Convention in the national legal system.

[37] Act of 12 December 2013 on foreigners (Polish Journal of Laws of 2024, item 769, as amended).

[38] Polish Journal of Laws of 2023, item 1725.

[39] The Regional Administrative Court in Bydgoszcz, in its judgment of 24 April 2024, II SA/Bd 368/21 (CBOSA), reopened proceedings on the basis of the ECtHR judgment of 19 November 2020 in *Gorzkowski v. Poland*, application no. 65546/13 (HUDOC).

[40] ECtHR judgment of 21 March 2024, application no. 10103/20, HUDOC.

[41] See the judgment of the Regional Administrative Court in Lublin of 20 March 2025, II SAB/Lu 13/25, CBOSA; judgment of the Regional Administrative Court in Gdańsk of 3 October 2024, III SAB/Gd 170/24, CBOSA.

Changes in the modern world, the social and economic development, the migration of people for various reasons, as well as various threats related to these phenomena may affect the scope of protection granted under the Convention by the ECtHR and national courts. The threats associated with new phenomena may cause tensions in relations between the judiciary and other state authorities[42].

The increase in the number of applications submitted to the Court and administrative courts may be influenced by the lack of uniform jurisprudence or the failure to guarantee the protection of the rights and freedoms listed in the Convention in national law. Recently, the Court gave notice to the Polish Government of a group of six applications, *Kuczma and Others v. Poland* (Application no. 36351/18 and others)[43] for violation of Article 6(1) ECHR due to the lack of access to review by administrative courts of air quality protection programmes and Article 13 ECHR due to the lack of a domestic remedy that would allow such programmes to be challenged and thus require the state to effectively combat air pollution. Given the seriousness of the allegations raised in these cases, it may be necessary to amend national law or judicial practice.

* * *

The great importance of the Convention for the case-law of administrative courts and the complexity of its application are reflected in the individual sections of this monograph, published for the 75th anniversary of the Convention for the Protection of Human Rights and Fundamental Freedoms.

I would like to thank the judges of the Supreme Administrative Court for their contribution to the creation of this book. The studies contained herein reflect not only the scientific interests and reflections of the authors, but above all the experience of judges in applying the Convention.

I would like to express my appreciation and gratitude to the scientific editor, prof. dr hab. Krzysztof Wojtyczek, judge of the European Court of Human Rights in 2012–2024 for providing valuable comments to the authors and ensuring the highest quality of the publication. I would like to thank prof. dr hab. Leszek Garlicki, judge of the European Court of Human Rights from 2002 to 2012, and dr hab. Marcin Wiącek, the Polish Commissioner for Human Rights, for taking on the task of reviewing this book.

[42] The tensions may also have a broader European dimension, as indicated by the statement of 22 May 2025, in the form of an open letter addressed by the leaders of nine European countries to the ECtHR concerning the interpretation of the Convention in asylum and migration matters, see https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf (date of access: 10.7.2025).

[43] See https://hudoc.echr.coe.int/?i=001-243216 (date of access: 10.7.2025).

I hope that reading the articles included in this monograph will help to clarify interpretative doubts related to the application of the Convention, disseminate the case-law of administrative courts, and thus increase the legal protection provided by administrative courts.

prof. dr hab. Jacek Chlebny
President of the Supreme Administrative Court of Poland

Tomasz Bąkowski*

A Few Comments on Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as a Basis for Challenging the Provisions of Local Spatial Development Plans

In accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Paris on 20 March 1952, which entered into force in relation to the Republic of Poland on 10 October 1994[1], "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The principles arising from this provision[2] have been incorporated into national law. Provisions corresponding to those principles are found both in the Polish

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Gdańsk; ORCID: 0000-0002-9363-2124.

[1] Government Declaration of 18 November 1994 on the ratification by the Republic of Poland of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Paris on 20 March 1952, and Protocol No. 2 to the above Convention, done at Strasbourg on 6 May 1963 (Polish Journal of Laws of 1995, No. 36, item 178).

[2] In the literature, based on the cited provision, the following principles are reconstructed: (1) respect for property; (2) the conditional possibility of deprivation of property; and (3) regulation of the use of property in accordance with the public interest (see *M.A. Nowicki*, [in:] Komentarz do Protokołu Nr 1 do Konwencji o ochronie praw człowieka i podstawowych wolności, [in:] Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, Warszawa 2021, art. 1).

Constitution, including Articles 2[3], 21[4], 31(3)[5] and 64[6], as well as in statutory solutions, in particular the provisions of the Real Estate Management Act (GospNierU), the Spatial Development Plan Act[7], and the Construction Law[8], or so-called special acts laying out specific legal regulations concerning the implementation of certain investments[9]. It could therefore be assumed that issues concerning the protection of property rights, or more broadly, property and its boundaries, as well as cases in which such protection is excluded, have been incorporated into the national legal system in accordance with Article 1 of Protocol No. 1, as indicated in administrative court case-law[10], while any doubts arising as to the compatibility of national legislation in this regard are subject to assessment by the ECtHR. This, in turn, raises the question of the legitimacy of reviewing general and individual acts subject to the jurisdiction of administrative courts in terms of their compliance with Article 1 of Protocol No. 1. The reason for considering this issue is the numerous cases of administrative court review of these acts, which are criticised for being inconsistent with Article 1 of Protocol No. 1, often alongside allegations of violations of the above-mentioned provisions of the Polish Constitution; one category of these acts are resolutions on local spatial development plans.

[3] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

[4] "1. The Republic of Poland shall protect ownership and the right of succession. 2. Expropriation may be allowed solely for public purposes and for just compensation".

[5] "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

[6] "1. Everyone shall have the right to ownership, other property rights and the right of succession. 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. 3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right".

[7] The Act of 27 March 2003 on the Spatial Development Plan (consolidated text, Polish Journal of Laws of 2024, item 1130).

[8] The Act of 7 July 1994 – the Construction Law (consolidated text, Polish Journal of Laws of 2025, item 418).

[9] *E.g.* the Act of 10 April 2003 on specific rules for the preparation and implementation of public road investments (Polish Journal of Laws of 2024, item 311); the Act of 12 February 2009 on specific rules for the preparation and implementation of public airport investments (Polish Journal of Laws of 2024, item 1464); the Act of 24 July 2015 on the preparation and implementation of strategic investments in transmission networks (Polish Journal of Laws of 2024, item 1199).

[10] See, *i.a.* the judgment of the NSA of 22 May 2024, II OSK 354/24, Legalis, which indicated that the substantive content of Article 1 of Protocol No. 1 is essentially identical to the content of Article 22, Article 64(1)–(3) and Article 31(3) of the Constitution of the Republic of Poland. Similarly, in the judgment of the NSA of 8 January 2014, I OSK 1495/12, Legalis.

The judicial practice of administrative courts, confirming the use of Article 1 of Protocol No. 1 as a benchmark for reviewing the legality of public administration activities, may lead to the conclusion that allegations of violations of Article 1 of Protocol No. 1 by public administration bodies are a kind of superfluous complaint, raised in order to emphasise or increase the 'specific weight' of the basis for the appeal. A review of administrative court case-law allows us to identify cases confirming this proposition, but also provides grounds for concluding that judicial review of public administration activities for compliance with Article 1 of Protocol No. 1 is justified despite the existence of provisions of national law adequate thereto. This is evidenced, among other things, by judicial review of the application of the Real Estate Management Act and special investment and construction laws in relation to decisions concerning various forms of expropriation and related issues of compensation for expropriated property[11]. In this regard, it can be ventured that the judgment of the ECtHR of 6 November 2007 in the case of *Bugajny and Others v. Poland*[12], concerning the refusal to expropriate property intended for public roads and the payment of compensation, played a significant role in 'popularising' the use of Article 1 of Protocol No. 1 in constructing the grounds for challenging administrative decisions issued in the above cases. In its judgment, the ECtHR found, *inter alia*, that there had been a violation of Article 1 of Protocol No. 1 resulting from the misinterpretation and misapplication of Article 98 in conjunction with Article 93 of the Real Estate Management Act.

The case-law of the administrative courts, as well as the views formulated in legal scholarship, provide grounds for asserting that Article 1 of Protocol No. 1 also serves as a means of verifying the legality of the activities of public administration bodies in other areas. One such area is spatial planning, including the preparation and adoption of local spatial development plans by municipal authorities. In turn, the source of the positions formulated by administrative courts and legal scholars in this regard is the case-law of the ECtHR[13]. The principles reconstructed on the basis of ECtHR

[11] See, *e.g.* NSA rulings dated: 13 September 2013, I OSK 802/12; 30 July 2014, II OSK 1343/14; 5 May 2016, I OSK 1153/14; 1 June 2016, I OSK 1962/14; 9 May 2017, I OSK 1975/15; 25 May 2017, I OSK 2263/15; 26 July 2017, I OSK 2665/15; 12 October 2017, I OSK 925/17; 22 November 2019, I OSK 795/18; 21 May 2020, I OSK 1704/19; 4 May 2021, I OSK 45/19; and 10 February 2022, II OSK 2600/21 – available in Legalis.

[12] ECtHR judgment of 6 November 2007, *Bugajny and Others v. Poland*, application no. 22531/05, https://trybunal.gov.pl/polskie-akcenty-w-orzecznictwie-miedzynarodowym/rada-europy-europejski-trybunal-praw-czlowieka/w-sprawach-polskich/art/8017-sprawa-bugajny-i-inni-przeciwko-polsce-skarga-nr-2253105-wyrok-6112007 (date of access: 21.7.2025).

[13] See, *i.a.*, *S. Pawłowski*, Modyfikacje klasycznej koncepcji wywłaszczenia a gwarancje praw jednostki, Poznań 2018, p. 381; *J. Dziedzic-Bukowska, P. Sosnowski*, Działania samorządu terytorialnego w sferze planowania przestrzennego a prawo własności w świetle standardów Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności z 1950 r., [in:] Internacjonalizacja administracji

case-law serve to verify the compliance of spatial planning instruments with Article 1 of Protocol No. 1. These are the principles of peaceful enjoyment of property, restriction of rights justified by the public interest, fair balance, and legal certainty[14]. The case-law of the ECtHR indicates, *inter alia*, that restrictions on the exercise of property rights introduced by local spatial development plans constitute an interference with the right to respect for property within the meaning of Article 1 of Protocol No. 1. In legal scholarship, this is seen in terms of supporting the definition of so-called actual expropriation, which includes expropriation through planning[15]. As *M. Gdesz* writes, "the phrase «peaceful enjoyment of possessions» used in Article 1 of Protocol No. 1 implies a scope of protection of property rights that goes far beyond the narrowly understood concept of expropriation"[16]. The broad protection of property rights under the standard reconstructed from Article 1 of Protocol No. 1 in the area of spatial planning is reflected in the judgment cited by *M. Gdesz* in the case of *Katte Klitsche de la Grange v. Italy*[17], in which the ECtHR explicitly recognised that the provisions of a local spatial development plan restricting the use of property meet the criteria for interference with the right to respect for property referred to in Article 1 of Protocol No. 1[18], which means that in cases where such interference is not justified by the need to regulate the use of property in accordance with the general interest within the meaning of that provision, it will be considered a violation of that provision of Protocol No. 1.

When analysing the content of complaints and cassation appeals, and subsequently of assessments of their validity as contained in the justifications for administrative court rulings, it can be seen that allegations of a violation of Article 1 of Protocol No. 1 on the part of a municipal council through a resolution on a local spatial development plan are usually accompanied (in various combinations) by allegations of violation of Articles 2, 21, 31(3), 32 and 64 of the Polish Constitution[19]. One may also refer to rulings in which administrative courts, when addressing allegations of

publicznej (eds. *Z. Czarnik, J. Posłuszny, L. Żukowski*), Warszawa 2015, pp. 436 *et seq.* and the ECtHR judgments cited in both publications.

[14] Cf. *J. Dziedzic-Bukowska*, *P. Sosnowski*, Działania, pp. 434–439.

[15] *M. Gdesz*, Wywłaszczenie planistyczne, Sam.Teryt. 2014, No. 4, pp. 51–61.

[16] *Ibid.*, p. 53; *S. Pawłowski*, Modyfikacje, pp. 382 *et seq.*

[17] ECtHR judgment of 27 October 1994, *Katte Klitsche de la Grange v. Italy*, application no. 12539/86, HUDOC.

[18] *M. Gdesz*, Wywłaszczenie, p. 53.

[19] See, *i.a.*, NSA rulings dated: 9 December 2009, II OSK 1362/09; 14 November 2013, II OSK 81/13; 10 April 2014, II OSK 2732/12; 22 July 2014, II OSK 408/13; 24 October 2018, II OSK 1966/18; 10 June 2020, II OSK 1805/19; 9 March 2021, II OSK 1872/18; 16 May 2023, II OSK 1392/20; 26 September 2023, II OSK 969/22; 17 January 2024, II OSK 2121/22; 22 February 2024, II OSK 1330/21; 6 May 2024, II OSK 675/23; 13 September 2024, I OSK 1009/21; and dated 9 December 2024, II OSK 2318/23 – available in Legalis.

violations of the provisions of the Polish Constitution reflecting the content of Article 1 of Protocol No. 1, refer exclusively to the constitutional provisions, something which, in cases where the norms resulting from both sources are identical, should not be considered an erroneous omission of the assessment of the basis for the appeal indicated by the appellant[20].

Significantly less frequently, a violation of Article 1 of Protocol No. 1 is raised as the basis for challenging the provisions of a local spatial development plan without reference to the above-mentioned provisions of the Polish Constitution[21], which may indicate that the reference to the relevant provision(s) of the Constitution is intended to set (specify) the context in which, in the opinion of the author of the complaint or cassation appeal, Article 1 of Protocol No. 1 is violated.

In judicial practice, it sometimes happens that a court, when assessing a violation of a provision of the Polish Constitution correlating with the content of Article 1 of Protocol No. 1, appears to reinforce its position by referring to that article, which was not cited as the basis for the appeal[22]. This could be considered additional confirmation of the legitimacy of the judicial review of local spatial development plans in terms of their compliance with Article 1 of Protocol No. 1, regardless of the fact that, as indicated above, many provisions of the Polish Constitution can be reconstructed as norms referring to that article.

In the context of administrative court review of local spatial development plans in terms of their compliance with Article 1 of Protocol No. 1, it is worth noting certain limitations resulting from the scope and nature of the jurisdiction of administrative courts. These restrictions are particularly evident in situations where the subject matter of the appeal are the provisions of local spatial development plans designating private land for public purposes within the meaning of Article 6 of the Real Estate Management Act, which provides grounds for the acquisition of such land by the State Treasury or local government authorities by way of an agreement, and, in the absence of the owner's consent to conclude such an agreement, by way of expropriation. In many cases, public investments envisaged in local spatial development plans are not implemented for years, which leads to the so-called 'freezing' of the area, resulting, among other things, in the inability to develop the property in line with the owner's intentions, its actual non-transferability, and, consequently, a reduction in

[20] See, *i.a.* NSA rulings dated: 26 June 2019, II OSK 1516/18; 27 February 2020, II OSK 41/19; and 28 February 2024, II OSK 1393/21 – available in Legalis.

[21] See, *e.g.* NSA rulings dated: 18 September 2014, II OSK 686/13; 25 January 2017, II OSK 1143/15; and 18 March 2021, II OSK 1775/18 – available in Legalis.

[22] See, *i.a.* NSA rulings dated: 4 November 2011, II OSK 1855/11; and 23 November 2016, II OSK 556/15 – available in Legalis.

the owner's rights referred to in Article 140 of the Civil Code[23], while the obligations arising from the ownership of the property, including those arising from tax regulations, are maintained.

Such cases, which also occur in other States Parties to the Convention, have been the subject of rulings by the ECtHR, which has classified them as violations of Article 1 of Protocol No. 1[24]. However, complaints lodged with Polish administrative courts against local spatial development plans designating private land for public purpose investments, justified by the failure to implement such investments, preceded by the purchase of property or its expropriation with compensation, are not substantiated. The reason for this is the scope of the review of the legality of the resolution on the local spatial development plan. The courts assess the legality of these resolutions on the date they are adopted, and therefore the 'freezing' of the land, which is contrary to Article 1 of Protocol No. 1, escapes the review of the administrative courts.

In summary, it should be emphasised that the principles set out in Article 1 of Protocol No. 1, although reflected in the provisions of the Polish Constitution, are recognised and even explicitly referred to as grounds for challenging the provisions of a local spatial development plan, or as grounds for a cassation appeal that deserve consideration in certain circumstances[25]. In the context of challenging the provisions of a local spatial development plan before an administrative court, the interpretation of Article 1 of Protocol No. 1, which defines the concept of actual expropriation, one form of which is expropriation through planning, is also significant. This, in turn, if not justified by the principles resulting from Article 1 of Protocol No. 1, of conditional deprivation of property or of regulation of the use of property in accordance with the public interest, will constitute a violation of this provision.

Finally, the above-mentioned issue of judicial review of local spatial development plans on the date of their adoption pursuant to Article 1 of Protocol No. 1 provides grounds for their verification by the ECtHR in situations where the pursuit of public objectives on private land, as set out in the plans, does not result in the transfer of such land to the State Treasury or other public entities within a reasonable period

[23] In accordance with the above provision: "Within the limits specified by law and the principles of social coexistence, the owner may, to the exclusion of other persons, use the property in accordance with the socio-economic purpose of their right, in particular, they may derive benefits and other income from the thing. Within the same limits, he/she may dispose of the thing".

[24] See on this subject *D. Sześciło*, Z orzecznictwa trybunałów europejskich. Wyroki Europejskiego Trybunału Praw Człowieka w sprawach: *Skibiński przeciwko Polsce* z 14 listopada 2006 r., *Rosiński przeciwko Polsce* z 17 lipca 2007 r. i *Skrzyński przeciwko Polsce* z 6 września 2007 r., Sam.Teryt. 2008, No. 1–2, pp. 154–161, and *ibid.*, Z orzecznictwa trybunałów europejskich Wyrok Europejskiego Trybunału Praw Człowieka z 23 września 1982 r. w sprawie *Sporrong i Lönnroth przeciwko Szwecji*, skargi nr 7151/75 i nr 7152/75, Sam.Teryt. 2008, No. 7–8, pp. 152–156.

[25] See, *i.a.* NSA judgment of 31 January 2018, II OSK 908/16, Legalis.

of time, thereby depriving the owners of the possibility of enjoying their property or receiving fair compensation for its sale (the price for the sale to the entity competent to pursue the public objective, or compensation for expropriation).

Abstract

The study was devoted to the role of Article 1 of Protocol No. 1 of the Convention for Protection of Human Rights and Fundamental Freedoms in the legal review of local spatial development plans carried out by administrative courts. The elaboration addresses the issue of the legitimacy of simultaneously raising the charge of violation by the resolution on the local plan of Article 1 of Protocol No. 1 and provisions of the Constitution of Republic of Poland, which have identical content. It also pointed out the normative limitations of judicial review of the compliance of local plans with Article 1 of Protocol No. 1 to the Convention.

Stanisław Bogucki*

The Concept of a Spouse and a Person Living *de facto* in a Marital Relationship in Property Taxes in the Light of the European Convention on Human Rights

§ 1. Introduction

Property taxes are a group that is not uniform. These include taxes that either apply to all or part of the assets owned, or are levied on the increase in the value of the assets, or result from their turnover (property tax, agricultural tax, forest tax, transport tax, inheritance and donation tax, tax on civil law transactions)[1]. It should be noted that there is no complete agreement in the literature regarding an unambiguous classification of specific taxes into the group of property taxes[2].

An element that seems controversial in the interpretation of property tax regulations covering tax exemptions, *i.e.*, among others, Article 4(1)(6) and Article 4a(1) of the Inheritance and Donation Tax Act, as well as Article 9(5) and (10)(b) and (c) of the Tax on Civil Law Transactions Act and Article 12(5) of the Agricultural Tax

* Judge of the Supreme Administrative Court of Poland, Vice-President of the III Division of the Financial Chamber, dr; ORCID: 0000-0002-5532-3080.

[1] See *B. Brzeziński*, Prawo podatkowe. Zagadnienia teorii i praktyki, Toruń 2017, pp. 177 *et seq.*; *M. Kalinowski*, Podatki majątkowe, [in:] Zagadnienia ogólne prawa podatkowego (eds. *W. Nykiel*, *M. Wilk*), Łódź 2014, pp. 121 *et seq.*; *P. Smoleń*, Podatki majątkowe, [in:] System prawa finansowego, Vol. 3, Prawo daninowe (ed. *L. Etel*), Warszawa 2010, pp. 329–330; *M. Sosnowski*, Sprawność fiskalna podatków majątkowych, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu, No. 528, 2018, p. 234; *R. Rosiński*, Istota i znaczenie fiskalne podatków majątkowych w Polsce, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu, No. 158, 2011, p. 804.

[2] *P. Felis*, Elementy teorii i praktyki podatków majątkowych. Poszukiwanie ładu w opodatkowaniu nieruchomości w Polsce z perspektywy przedsiębiorców oraz jednostek samorządu terytorialnego, Warszawa 2012, p. 75.

Act, is the definition of the term "spouse"[3] and whether the term "person living in a *de facto* marital relationship" includes only persons who are married or also persons who are not married but are actually living together.

It is pointed out that since the above-mentioned tax exemptions apply to spouses, they do not cover persons in informal relationships. It should be emphasized that even though tax law recognises a gap that does not include same-sex partners in civil partnerships among the beneficiaries of the above-mentioned exemptions, the regulation contained in Article 4a of the Inheritance and Donation Tax Act (to which the above exemption-related provisions refer) is not open-ended or incomplete, and therefore a rule extending tax exemptions to persons in same-sex civil partnerships cannot be reconstructed by analogy[4]. It is argued that including spouses in the scope of the above-mentioned exemptions is a deliberate legislative measure. If the legislator had intended to extend this scope, it would have referred to the concept of persons living in a *de facto* marital relationship, which appears, *inter alia*, in Article 4(1) (6) of the Inheritance and Donation Tax Act[5]. In such a situation, there would be no obstacles to granting both heterosexual and homosexual couples the same rights as couples in a *de facto* marriage on the basis of equality, justice, non-discrimination, and protection of property (Articles 32, 47, and 64 of the Constitution of the Republic of Poland). The term "persons living in a marital relationship" should be understood as a stable, *de facto* personal and financial union of two persons, regardless of their sex[6].

The interpretation of Article 18 of the Polish Constitution, which does not preclude the institutionalisation of civil partnerships, cannot lead to opposite conclusions[7]. A spouse or partner (regardless of sex) cannot benefit from the tax exemption available to heterosexual spouses. This not only has negative tax implications, but also constitutes tax discrimination on the basis of sexual orientation[8].

In this situation, it becomes an interesting question to what extent the interpretation of the above-mentioned concepts of Polish tax laws by national courts, in a situation where judges are subject to the Constitution of the Republic of Poland and Polish statute, takes into account the different interpretation in the practical application

[3] *S. Bogucki*, [in:] *S. Bogucki*, *A. Wacławczyk*, *K. Winiarski*, Podatek od czynności cywilnoprawnych. Komentarz, Warszawa 2021, pp. 513–516.

[4] NSA judgment of 20 March 2012, II FSK 1704/10, Legalis.

[5] NSA judgment of 28 October 2016, II FSK 2835/14, Legalis.

[6] NSA judgment of 20 March 2012, II FSK 2082/10, Legalis.

[7] *E. Łętowska*, *J. Woleński*, Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r., PiP 2013, No. 6, pp. 15–40. *In contario,* see *I. Nowak*, Małżeństwo a związki partnerskie w świetle wybranych regulacji polskiego prawa podatkowego, KPPod 2017, No. 3, pp. 73–76.

[8] *J. Szczygieł*, [in:] *S. Bogucki*, *G. Liszewski*, *P. Smoleń*, *K. Winiarski*, *J. Szczygieł*, Podatek od spadków i darowizn. Komentarz, Warszawa 2021, p. 215.

of the ECHR by the ECtHR. This applies to situations where there is incompatibility between the provisions of the ECHR and the regulations adopted in national law, as reflected in the judgments of the ECtHR issued, *inter alia*, against Poland.

This paper provides a comprehensive interpretation of the above provisions as indicated in the literature and by the adjudicating panels of Polish administrative courts[9], which both assume that these concepts refer exclusively to married persons, and also formulate the proposition that the beneficiaries of the exemptions do include persons of the same sex and different sexes who are in civil partnerships.

The above-mentioned analysis considers the extent to which the interpretation of the aforementioned concepts in Polish tax laws, carried out by national courts in a situation where judges are bound by the Polish Constitution and statute, takes into account the different interpretation in the practical application of the ECHR by the ECtHR. This applies to situations where there is a conflict between the provisions of the Convention and the regulations adopted in national law, as reflected in the judgments of the ECtHR issued, *inter alia*, against Poland. The analysis was conducted using sources of law, court rulings, and the tax law doctrine, applying a dogmatic-legal method, as well as an empirical-analytical method with respect to Polish administrative court rulings and ECtHR rulings.

§ 2. Understanding property tax concepts

When drafting the rules governing inheritance and donation tax (here: Article 4(1)(6) and Article 4a(1) of the Inheritance and Donation Tax Act, to which the provisions of the above-mentioned exemptions refer), the legislator decided to link the amount of tax to the taxpayer's personal relationships. The amount of tax is determined depending on the tax group specified in Article 14 of the Inheritance and Donation Tax Act, to which the successor belongs.

The exemption referred to in Article 4a(1) *in principio* of the Inheritance and Donation Tax Act covers persons who belong to tax group I as defined in Article 14(3)(1) of the Inheritance and Donation Tax Act. A linguistic interpretation of Article 4a(1) of the Inheritance and Donation Tax Act leads to the conclusion that the exemption in question applies only to married persons and does not apply to persons in informal relationships (partners). A summary of all tax groups specified in Article 14 of the Inheritance and Donation Tax Act leads to the conclusion that partners (regardless of their sex), even though they are usually the people who are closest to each

[9] *S. Bogucki*, Recepcja koncepcji kompleksowej wykładni prawa przez sądy administracyjne w sprawach podatkowych, [in:] Sądownictwo administracyjne w umacnianiu państwa prawa. Księga z okazji 100-lecia sądownictwa administracyjnego w województwie śląskim (eds. *A. Matan*, *A. Nita*), Warszawa 2022, pp. 76–86.

other, belong to tax group III ("other successors"). The consequence of this classification is that they are required to pay inheritance and donation tax at the highest tax rate[10]. Additionally, pursuant to Article 111 § 3 TO, a partner is a member of one's immediate family who is jointly and severally liable for tax obligations. This provision therefore imposes the same obligations on a partner as on a spouse, and it is the only tax provision that equates the status of a spouse with that of a partner[11].

§ 3. Marriage as the institutionalisation in Poland of a union between two people of different sexes, and different solutions in other countries

In Poland, the only form of institutionalisation of a relationship between two people is marriage, as a sanctioned, permanent, and equal relationship between a man and a woman concluded before the head of the Civil Registry Office by making a declaration of entering into marriage. It should be emphasised that marriage is an institution that exists in the legal systems of all EU Member States. However, EU law does not harmonise family law in this area, nor does it harmonise inheritance or tax law systems. The lack of harmonisation of marital status regulations at the EU level means that the solutions adopted in this area in individual Member States differ in terms of content, form, and scope of data disclosed in national marital status registers[12]. The current legal system, both in terms of recognising civil partnerships registered in the EU and granting the exemption referred to in Article 4a of the Inheritance and Donation Tax Act to spouses, excluding spouses in same-sex families, features a legal loophole that results in these persons being treated as strangers.

In Poland, there is a large number of people living in informal relationships for whom the institution of marriage is inadequate or, in the case of same-sex relationships or relationships between people with mental or intellectual disabilities, still unavailable under the current legal framework in Poland (in 2022, there were approximately 2,230,000 people in Poland living in informal relationships, of whom approximately 2,207,000 were in opposite-sex relationships and approximately 162,000 were in same-sex relationships). The institution of civil partnership is widely known in other European countries, as well as outside Europe. There are two models of registered partnership institutions (the first assumes that this union is available

[10] NSA judgment of 11 October 2024, III FSK 1463/22, Legalis.

[11] *M. Wąsik*, Związki osób tej samej płci. Konsekwencje braku regulacji w prawie polskim, Warszawa 2024, pp. 109–112; judgment of the NSA of 20 March 2012, II FSK 2082/10, Legalis.

[12] Resolution of a panel of seven judges of the NSA of 2 December 2019, II OPS 1/19, ONSAiWSA 2020/2, item 11.

only to same-sex couples, while the second assumes that a partnership is open to two people regardless of their sex)[13].

§ 4. ECtHR case-law and the application of the ECHR by national courts

There are numerous doubts surrounding the application of the ECHR by national courts in the context of judges' subordination to the Polish Constitution and statutes. The literature emphasises that the application of the ECHR in conjunction with national law should consist in courts applying its provisions and standards when adjudicating individual cases. Complications arise, however, when there is a conflict between the provisions of these three legal systems (the ECHR, the Constitution of the Republic of Poland, and statutes). It should be the duty of the court to adopt an interpretation of national law that will allow for this conflict to be resolved. However, if there is a real conflict, the ECHR – as an international agreement ratified with prior consent expressed in a statute (Article 91(1)–(2) of the Constitution of the Republic of Poland) – should take precedence over any provisions contained in statutes or lower-level acts. This is not precluded by the general wording of Article 178(1) of the Polish Constitution, which states that judges are subject "only to the Constitution and statutes", as it should be read in conjunction with the provision contained in Article 91(2) thereof.

A more complex situation arises in the event of a conflict between the provisions and standards of the Convention and constitutional provisions. It is therefore concluded that "constitutional provisions on fundamental rights are formulated using very general terms, and newer European constitutions (such as the Polish Constitution of 1997) were written with a view to adapting them to the guarantees established by the Convention. Courts applying the Constitution should therefore have no difficulty in choosing an interpretation of its provisions that would render any conflict apparent"[14].

It follows from the above that it is not true that the ECHR has not been and cannot be applied directly because its provisions, as some argue, are vague. Although the ECHR formulates rights in general terms, in practice they are given concrete meaning and significance by courts composed of judges from all the States Parties to the Convention. Although formally binding only on the state directly concerned,

[13] See the explanatory memorandum for the bill on registered civil partnerships of 18 October 2024, RCL, UD87, https://legislacja.rcl.gov.pl/projekt/12390651/katalog/13088495#13088495 (date of access: 19.6. 2025).

[14] *L. Garlicki*, Stosowanie Europejskiej Konwencji Praw Człowieka przez sądy krajowe a podporządkowanie sędziego Konstytucji i ustawie, EPS 2023, No. 11, p. 11.

ECtHR judgments serve not only to resolve specific cases, but also to clarify, protect, and develop the principles established in the ECHR[15].

In the ECtHR judgment of 12 December 2023, in *Przybyszewska and Others v. Poland* (application no. 11454/17, HUDOC), Poland was obliged to provide a legal framework enabling same-sex couples to have their relationship properly recognised and protected. Protection for same-sex couples should be "adequate" and apply to areas such as taxation and inheritance[16].

In another judgment, of 19 September 2024 in the case of *Formela and Others v. Poland* (application no. 58828/12, HUDOC), the ECtHR found that Poland refuses to recognise and protect same-sex relationships and at the same times violates their right to respect for private and family life. On 27 February 2025, the ECtHR issued a judgment in the case of *Szypuła and Others v. Poland* (application no. 78030/14, HUDOC); there, the Court found that the Polish authorities had left the applicants in a legal vacuum and had failed to meet their basic needs in terms of recognition and protection of same-sex couples in stable and committed relationships.

In all of the above judgments, the ECtHR stated, referring to its earlier judgments against Poland, that in fulfilling its obligations under these judgments, Poland should comply with its positive obligation under Article 8 ECHR. In the above-mentioned rulings, there is a conflict between the provisions of the Convention and the constitutional norms of the Polish state as a State Party to the ECHR[17]. It is emphasised that Polish administrative courts – due to the lack of regulations in Polish law concerning same-sex relationships – were unable to grant complaints from persons in informal same-sex relationships[18]. In its judgment of 6 July 2022 (II OSK 2376/19,

[15] *A. Wyrozumska*, Kilka uwag na trzydziestolecie obowiązywania konwencji o ochronie praw człowieka w Polsce, EPS 2023, No. 11, p. 21.

[16] *M. Wąsik*, Przybyszewska i inni przeciwko Polsce. Istotny wyrok dla Polski i mała cegiełka w budowaniu podwyższonego standardu strasburskiego dla związków jednopłciowych, EPS 2024, No. 3, pp. 20–26; *E. Milczarek*, Standardy uznania i ochrony związków par jednopłciowych w Europie, PPP 2024, No. 10, pp. 18–30; *L. Garlicki*, „Aborcyjny wyrok" Trybunału Konstytucyjnego przed Europejskim Trybunałem Praw Człowieka – glosa do wyroku Europejskiego Trybunału Praw Człowieka z 14.12.2023 r., 40119/21, *M.L. przeciwko Polsce*, EPS 2025, No. 1, pp. 23–30; *J. Pawliczak*, *M. Wąsik*, Związki osób tej samej płci. Konsekwencje braku regulacji w prawie polskim, Warszawa 2024, PiP 2024, No. 10, pp. 120–125; *D. Jaroszewska-Choraś*, Potwierdzenie obowiązku instytucjonalizacji związków tej samej płci, GSP 2025, No. 1, pp. 273–283.

[17] See also previous ECtHR rulings of such kind against Poland: ECtHR judgment of 3 May 2007 in *Bączkowski and Others v. Poland*, application no. 1543/06, HUDOC; ECtHR judgment of 2 March 2010 in *Kozak v. Poland*, application no. 13102/02, HUDOC; ECtHR judgment of 16 September 2021, *X v. Poland*, application no. 20741/10, HUDOC; ECtHR judgment of 17 February 2022 in *Y. v. Poland*, application no. 74131/14, HUDOC.

[18] See *P. Florjanowicz-Błachut*, Wyrok Wielkiej Izby ETPC z 19.1.2023 r. w sprawach połączonych Fedotova i inni przeciwko Rosji (skargi Nr 40792/10, 30538/14 i 43439/14), ZNSA 2023, No. 2, pp. 108–109.

Legalis), the NSA signalled the need for legal regulation of same-sex relationships in the Polish legal system, which constitutes a landmark decision in this area. It pointed out, referring to Article 18 of the Polish Constitution, that this provision "does not preclude possible legal regulation of same-sex relationships, but emphasises the special protection of marriage as a union between a man and a woman" and "does not prohibit the statutory regulation of same-sex relationships"[19].

§ 5. Draft law on registered partnerships

In view of the existing case-law of the ECtHR, in particular the obligations arising from judgments against Poland, the Council of Ministers decided that it was necessary to introduce legislative changes that would ensure the protection and legal recognition of opposite-sex and same-sex relationships, as well as the right to financial support, tax and inheritance benefits, exemption from inheritance and gift taxes, possible joint tax returns, statutory inheritance, maintenance, and benefits in the event of a partner's death. The answer is the government's bill on registered civil partnerships[20].

The solutions proposed in the bill introduce very broad changes to the Polish legal system due to the addition of a new institution, namely registered civil partnerships, which are unions between two persons, regardless of their sex, and which in their assumptions and effects are very similar to the institution of marriage existing in the Polish legal system.

A registered civil partnership is, according to the drafters, an institution that will provide protection for same-sex couples and enable opposite-sex couples to formalise their relationship. The proposed version regulates property relations, maintenance obligations, the rights and obligations of partners, including the satisfaction of basic needs, care for the children of the other partner (although external adoption or adoption of a child is not regulated) and the option to change one's surname. The conclusion of a civil partnership will have legal consequences in almost all areas of the legal system – from inheritance rights, taxes, social security and social assistance, through numerous exemptions related to potential conflicts of interest, to the impact on the rights and situations of third parties, *e.g.*, creditors of persons in a civil partnership in connection with the property regime binding these persons. Remaining in a civil partnership will prevent a person from marrying another person. However,

[19] NSA judgment of 6 July 2022, II OSK 2376/19, Legalis. See *P. Florjanowicz-Błachut*, Wyrok Wielkiej Izby ETPC z dnia 19.1.2023 r. w sprawach połączonych Fedotova i inni przeciwko Rosji (skargi Nr 40792/10, 30538/14 i 43439/14), ZNSA 2023, No. 2, pp. 97–109.

[20] See the explanatory memorandum for the bill on registered civil partnerships of 18 October 2024, Sejm of the 10th Term, UD87, https://legislacja.rcl.gov.pl/projekt/12390651/katalog/13088495#13088495 (date of access: 19.6.2025).

the restriction of regulations was emphasised in the explanatory memorandum for the bill, which specified the differences between a registered partnership and marriage, both in practical and symbolic terms (*e.g.*, a limited catalogue of rights and obligations, replacement of the concepts of 'cohabitation' and 'living together' with the concepts of 'forming a relationship' and 'remaining in a relationship'). A registered civil partnership will also not create a bond of affinity. However, considering the allegations made in previous cases against Poland, the bill itself provides a minimum standard, without regulating all the issues raised in the ECtHR judgments in *Przybyszewska and Others v. Poland* and *Formela and Others v. Poland*.

The adaptation of existing laws, aimed at maintaining the consistency of the legal system, to the solutions contained in the bill on civil partnerships is to take place on the basis of the law titled Implementing Provisions for the Act on registered civil partnerships[21]. The bill concerns amendments to numerous acts, including changes to the aforementioned provisions on property tax exemptions and the Tax Ordinance.

Article 19 of the draft contains the following proposal to amend the Inheritance and Donation Tax Act:

1) Article 4(1)(6) shall read: "acquisition by way of donation of rights to a savings and loan account by a person who is living in a *de facto* marital relationship or in a civil partnership with the holder of a savings and loan account with a housing credit union, provided that the funds accumulated in that account are used for housing purposes";
2) In Article 4a(1), the introduction to the list shall read: "The acquisition of property or property rights by a spouse, the other person in a civil partnership, descendants, ascendants, stepchildren, children of the other person in a civil partnership, siblings, stepfathers and stepmothers shall be exempt from tax if:";
3) Article 14(3)(1) and (2) shall read: "(1) Group I – spouse, civil partner, descendants, ascendants, stepchildren, sons-in-law, daughters-in-law, siblings, stepfathers, stepmothers, civil partners of parents, parents-in-law, parents of civil partners, children of civil partners; (2) Group II – descendants of siblings, siblings of parents, descendants and spouses or civil partners of stepchildren, descendants and spouses or civil partners of children of the other person in a civil partnership, spouses of siblings and siblings of spouses, spouses of siblings of spouses, spouses of other descendants".

[21] See the bill for the Implementing Provisions for the Act on registered civil partnerships of 14 April 2025, RCL, UD88, https://legislacja.gov.pl/projekt/12390652/katalog/13088590#13088590 (date of access: 26.6.2025). A bill for the same kind of legal act was brought forward in a deputy's motion on 10 June 2025 to the Marshal of the Sejm of the Republic of Poland – https://orka.sejm.gov.pl/Druki10ka.nsf/Projekty/10-RPW-19567-2025/$file/10-RPW-19567-2025.pdf (date of access: 26.6.2025).

On the basis of the Inheritance and Donation Tax Act, the bill therefore provides for the addition of, among others, persons in civil partnerships to the list of persons eligible for the exemption referred to in Article 4a of the Inheritance and Donation Tax Act. Furthermore, persons in a civil partnership will be classified in tax group I, which consists of immediate family members. Classification in this group will mean that if the conditions for the exemption referred to in Article 4a of the Inheritance and Donation Tax Act are not met, the lowest inheritance and donation tax rate will apply. This way, persons in civil partnerships will gain the right to tax relief, such as that provided for in Article 4(1)(5a) or Article 4(1)(9) of the Inheritance and Donation Tax Act.

The proposed amendment regarding inheritance and donation tax will also contribute to the expected change in the Tax on Civil Law Transactions Act. The inclusion of persons in civil partnerships, as well as the other person in the civil partnership of a parent and the child of the other person in the civil partnership to tax group I, within the meaning of the Inheritance and Donation Tax Act, will allow these persons to benefit from the exemptions from the tax on civil law transactions provided under Article 9(5) and (10)(b) of the Tax on Civil Law Transactions Act for persons classified into tax group I. Article 12(5) of the Agricultural Tax Act and Article 111 § 3 TO, in their newly drafted versions, also take into account the proposed institution of civil partnerships.

§ 6. Conclusions

The concepts of spouse and partner living in a *de facto* marital relationship have been defined in certain statutory regulations, including those concerning property taxes, tax exemptions, and the Tax Ordinance. Against the backdrop of these regulations, practical problems arise, and the key issue at the heart of the dispute is the correct interpretation of the term "spouse" used in these provisions, as well as whether the term "person living in a *de facto* marital relationship" includes only persons who are married or also those who are not married but are actually living together.

This paper has provided an interpretation of the above-mentioned provisions as indicated in the literature and by the adjudicating panels of Polish administrative courts, which both assume that these concepts refer exclusively to married persons, and also formulated the proposition that the beneficiaries of the exemptions include persons of the same sex and different sexes who are in civil partnerships.

In Poland, the only form of institutionalisation of a relationship between two people is marriage, as a sanctioned, permanent and equal relationship between a man and a woman. An analysis of the case-law of Polish administrative courts and literature leads to the conclusion that the lack of recognition of opposite-sex and same-sex

relationships is becoming significant in tax matters. While a few aspects can be regulated under private law, regulating legal relations between partners faces far-reaching restrictions in the area of tax law. In light of the tax law provisions, partners will generally be treated as strangers, and thus deprived of tax privileges and subject to taxation at rates identical to those applicable to unrelated persons.

An interesting question is to what extent the interpretation of the above-mentioned concepts of Polish tax laws by national courts, in a situation where judges are subject to the Constitution of the Republic of Poland and statutes, takes into account the different interpretation in the practical application of the ECHR by the ECtHR. This applies to situations where the provisions of the ECHR are incompatible with the regulations adopted in national law, as reflected in the judgments of the ECtHR issued, *inter alia*, against Poland.

In view of the existing case-law of the ECtHR, in particular the obligations arising from judgments against Poland, the Council of Ministers decided that it was necessary to introduce legislative changes that would ensure the protection and legal recognition of same-sex relationships, as well as the right to financial support, tax and inheritance benefits, exemption from inheritance and gift taxes, possible joint tax returns, statutory inheritance, maintenance, and benefits in the event of a partner's death. The answer is the bill on registered civil partnerships. The adaptation of existing laws, aimed at maintaining the consistency of the legal system, to the solutions contained in the bill on civil partnerships is to take place on the basis of the act titled Implementing Provisions for the Act on registered civil partnerships.

An analysis of the above-mentioned bills on registered partnerships and the Implementing Provisions for the Act registered civil partnerships leads to the conclusion that the proposed solutions introduce very broad changes to the Polish legal system due to the addition (alongside marriage) of a new institution of registered partnerships, which are unions of two persons, regardless of their sex, which in their assumptions and effects are very similar to the institution of marriage existing in the Polish legal system. In particular, extending the list of persons classified in tax group I to include persons in civil partnerships will satisfy the scope of rights indicated in the above-mentioned judgments of the ECtHR. It will protect the assets that people who are currently in informal partnerships accumulate during their life together, which until now have been taxed at the highest rate, as in the case of strangers without the possible enjoyment of any tax exemptions.

Abstract

The concepts of spouse and persons actually living in cohabitation are of crucial importance for the application of tax exemptions in regulations concerning property

taxes and the Tax Ordinance, which directly aff ects the legal situation of the benefi ciaries of these exemptions. Despite the signifi cance of these concepts, Polish case-law lacks uniform application, and national courts often fail to consider the interpretation of the ECHR applied by the ECtHR, particularly when there is a conflict between the Convention's provisions and national law. In light of the above, the aim of this study is to conduct a comprehensive analysis of the interpretation of the concepts of spouse and persons living in cohabitation in Polish tax legislation, with particular emphasis on the compliance of this interpretation with the ECHR interpretation by the ECtHR. To achieve this objective, the dogmatic legal method was applied in analysing legal sources and tax law doctrine, and the empirical-analytical method was employed in examining the case-law of Polish administrative courts and the ECtHR. The conducted analysis revealed significant discrepancies in administrative court jurisprudence. Some adjudicating panels hold that the discussed concepts refer exclusively to persons in marital unions, while others recognise persons of the same and different sexes living in partnership arrangements as beneficiaries of exemptions. This lack of uniform interpretation, combined with the fact that national courts bound by the Constitution and statute may not take into account standards arising from ECtHR case-law, leads to potential violations of the Convention, as evidenced by ECtHR judgments issued against Poland. In view of the existing ECtHR case-law, particularly the obligations arising from judgments issued against Poland, the Council of Ministers is working on a government bill on registered partnerships.

Jacek Brolik*

The Right to Court in Cases Concerning the Cancellation of Tax Arrears in the Context of European Standards

§ 1. Introduction

This article, based on principles derived from the case-law of Polish administrative courts and Polish legal scholarship, is intended by the author to be of particular significance in the context of the right to court and the right to a fair trial referred to, *inter alia*, in Article 6(1) of the Convention. Considerations regarding the exercise of administrative discretion, the type of decisions made by tax authorities in the area analysed, the substantive and formal significance of the burden of proof and the obligation to provide evidence are aimed at indicating who should prove and justify what in tax proceedings concerning the analysed relief in the performance of tax obligations, and what rights and obligations in the area of evidence apply to the party and to the tax authority. This is essential for assessing whether the right to a fair trial is ensured in an individual case. Decisions regarding the cancellation of tax arrears may be appealed to an administrative court pursuant to Article 3 § 2(1) APAC. Decisions discontinuing tax proceedings as well as decisions refusing to initiate tax proceedings on granting relief in the performance of a tax obligation are also subject to administrative court appeal, pursuant to the aforementioned act (Article 3 § 2(1) and (2) APAC). The subject-matter and institutional scope of permissible appeals is broad. Granting relief in the form of tax arrears cancellation is not an "act of grace" on the part of the tax authority. It is the right of the tax authority, just as applying for the cancellation of tax arrears is the taxpayer's right. The review of the legality and justification of the exercise of these rights constitutes a fundamental, legally significant

* Judge of the Supreme Administrative Court of Poland.

rationalisation of the exercise of the right to court in order to obtain a fair and lawful judgment, as referred to in Article 6(1) *ab initio* of the Convention.

§ 2. Grounds for the cancellation of tax arrears

Pursuant to Article 67a § 1(3) TO, the tax authority may, at the taxpayer's request, in cases justified by the taxpayer's important interest or public interest, cancel all or part of their tax arrears and interest on the late payment of tax arrears. The tax authority therefore first examines whether there are any tax arrears, and then proceeds to determine and assess the justified possibility of cancelling the arrears.

The invoked Article 67a § 1(3) TO provides for two conditions under which the tax authority may grant a tax relief by way of a decision: 'taxpayer's important interest' or 'public interest'. In accordance with linguistic interpretation guidelines, the conjunction 'or' used in the provision means that it is sufficient to fulfil one of the disjunctive conditions. The concepts of important public interest and public interest are general clauses which do not have a fixed conceptual scope in the Tax Ordinance. When examining individual cases, tax authorities are therefore obliged to fill these concepts with legally significant content supported by evidence[1]. Analyses on this subject cannot ignore human rights, which are personalised in individual tax cases. It should be emphasised that the institution of tax arrears cancellation is discretionary in the sense that it allows for a choice of legal consequences of the situation described in the hypothesis of a legal norm. Therefore, if any of the conditions specified in Article 67a § 1 TO are found to exist in the case (taxpayer's important interest or public interest, or both), the authority makes a discretionary decision on which disjunctive solution to choose: whether to grant the taxpayer relief in the payment of tax liabilities or not. As such, Article 67a TO sets out, as it were, the successive stages of tax proceedings: the tax authority is required to determine whether at least one of the conditions for applying the relief is met, which requires gathering the evidence necessary for these findings and conducting a proper assessment thereof. The authority is also obliged to indicate how, especially in the context of the existing facts, the terms 'taxpayer's important interest' and 'public interest' should be understood. In this regard, the limits of the authority's responsibilities are defined by the legal standards contained in Article 122 TO (detailed clarification of the facts), Article 187 § 1 TO (collection and comprehensive examination of all evidence), or Article 191 TO (assessment, on the basis of all the evidence, whether a given circumstance has been proven) and, of course, by the correct interpretation of Article 67a § 1 TO. Clearly, it is in the interest of the taxpayer initiating tax proceedings under Article 67a § 1 TO to indicate the circumstances justifying why their request should be granted.

[1] *A. Hanusz*, Klauzule generalne w ordynacji podatkowej, PiP 2016, No. 8, pp. 3–17.

However, if the arguments presented in the application for relief are deficient or the taxpayer limits themselves to certain circumstances (which the same considers sufficient), the authority is not released from the obligations specified in Article 122 or Article 187 § 1 TO, *i.e.*, to independently make comprehensive factual findings and assess them. This constitutes an expression of consideration for the legal protection of the parties to the proceedings, including human rights.

Pursuant to Article 67a § 1 TO, the tax authority may grant relief in the repayment of tax liabilities if, in an individual case, it finds and assesses the existence of the grounds of taxpayer's important interest or public interest[2]. If one or both of these conditions are deemed to have been met, the proceedings enter the next phase, in which the authority chooses either to grant or refuse to grant the relief. Article 67a § 1 TO does not specify the criteria for choosing one or the other in the event that any of the conditions for cancellation of tax arrears are met. The word 'may' used in this provision means that the authority independently chooses a disjunctive solution, which does not, however, mean that it has complete discretion in this regard. The tax authority cannot be replaced by an administrative court in this respect. If the authority finds that there is no taxpayer's important interest or public interest in applying the tax relief, it will have no choice but to refuse relief, and the decision will be binding[3]. The absence of grounds therefore means that a decision must be made to refuse the tax relief.

Generally speaking, the fulfilment of the condition of the taxpayer's important interest is related to the existence of specific reasons on their part, where the demand for full and timely payment of tax may undermine the basis of existence of the taxpayer and/or their dependants. The concept of the taxpayer's important interest cannot be limited solely to extraordinary situations or fortuitous events preventing the settlement of tax arrears, as this concept has a much broader meaning, taking into account not only extraordinary circumstances, but also the taxpayer's relatively normal economic situation, their income and expenditure, including expenditure incurred in connection with the protection of their own health or that of their immediate family members (medical expenses). Therefore, in tax proceedings initiated by a taxpayer's application for relief from tax liabilities, particular emphasis should be placed on analysing the taxpayer's economic situation.

The tax authority finding whether there is 'public interest' involves weighing values on two levels: one level is the principle of timely payment of taxes in full, and the other is the exception to that principle, consisting in the application of an individual tax relief. In each case, the authority should determine what is more beneficial from

[2] NSA judgment of 21 August 2015, II FSK 1703/13, CBOSA.
[3] NSA judgment of 16 March 2006, II FSK 493/05, CBOSA.

the point of view of public interest (recovery of the debt or application of relief). Of course, there are situations in which economic considerations alone justify the application of a tax relief (*e.g.*, if it is not possible to collect the tax in full, and the taxpayer's economic situation precludes possible radical improvement in their financial situation in the foreseeable future). When 'weighing' both values, the tax authority naturally also takes into account other directives common to the whole of society, such as justice, ethical principles, trust in state authorities, etc[4]. In Article 67a § 1 TO, the legislator does not specify, and therefore does not prejudge, what facts may sufficiently justify such their assessment as would reasonably lead to the conclusion that there is taxpayer's important interest or public interest in granting the relief. In light of this observation, assessments made in the case-law of tax authorities that only certain events, for example only fortuitous events or events otherwise completely independent of the taxpayer constitute sufficient grounds for the positive application of Article 67a § 1 TO are completely unjustified[5].

Exercising the right to court hearing referred to, *inter alia*, in Article 6(1) of the Convention, a taxpayer may lodge an appeal against a final decision under Article 67a(1)(3) TO with an administrative court. Within the scope presented above, the appeal may cover: the interpretation of substantive tax law, in particular with regard to the content and meaning of the premises of the taxpayer's important interest and public interest, the legality of the evidence-gathering procedure, the sufficient and adequate scope of the evidence-taking proceedings, the assessment of evidence within and without exceeding the limits of discretionary evaluation of evidence, and the ensuring of the party's participation in the proceedings. The scope of judicial legal protection for taxpayers is therefore broad. The review of the legality of proceedings in the event of an appeal against a decision to a court is extensive, which provides real assurance of the fairness of proceedings concerning relief from tax obligations which the taxpayer has applied for to the tax authority.

§ 3. Administrative discretion

In the context discussed here, there is a need to weigh up two fundamental values. The principles of equality and universality of taxation derive from the provisions of Article 2, Article 32(1), Article 84 and Article 217 of the Constitution of the Republic of Poland. Tax relief, including relief in payment – fulfilment of tax obligations – is an exception to this rule, thereby confirming it. Relief in the universality and equality of taxation, on the one hand, cannot be based on arbitrariness in its granting, and on the other hand, is not an expression of 'distributive justice', *i.e.*, it cannot

[4] NSA judgment of 3 August 2016, II FSK 1968/14, OSP 2017, No. 6.

[5] *J. Brolik*, Postępowanie podatkowe w przedmiocie ulg w spłacie zobowiązań podatkowych, Przegl.Pod. 2012, No. 8, pp. 40–46.

be granted to everyone who applies for it. In the author's opinion, fairness, equality and universality in granting relief from tax obligations means that it can be granted on equal terms, justified in relation to the individual case of the entity applying for it. The right to court and the right to a fair trial in cases concerning the cancellation of tax arrears, in the event of an administrative court appeal being lodged, should be enforced by administrative courts by reviewing the examination and adjudication of cases on equal terms in different, fundamentally dissimilar facts. Compliance with the legal principle of equality in factual diversity, understood this way, should pursue the principle of equality before the law.

In this context, it should be noted that tax authorities grant relief in the form of tax arrears cancellation by exercising their right to justified administrative discretion. Submission of an application for tax arrears cancellation does not impose an obligation to grant the relief sought in the performance of a tax obligation. Nor does Article 67a § 1 TO imply that demonstrating the existence of the taxpayer's important interest or public interest *ex lege* obliges the authority to cancel the tax arrears. It should be noted here that when making a 'volitional' decision on tax relief, the tax authority subsumes it under the provision of Article 67a § 1 TO, expressed in its content by the phrase 'the authority may.' It follows that the tax authority makes and issues a decision on the application of the said tax relief, which means that if it finds that there is taxpayer's important interest or public interest in the case, it may, that is, it is entitled to: cancel the tax arrears, but also refuse to cancel them if it decides to do so and, in the area of the relevant circumstances of the individual case, justifies this position in a manner that meets the requirements and standards of Article 210 § 4 TO. The decision to refuse tax relief is a decision on its application and therefore falls within the scope of the powers granted to tax authorities in Article 67a § 1[6]. From the taxpayer's point of view, which seems to be the most important perspective here, the basis for a decision to cancel tax arrears is not only the comprehensiveness and correct assessment of the proceedings conducted, but also the choice of a possible disjunctive solution by the tax authority. The principle of trust in tax authorities, established in Article 121 § 1 TO, requires that this choice be rational, objective, and based on the circumstances of the specific case. It is precisely in this regard that the administrative court should assess the discretionary decision, including with regard to the very choice of whether to cancel or refuse to cancel tax arrears[7]. The absence of grounds of taxpayer's important interest and/or public interest results in a justified refusal to cancel tax arrears; in this respect and within this meaning, the aforementioned decision of the tax authority is binding. The finding that there is taxpayer's important interest and/or public interest in the case opens the way for the authority

[6] NSA judgment of 5 June 2013, II FSK 2130/11, CBOSA.
[7] NSA judgment of 4 January 2017, II FSK 3615/14, CBOSA.

to exercise its right to choose a decision, provided that this choice is fully rational, specific, and comprehensively justified. It should be emphasised that there are certain limits to administrative discretion within which the tax authority may operate when making a decision based on the premise of 'taxpayer's important interest' or 'public interest.' Cases where authorities exercise their powers in a manner arbitrary, unreasonable, irrational, or contrary to fundamental constitutional principles cannot remain outside the scope of administrative courts' review of public administration. Criteria should be established to assess whether the tax authority has exceeded the limits of administrative discretion. These limits are exceeded when the disjunctive choice made by the tax authority involves: (1) a flagrant violation of the principle of justice; (2) manifestly irrelevant (trivial or irrational) criteria; (3) false grounds (untrue arguments).

Such defects in discretionary decisions cannot be excluded from the scope of administrative court review. This would constitute a real restriction on judicial recourse which is intended to enable taxpayers to assert rights that have clearly been violated by the tax authority. Justice *in concreto* in the judicial application of law is opposition to the heartless, evil, and wicked application of law by the tax authority. The right to relief from tax obligations in the form of cancellation of tax arrears together with interest for late payment is transformed into its opposite when the rigour of the tax authority, arising from a sense of arbitrariness in its decisions, ceases to take into account the social and economic context. Then, *iniuria* occurs, *i.e.*, wickedness and injustice[8].

§ 4. Conclusions

Tax law belongs to the cross-sectoral area of public law which concerns public law tasks performed by the state and the corresponding public law rights and obligations of individual addressees of the law. In public law, legal relationships regulated by administrative and legal methods are usually characterised by the subordination of one of the parties to that relationship and the associated administrative power. Power and subordination – these two characteristics are also specific to the regulatory method used in tax law. The parties to the relationship of obligation do not have equal legal standing. Subordination is the rule. State power is an essential condition for the fulfilment of a tax obligation. The relationship of obligation, shaped unilaterally by the state, arises as a consequence of the taxpayer's factual situation corresponding to the tax norm. It is the legislator who decides which social relations are subject

[8] *A. Gomułowicz*, Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 3 sierpnia 2016 r., II FSK 1968/14, OSP 2017, No. 6, item 56.

to taxation.[9] Tax law, in accordance with the constitutional principle of equality and universality of taxation established by the State – Article 2, Article 32(1), Article 84, Article 217 of the Constitution of the Republic of Poland – is essentially restitutive in nature, but imposes public law burdens and may therefore be perceived as punitive from the point of view of those subject to the law. For the latter reason, taxpayers often draw analogies between tax law and criminal law when interpreting and enforcing tax law. For this reason, it is extremely important to guarantee taxpayers the right to court and the right to a fair trial and resolution of their case, as provided for in Article 6(1) of the Convention. The cited provision of Article 6(1) does not expressly refer to tax matters, but the public law nature of tax law and its social perception as 'punitive law' entitles, in the author's opinion, the *mutatis mutandis* application of the right to a fair trial – resulting from Article 6(1) of the Convention – also to tax matters, which obviously include cases concerning relief from tax obligations. The directional principle of legal interpretation proposed in this article additionally validates national regulations on the right to court in European law, and may also constitute a normative guideline for the enactment, interpretation, and application of tax law, which, in accordance with Article 77(2) of the Constitution of the Republic of Poland, shall not bar the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights. The above arguments can be reinforced by invoking the right to good administration from the Charter of Fundamental Rights of the European Union. The right to a fair and impartial hearing within a reasonable time, as enshrined in Article 41(1) of the Charter, should be implemented in the relevant administrative actions, but these, also in the aforementioned scope, may become the subject of the right to an impartial court, *i.e.*, the right to court referred to in European law regulations and in Article 45(1) of the Constitution of the Republic of Poland. The right to court, albeit in different cases and matters, is subject to fundamental protection; the legal regulations invoked above give rise to a presumption of the right to a court that should examine the cases brought before it fairly.

The right to court and to a fair trial requires emphasis and comprehensive justification in cases concerning the cancellation of tax arrears, where the parties are often individuals in difficult situations, often helpless in life, and therefore people that require protection in terms of human rights; after all, the Convention is dedicated to the protection of human rights. The administrative court cannot grant relief in the performance of tax obligations, nor can it cancel tax arrears and interest on those arrears because, pursuant to Article 67a § 1 TO, the above is the subject of action by the executive authority, *i.e.*, the competent tax authority. In such cases, the exercise of the right to a fair examination and adjudication of a case consists in reviewing the

[9] *A. Gomułowicz*, [in:] *A. Gomułowicz*, *W. Małecki*, Podatki i prawo podatkowe, Warszawa 2010, s. 135; *J. Brolik*, Wykładnia prawa podatkowego oraz jej determinanty, ZNSA 2014, No. 3, pp. 54–75.

legality of administrative tax proceedings in cases brought before the court, assessing the comprehensiveness, accuracy, and completeness of the evidence-taking proceedings and the justified conclusions drawn from them, analysing the rationality, objectivity, and, at the same time, the possible 'empathy' of the result and justification of the administrative decision made in an individual case.

To sum up, the *mutatis mutandis* application of the principle of the right to court and the right to a fair trial, as an element of the protection of the rights of those subject to the law, including the protection of human rights referred to in the Convention for the Protection of Human Rights and Fundamental Freedoms, should also be taken into account in individual cases concerning the cancellation of tax arrears and interest thereon. The author believes that the provision of Article 6(1) of the Convention, in particular the principle of the right to court resulting from Article 6(1) *ab initio* has additional 'European legal' significance in the matter under consideration, important in emphasising the need and justification for the broad application of the principles of this law for the purpose of judicial review of administrative decisions regarding the application of the institution of tax arrears cancellation. For this reason, this paper accurately and, above all, in a meaningful way, presents the most important and difficult problems in the area of tax arrears cancellation in order to demonstrate the need for judicial protection in the area of taxpayer's interests that deserve protection, without unjustified infringement of the public interest. Although Article 6 of the Convention does not apply directly to tax matters, the standards developed in case-law concerning other types of cases may be used as guidance when administrative courts hear tax cases. The protection of the important, legitimate interests of taxpayers, who are very often individuals in difficult life, financial, or health situations, falls, in the author's opinion, within the broad concept of human rights protection. This type of interpretation of the law, extended to include European legal standards, can be described as the *mutatis mutandis* application of the principle of the right to court referred to in Article 6(1) *ab initio* of the Convention in the category of cases under consideration. *Mutatis mutandis* application of the law in this area will involve taking into account the principles of judicial protection of rights arising from European law in cases concerning the cancellation of tax arrears. It should be noted that Article 45(1) of the Constitution of the Republic of Poland provides that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. This means that everyone has the right to a fair trial which should be conducted in an objective, open, and timely manner. The reference to the constitutional norm resulting from Article 45(1) is important for the subject matter and legal assessments of this publication primarily because the 'Polish' right to court, which exhibits and fulfils the above-mentioned legally significant positive characteristics and properties, undoubtedly remains in an

axiological relationship with the principles of European law which are set out, in this respect, in a fundamentally analogous manner, in Article 6(1) of the Convention and Article 41(1) of the Charter of Fundamental Rights. Therefore, pursuant to Article 45(1) of the Constitution of the Republic of Poland, courts apply the relevant principles of European law in this matter.

Abstract

The legal instrument of tax law in the form of remission of tax arrears may be difficult in relation to its proper application. Firstly, this legal institution is associated with controversies arising from the fact that it constitutes an exception to the constitutional principles of equality and universality of taxation. Legal uncertainties may also arise regarding the definition of the subject matter of the discussed relief in the performance of tax obligations and the related consequences. Secondly, in the provisions concerning the remission of tax arrears, the legislator uses legally undefined terms, such as „taxpayer's important interest" and „public interest." Thirdly, and most importantly, the application of the remission of tax arrears often concerns individuals in very difficult life and economic circumstances, whose legitimate interests require protection, including protection against arbitrary decisions by tax authorities. For the above reasons, it is extremely important in these matters to ensure that obligated parties are granted a genuine right to a fair trial and the right to have their case fairly examined, especially since they may subjectively perceive and experience the enforcement – often compulsory – of tax obligations and interest on tax arrears as a form of punishment imposed by the state. The expansion of legal protection under Polish law in the form of the right to a court and the right to a fair hearing with European law regulations, including the regulation of Article 6(1) of the Convention is necessary and justified in cases concerning the remission of tax arrears.

Jacek Chlebny*

Protection of the Right to Nationality under ECHR and Polish Law

§ 1. Protection of the right to nationality under ECHR

The right to a nationality is not to be found among the rights listed in the Convention. However, the Convention is invoked in cases concerning the acquisition and loss of nationality examined by the ECtHR and Polish administrative courts, and it is so for the sake not of *decorum*, but of real protection. Indeed, nationality is seen as a component of an individual's identity and can therefore be protected under Article 8 ECHR. According to it, everyone has the right to respect for his private and family life, his home and his correspondence (Article 8(1) ECHR). The concept of 'private life' used therein is understood broadly in ECtHR case-law and covers many aspects of both physical and social identity of an individual[1]. Although the Court examines the issue of nationality in relation to the right to private life, the denial or deprivation of nationality may also have effects on the right to family life[2].

Interference by a public authority with the right to private life must be statutory and is allowed only in situations necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2) ECHR). The arbitrary denial or deprivation of nationality may therefore justify a finding of a violation of Article 8

* Judge and President of the Supreme Administrative Court of Poland, prof. dr hab., University of Lodz; ORCID: 0000-0002-4955-478X.

[1] *E.g.*, it includes the right to establish and develop relationships with other human beings, the right to personal development or the right to self-determination, see ECtHR judgment of 12 June 2018, *Alpeyeva and Dzhalagoniya v. Russia*, applications nos. 7549/09 and 33330/11, § 107, HUDOC.

[2] ECtHR judgment of 11 October 2011, *Genovese v. Malta*, application no. 53124/09, § 33, HUDOC.

ECHR on the grounds of protection of an individual's private life[3]. Recognising the similarity of effects, the Court accepts that it is admissible to apply, in cases concerning the denial and deprivation of nationality, common general principles for assessing the compatibility of State authorities' actions with Article 8 ECHR[4]. The protection of the right to a nationality under the right to private life is subject to the prohibition of discrimination under Article 14 ECHR[5].

Finding a violation of Article 8 ECHR requires a two-step test of, first, the effects (consequences) on the applicant of the nationality decision issued and, second, of the "arbitrariness" of the action by the public authority[6]. The first step, individual and concrete, has the aim of ruling out a hypothetical violation of the right to private life. The Court found the denial of recognition of nationality in a case based on a complaint that the applicant's right to continued residence in the country was threatened, where her residence was not only not contested by the national authorities but, moreover, adequately protected in the country's legal system, to be precisely such a hypothetical violation[7]. The Court also did not agree with the argument that lack of nationality prevented the applicant from participating in parliamentary elections, when she had not been interested in exercising her right to vote for many years[8]. For the assessment of the consequences of the denial of recognition as a national, the fact of having another nationality is also not irrelevant. Indeed, in such cases the denial is not linked to a finding of statelessness[9]. In sum, in the light

[3] *E.g.*, ECtHR inadmissibility decisions of 10 October 2024 in *Elmi ABO v. Estonia*, application no. 29295/22, § 63, HUDOC, and of 9 December 2021 in *S.-H. v. Poland*, applications nos. 56846/15 and 56849/15, § 65, HUDOC, as well as ECtHR judgments of 11 October 2011, *Genovese v. Malta*, applications no. 53124/09, § 30, HUDOC, and of 12 June 2018, *Alpeyeva and Dzhalagoniya v. Russia*, applications nos. 7549/09 and 33330/11, § 107, HUDOC. Deprivation of nationality may constitute an even more severe interference with the individual right to private life than denial of nationality, see the hereinabove invoked ECtHR judgment of 12 June 2018, *Alpeyeva and Dzhalagoniya v. Russia* and ECtHR judgment of 30 January 2020 in *Ahmadov v. Azerbaijan*, application no. 32538/10, § 43, HUDOC.

[4] ECtHR decision of 10 October 2024, *Elmi ABO v. Estonia*, § 71; ECtHR decision of 9 March 2017, *K2 v. United Kingdom*, application no. 42387/09, § 49, HUDOC.

[5] ECtHR judgment of 11 October 2011, *Genovese v. Malta*, § 44. The prohibition of discrimination was violated in the denial to recognise the acquisition of a nationality by a child born out of wedlock.

[6] *E.g.*, ECtHR inadmissibility decision of 10 October 2024, *Elmi ABO v. Estonia*, § 64, ECtHR judgment of 22 December 2020, *Usmanov v. Russia*, application no. 43936/18, § 53–54, HUDOC, and the Court's case-law cited therein.

[7] ECtHR inadmissibility decision of 10 October 2024, *Elmi ABO v. Estonia*, § 72.

[8] Despite considering herself to be an Estonian citizen and having lived in Estonia since 1998, the applicant never took the necessary (administrative) steps to exercise her right to vote before learning in 2020 that she was not recognised as an Estonian citizen. Cf. ECtHR inadmissibility decision of 10 October 2024 in *Elmi ABO v. Estonia*, § 74.

[9] ECtHR inadmissibility decision of 10 October 2024, *Elmi ABO v. Estonia*, § 78, and ECtHR decision of 9 December 2021, *S.-H. v. Poland*, § 69–70. In this case, the applicants already were dual nationals.

of ECtHR case-law, the assessment of the effects of a nationality decision cannot be hypothetical, and therefore the absence of sufficiently serious negative consequences for private life leads to the application being declared incompatible *ratione materiae*.

During the second step of testing the well-founded nature of the application, which concerns the arbitrariness of state interference with an individual's right, the Court assesses: (1) whether the measure challenged was lawful; (2) whether it was accompanied by the necessary procedural guarantees, including whether the person deprived of their nationality had the opportunity to challenge the decision before courts providing adequate safeguards; and (3) whether the authorities acted swiftly and diligently[10].

The order in which the steps of the tests are taken is not immutable. In cases involving deprivation of nationality on the grounds of the applicant's terrorist activities, the Court first determined whether the measures challenged were taken arbitrarily, and only then examined the impact of the deprivation of nationality on the applicants' private lives[11]. In another case concerning deprivation of nationality, both issues were found to require joint consideration and evaluation[12]. In the case of the refusal to confirm the acquisition of Polish nationality by operation of law by applicants born through surrogacy, however, the Court first considered the seriousness of the negative consequences of this refusal[13].

§ 2. Protection of the right to a nationality in administrative cases

The Act of 2 April 2009 on Polish nationality provides for the acquisition of nationality by operation of law, by the granting of nationality, by recognition of a person as a national, and by restoration of nationality (Article 4 of the Polish Nationality Act). In addition, the Act of 9 November 2000 on repatriation makes it possible to acquire Polish nationality by repatriation, *i.e.*, as a result of the return of Poles and their descendants to Poland (Article 1(1) of the Repatriation Act). A national visa issued by a consul for repatriation purposes under this Act serves as the basis for the acquisition of Polish nationality by operation of law on the day that the person arriving in Poland crosses the border (Article 4 and Article 12b of the Repatriation Act).

[10] ECtHR judgment of 22 December 2020, *Usmanov v. Russia*, § 54.

[11] ECtHR inadmissibility decision of 10 October 2024, *Elmi ABO v. Estonia*, § 66 and case-law cited therein.

[12] ECtHR decision of 9 March 2017, *K2 v. United Kingdom*, § 50.

[13] ECtHR decision of 9 December 2021, *S.-H. v. Poland*, § 73–76. The Court found the complaint under Article 8 ECHR incompatible *ratione materiae* within the meaning of Article 35 § 3(a) ECHR, finding that the applicants had no ties with Poland and that they had dual nationality of other states. The decision to refuse the confirmation of nationality in this case did not exceed the minimum threshold of negative consequences on the applicants' private lives required for the finding of a violation of Article 8 ECHR.

Polish nationality is also acquired once a voivode's decision to recognise a foreigner as a repatriated person becomes final (Article 16c of the Repatriation Act). What is a characteristic feature of the provisions on repatriation is that their territorial scope is limited to persons of Polish origin returning to Poland from the former Soviet republics in Asia.

Under the provisions of the Polish Nationality Act, administrative proceedings are conducted in cases of: (1) recognition of a foreigner as a national (Article 30 of the Polish Nationality Act); (2) restoration of nationality (Article 38 of the Polish Nationality Act); and (3) confirmation of possession or loss of nationality (Articles 44(2), 55(1), 65(2) of the Polish Nationality Act).

The President of the Republic of Poland grants Polish nationality not within a process conducted on the basis of the Code of Administrative Procedure; it is a discretionary process and does not require an assessment of prerequisites of substantive law. For this reason, the administrative procedure in cases of recognition of a foreigner as a national is of fundamental importance[14].

Acquisition of nationality by operation of law, in turn, does not constitute an independent subject matter of proceedings. However, it may need to be assessed in proceedings for confirmation of nationality (Article 55 of the Polish Nationality Act).

In proceedings for the restoration of Polish nationality, it is necessary to assess the prerequisites under provisions governing Polish nationality that have expired (Article 38(1) of the Polish Nationality Act). In turn, the link between the issuance of a nationality decision and the currently applicable law as well as facts that are currently at hand pertains to the application of procedural laws (in the Code of Administrative Procedure and the Polish Nationality Act) and the question whether the person poses a threat to national defence or security or to the protection of public order and security; if so, a positive nationality decision cannot be issued (Article 38(3) Polish Nationality Act). Acquisition of Polish nationality, as indicated in Article 39(2) of the Polish Nationality Act, takes place on the day on which the decision on the restoration of Polish nationality becomes final. In all cases where the acquisition of Polish nationality is the result of a constitutive decision (proceedings for the recognition of a foreigner as a national and for the restoration of nationality), room for consideration arises regarding the compatibility of the decision reviewed by the court with Article 8 ECHR. The situation is different for declaratory decisions which include decisions in cases concerning the confirmation of possession or loss of Polish nationality (Article 55(1) Polish Nationality Act). Indeed, as a result of their issuance,

[14] *J. Chlebny*, Postępowania administracyjne w sprawach cudzoziemców, [in:] System Prawa Administracyjnego Procesowego (eds. *G. Łaszczyca*, *A. Matan*), Vol. IV. Postępowania autonomiczne i szczególne. Postępowania niejurysdykcyjne (Vol. ed. *A. Matan*), Warszawa 2021, pp. 554–555, 611–612.

their subject does not acquire or, respectively, lose Polish nationality. Instead, these decisions dispel doubts as to the status of their subjects as Polish nationals.

The issue of the right to a nationality and the possible violation of Article 8 ECHR has emerged in the case-law of administrative courts not only in cases concerning the review of decisions issued under the Polish Nationality Act. The Supreme Administrative Court has referred to this issue, citing ECtHR case-law, in cases concerning the registration of a birth certificate listing civil partners as parents. The administrative court refused to register such a certificate on the basis of Article 107(3) of the Law on the Vital Records as contrary to the fundamental principles of the legal system of the Republic of Poland. At the same time, it made it clear that the refusal of registration does not constitute an impediment to the child acquiring Polish nationality if the child's biological parent is a Polish citizen in a civil partnership that is disclosed in the child's birth certificate[15]. The position on the need not to link the refusal to register the certificate with the acquisition of Polish nationality should be considered as established in case-law[16].

§ 3. Protection of the permanence of a national's status

Pursuant to Article 34(2) of the Polish Constitution, a Polish national may not lose Polish nationality except by renunciation thereof. The status of a national is therefore subject to absolute and full constitutional protection. However, the constitutional protection of the permanence of Polish nationality should only apply to a nationality acquired lawfully. Indeed, the recognition of the absolute protection of the permanence of one's status as a national, regardless of the circumstances in which one acquired such nationality, should not exclude an assessment whether this acquisition was correct. In the case-law of the administrative courts, the constitutional principle

[15] Cf. the reasoning of the NSA resolution of 2 December 2019, II OPS 1/19, Legalis. In it, the NSA clearly found the applicant's child to have acquired Polish nationality by operation of law. Indeed, the acquisition of Polish nationality cannot be made conditional on registering a vital record. The refusal to register the child's birth certificate wherein civil partners are entered as parents, is not an obstacle to the child acquiring Polish nationality if their biological parent is a Polish citizen in a civil partnership entered in the child's birth certificate and if the persons in that partnership are recognised as the child's parents under the law of the country where the certificate was drawn up. With regard to the question of the acquisition of nationality itself, the Supreme Administrative Court drew attention to the ECtHR judgment of 26 June 2014, *Mennesson v. France*, application no. 65192/11, § 77–79, HUDOC, and ECtHR judgment of 26 June 2014, *Labassee v. France*, application no. 65941/11, § 75, HUDOC. In these judgments, the Court linked the violation of the right to the protection of the child's private life due to the non-recognition in French law of surrogacy agreements to, *i.a.*, the inability to confirm the child's French nationality and biological ties with one of the parents.

[16] *E.g.*, NSA judgments of 16 December 2022, II OSK 128/19, and of 24 October 2024, II OSK 1163/22, and the case-law cited therein, available in the CBOSA database; cf. also *A. Chmielarz-Grochal*, Stosowanie przez sądy administracyjne standardów europejskich w toku rozstrzygania transgranicznych problemów obywatelstwa oraz transkrypcji aktów stanu cywilnego, AUL FI 2020, no. 93, pp. 148–152.

of the permanence of Polish nationality is not considered to be an impediment to challenging, in extraordinary procedures, administrative decisions constituting the basis for the acquisition of nationality, if such decisions suffer from a serious procedural or substantive legal defect. Indeed, adopting a position to the contrary could lead to socially unacceptable consequences, where a decision recognising someone as a Polish national even by virtue of a criminal offence would be regarded as a rightfully acquired right, subject to absolute constitutional protection. The constitutional protection of the permanence of acquired nationality, in turn, means that it is not possible for the legislator to introduce conditions justifying the deprivation of nationality by means of an administrative decision. Due to Article 34(2) of the Constitution of the Republic of Poland, a national cannot be deprived of Polish nationality on the grounds of posing a threat to national security or public order if this threat arose only after they acquired Polish nationality through an administrative decision[17]. However, if facts substantiating the threat to public order and security already existed at the time the decision was issued, but they were not known to the public administration authority, then it is possible to resume proceedings in a case concluded by virtue of a final decision on the basis of Article 145 § 1(5) of the Code of Administrative Procedure, and consequently to set aside the decision constituting the basis for the acquisition of nationality[18].

The right to protection of private life is not absolute and, as already noted, may be subject to limitations on the grounds of and under the conditions set out in Article 8(2) ECHR. In determining the standards for the permissibility of depriving people of their status as nationals, reference should also be made to the case-law of the ECtHR, in which the Court accepts that procedural defects present in the acquisition of nationality should not, in principle, lower the standard of protection of the status as a national under Article 8 ECHR[19]. The Court's case-law has highlighted various problems with respect to the question whether deprivation of an administratively

[17] *E.g.*, NSA judgments of: 13 July 2020, II OSK 933/20; 2 April 2025, I OSK 1857/22; 10 April 2019, II OSK 1263/17 – available in CBOSA.

[18] *E.g.*, NSA judgment of 7 June 2024, II OSK 2187/21, CBOSA. The basis for the resumption of proceedings under Article 145 § 1(5) of the Code of Administrative Procedure was the revelation that the person had committed and had been convicted of money laundering, substantiating the finding that they posed a threat to national security and public order. The case also addressed the complaint of a violation of Article 8 ECHR. It was assessed that resuming administrative proceedings on the granting of Polish nationality to the applicant and setting aside the decision to grant nationality in the resumption proceedings was permissible under Article 8(2) ECHR, as the applicant's acquisition of Polish nationality posed a threat to the protection of public order and security.

[19] ECtHR judgment of 12 June 2018, *Alpeyeva and Dzhalagoniya v. Russia*, § 110, § 124, § 126. In the case in question, the defectiveness of the acquisition of nationality was not through the fault of the applicants, but due to the lack of streamlined procedures and a unified database, and also because of errors committed by officials.

acquired status as a national is permissible. Thus, in finding that the fact that the applicants misled the administrative authority in proceedings for the acquisition of nationality is grounds for the deprivation of nationality, the Court noted that this misleading should relate to information relevant to the case[20]. In another case, the Court found no violation of Article 8 ECHR and Article 4 of Protocol No. 7 to the ECHR[21] in an application that referred to the deprivation, by an act of an administrative authority, of nationality acquired through an administrative procedure, due to the applicants' conviction for terrorist activities[22]. In the Court's view, in the light of Article 8(2) ECHR, deprivation of nationality on account of events arising after its proper acquisition is also not excluded, *e.g.*, on account of terrorist activities carried out after the acquisition of the nationality, even on the basis of *ex post facto* law[23]. That last case clearly confirms that the standard for the protection of the permanence of acquired nationality adopted in the Court's case-law is lower compared to Article 34(2) of the Polish Constitution[24]. This allows the general conclusion that

[20] ECtHR judgment of 22 December 2020, *Usmanov v. Russia*, § 71. In this judgment, the Court held that the lack of information about the applicant's siblings could be considered a sufficiently serious deficiency to deprive the applicant, after many years, of his nationality without infringing the principle of proportionality.

[21] In accordance with Article 4(1) of Protocol No. 7: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[22] ECtHR judgment of 25 June 202, *Ghoumid and Others v. France*, applications nos. 52273/16 and 4 others, HUDOC; the Court did not find the act of deprivation of nationality to be a punishment in criminal proceedings, but an administrative sanction, which is not affected by the *ne bis in idem* principle within the meaning of Article 4 Protocol No. 7 (§ 73). In view of the applicants' conviction for terrorist activities, the Court found the deprivation of nationality to be a permissible interference with the applicants' private lives (§ 52). It is also worth noting that in this judgment, the ECtHR referred to the judgment of the CJEU, which did not exclude the possibility of depriving the applicant of their nationality acquired through an administrative procedure on the grounds of their failure to disclose the commission of a criminal offence in earlier administrative proceedings for the acquisition of the nationality – see judgment of the CJEU of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104 (§ 23).

[23] *E.g.*, from the facts of the ECtHR judgment of 25 June 2021, *Ghoumid and Others v. France*, it follows that some of the applicants undertook terrorist activities after acquiring French nationality (§ 4–6, § 9). However, as a result of the change in the regulations, it became possible to take into account events that had occurred not only in the past ten years, but the past fifteen years (§ 46). The justification clearly shows the Court found that the decisions of the national authorities did not infringe on the principle of proportionality. After all, the applicants were not rendered stateless, and the deprivation of their nationality did not automatically entail deportation (§ 50). Deprivation of nationality on the grounds of terrorist activities undertaken after the acquisition of nationality was assessed in a case concluded in ECtHR's decision of 9 March 2017 in *K2 v. United Kingdom*, § 4–5. In this case, the Court ruled that the complaint under Article 8 ECHR was inadmissible on the grounds that it was manifestly ill-founded (§ 67).

[24] *L. Garlicki* and *K. Wojtyczek* point out that the case-law of the Strasbourg Court establishes, in principle, only minimum standards for the protection of ECHR rights "common to 47 European states with very different constitutional arrangements". The task of the Constitution of the Republic of Po-

the acquisition of nationality, even if correct, is not absolutely protected under Article 8(2) ECHR. By contrast, the lawful acquisition of Polish nationality is subject to absolute protection under Article 34(2) of the Polish Constitution which provides broader protection of the national status. Indeed, the provisions of the ECHR, under the conditions indicated in Article 8(2), do not preclude depriving somebody of their duly acquired status as a national.

§ 4. Procedural guarantees

It is the Court's established position that both the right to a nationality and the right to a passport are not civil rights within the meaning of Article 6 ECHR. Indeed, they are neither property nor private rights[25]. The non-civil nature of nationality cases precludes the application thereto of the procedural standards under Article 6 ECHR. However, ensuring protection in nationality cases under Article 8 ECHR requires guaranteeing the right to an effective remedy within the meaning of Article 13 ECHR, including the right to defence.

The problem of guaranteeing the right to defence in nationality cases may arise when an authority uses closed materials containing information protected by the Act of 5 August 2010 on the Protection of Confidential Information. In cases concerning the recognition of a person as a Polish national or restoration of nationality, the fact that the person poses a threat to national defence or security or to the protection of public order and security can be the sole basis for issuing a denial decision (Article 31(2) and Article 38(3) Polish Nationality Act). Where the case concerns the restoration of Polish nationality, the grounds for a denial decision also include certain conduct during World War II referred to in the law, actions taken at that time to the detriment of Poland, especially its independence and sovereignty, as well as participation in human rights violations (Article 38(2) Polish Nationality Act). Such findings may be made on the basis of closed material.

The voivode and the minister competent for internal affairs may refuse, in part, to justify the decisions issued pursuant to the Polish Nationality Act if this is required for reasons of national defence or security, or the protection of public order and security (Article 11 Polish Nationality Act). The administrative court, when reviewing the activity of the public administration in terms of lawfulness, decides on the basis of the case files, in line with the facts and the law applicable as at the date of the final decision, and does not conduct evidentiary proceedings, with the exception of

land, in turn, is "fulfilling, as best as possible, the principles of a democratic state ruled by law", *L. Garlicki*, *K. Wojtyczek*, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz (eds. *L. Garlicki*, *M. Zubik*), Vol. II, Warszawa 2016, p. 79.

[25] ECtHR inadmissibility decision of 6 July 2006, *Smirnov v. Russia*, application no. 14085/04, HUDOC.

taking documents as evidence (Article 106 APAC). Against the background of nationality cases, there arises a problem of assessing the exclusion, under Article 74 § 1 CAP, of the right to inspect documents in administrative files due to the protection of confidential information and important state interests. Its effects also extend to the proceedings before the adjudicating court. Indeed, the right to inspect court files, guaranteed under Article 12a § 4 APAC, does not extend to confidential documents in administrative files.

The negative impact of the exclusion of access to confidential documents on the exercise of the right to an effective remedy has long been recognised by the ECtHR[26], also in relation to Polish legislation[27]. However, in the case-law of the Supreme Administrative Court of Poland, restrictions on access to files in nationality cases are considered to be proportionate. Judges of administrative courts of both instances are obliged to read the full body of evidence, including classified evidence[28]. The rules for the evaluation of evidence, whether it be open or closed to a party, are governed by the provisions of the Code of Administrative Procedure on the taking of evidence and the principles of fact-finding. This evaluation is carried out by the authorities responsible for the conduct of the proceedings and, subsequently, by the

[26] *E.g.*, ECtHR judgment of 15 November 1996, *Chahal v. United Kingdom*, application no. 22414/93, § 131 and § 144, HUDOC, and ECtHR judgment of 20 September 2002, *Al-Nashif v. Bulgaria*, application no. 50963/99, § 137, HUDOC, recommending the preservation of the adversarial elements of the proceedings and the use of appropriate procedures which, without risking the disclosure of the nature and sources of confidential information, enable a party to exercise their rights, *e.g.*, by appointing a special representative with a security clearance that allows them to see classified documents. A judgment deviating from the aforementioned standard is the ECtHR judgment of 19 September 2017, *Regner v. the Czech Republic*, application no. 35289/11, HUDOC, which indicates that a lower standard of protection may be adopted. In that case, involving the revocation of the applicant's security clearance that allowed him to access classified information and was a condition for his continued employment in the administration, in a situation where neither the applicant nor his attorney had access to the evidence on the basis of which the security clearance was revoked and could not see the reasons for the decision to revoke the security clearance, the ECtHR found no violation of Article 6 ECHR. The ECtHR found that the restrictions on the applicant's rights under the principle of an adversarial process and equality of arms were duly balanced by the national courts. The obligation to guarantee a party's right to defence if the fact-finding in the case was carried out with the use of closed material was made clear in the judgment of the Grand Chamber of the ECtHR of 15 October 2020, *Muhammad and Muhammad v. Romania*, application no. 80982/12, HUDOC; cf. *J. Chlebny*, Glosa do wyroku Europejskiego Trybunału Praw Człowieka (Wielka Izba) z dnia 15 października 2020 r. Muhammad i Muhammad przeciwko Rumunii (skarga Nr 80982/12), ZNSA 2020, No. 6, pp. 172–173. In relation to the issues raised, it is worth mentioning an ECtHR judgment in a case for the deprivation of nationality on the grounds of terrorist activities. In it, the Court considered permissible restrictions on a party's right to inspect closed material. It noted, however, the need to disclose to the party the essential reasons for the deprivation of nationality and the possibility for the party to be represented in the case by a special representative, ECtHR decision of 9 March 2017, *K2 v. United Kingdom*, § 55, § 57.

[27] ECtHR judgment of 22 June 2023 in *Poklikayew v. Poland*, application no. 1103/16, HUDOC.

[28] *E.g.*, NSA judgment of 2 April 2025, I OSK 1857/22, CBOSA.

administrative courts[29]. Literature draws attention to the deficit in the protection of a party's rights and guarantees caused by an authority's use of evidence not disclosed to a party, with specific *de lege ferenda* demands also made therein[30].

§ 5. Conclusions

The Polish Constitution sets a higher standard for protecting the permanence of a national's status than the ECHR. Indeed, circumstances occurring after the acquisition of a nationality cannot, in principle, constitute grounds for the deprivation of nationality. This standard is not affected by the fact that extraordinary procedures provided for in the Code of Administrative Procedure can be effected in relation to decisions under which nationality is acquired. The higher standard of the protection of nationality under the provisions of the Constitution has been recognised in the case-law of the Supreme Administrative Court of Poland. By contrast, Polish legislation does not fully guarantee the right to an effective remedy within the meaning of Article 13 ECHR. Indeed, the use of closed evidence in administrative proceedings in accordance with the applicable regulations may have negative consequences for the right to defence, with such consequences not being counterbalanced by procedural mechanisms other than the judicial review of nationality decisions.

Abstract

The article analyses the issue of the protection of the right to nationality under the European Convention on Human Rights and Polish national law. Although the right to nationality is not explicitly mentioned in the ECHR, the European Court of Human Rights grants its protection through an interpretation of the right to respect for private life pursuant to Article 8 ECHR. Consequently, arbitrary refusal or deprivation of citizenship may therefore lead to a violation of this right on account of serious consequences for an individual's private life. Under Polish law, nationality is regulated primarily by the provisions of the Constitution, as well as the Act on Polish Nationality and the Act on Repatriation. The most important procedures for acquiring Polish nationality involve administrative proceedings related to the recognition of foreigners as Polish nationals. Special consideration in this article is given to the

[29] *E.g.*, NSA judgment of 19 November 2024, II OSK 170/22, CBOSA, in which the administrative court, having reviewed the closed materials in the case, set aside the decision refusing to recognise a foreigner as a Polish citizen, indicating the need for a full and critical assessment of the materials by the authority conducting the proceedings. Indeed, the authority may not uncritically accept classified evidence presented to it under Article 36(2) of the Polish Nationality Act by the Police or the Internal Security Agency.

[30] Cf. *J. Chlebny*, Zmiany w prawie o postępowaniu przed sądami administracyjnymi na dwudziestolecie dwuinstancyjnego sądownictwa administracyjnego, PiP 2025, No. 1, pp. 87–88.

principle of continuity of nationality, specifi ed in Article 34(2) of the Polish Constitution. Indeed, the Constitution of the Republic of Poland sets a higher standard of protection for nationality status than the ECHR. However, this protection is not absolute, and nationality acquired contrary to the law may be challenged through extraordinary administrative procedures. Additionally, the article addresses procedural safeguards and limitations resulting from access to classifi ed evidence during proceedings. It is emphasised that the currently applicable regulations may restrict the right to an eff ective remedy and the right of defence in such proceedings.

Anna Dumas*

The *ne bis in idem* Principle in Tax Cases from the Perspective of the Convention and National Law

§ 1. Introduction

The issue of the legal nature of tax sanctions is one of the most important and controversial topics in legal scholarship, analyzed from many aspects. The subject of this article is an analysis of the case-law of the ECtHR in tax cases in light of the *ne bis in idem* principle, supported by an analysis of the case-law of the Constitutional Tribunal and the Supreme Administrative Court of Poland.

§ 2. Jurisdiction of the European Court of Human Rights in tax cases

The European Court of Human Rights has ruled on many issues in tax cases.

The literature[1] points to the evolution of ECtHR case-law and the systematic broadening of analysis in tax cases. Initially, the case-law of the ECtHR was analyzed only in the context of Article 6(1) of the Convention, which guarantees the right to a fair trial, and then also from the perspective of Article 1 of Protocol I to the Convention, which guarantees the right to peaceful enjoyment of one's possessions. Three fundamental issues have emerged in case-law concerning Article 6 of the Convention, Article 1 of Protocol No. 1 guaranteeing the protection of one's possessions,

* Judge of the Supreme Administrative Court of Poland, President of the Regional Administrative Court in Kraków, dr, Jagiellonian University in Kraków; ORCID: 0000-0002-4705-0684.

[1] *T. Jasudowicz*, Podstawowe trendy orzecznictwa Europejskiego Trybunału Praw Człowieka w sprawach podatkowych, SPPub 2020, No. 3, p. 9 *et seq*.

and Article 4 of Protocol No. 7[2] establishing the prohibition against being tried or punished again.

The issue of classifying tax penalties as criminal penalties within the meaning of Article 6 of the Convention has been repeatedly examined in the case-law of the ECtHR.

According to the Court's case-law, Article 6 of the Convention does not apply to ordinary tax proceedings, which in principle do not have a "criminal character"[3]. However, the Court found that Article 6 of the Convention applies to proceedings concerning tax increases[4].

It is assumed that Article 6 of the Convention, in its criminal aspect, applies to proceedings concerning tax surcharges, in particular on the basis of the following factors:

– the law establishing penalties applies to all citizens as taxpayers;
– the surcharge was not intended to be financial compensation for the damage caused, but was essentially intended to punish the offender in order to prevent a repeat offense;
– the surcharge was imposed in accordance with the general principle, which aims to both deter and punish;
– the surcharge was substantial[5]. The criminal character of the offense may be sufficient to apply Article 6, despite the small amount of the tax increase[6].

The application of Article 6 of the Convention, in its criminal aspect, to tax sanctions may have repercussions for other related tax proceedings that do not strictly fall within the scope of that provision. Sometimes it is particularly difficult to distinguish between elements of proceedings relating to a "criminal indictment" and those

[2] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22 November 1984 in Strasbourg (Polish Journal of Laws of 2003, No. 42, item 364).

[3] ECtHR judgment of 12 July 2001, *Ferrazzini v. Italy*, application no. 44759/98, § 20; ECtHR judgment of 23 February 2006, *Stere and Others v. Romania*, application no. 25632/02, ECtHR judgment of 9 December 1994, *Schouten and Meldrum v. the Netherlands*, application no. 19005/91, § 50 – available in HUDOC.

[4] ECtHR judgment of 23 November 2006, *Jussila v. Finland*, application no. 73053/01, § 38; ECtHR judgment of 17 April 2012, *Steininger v. Austria*, application no. 21539/07, §§ 34–37; ECtHR judgment of 4 May 2017, *Chap Ltd v. Armenia*, application no. 15485/09, § 36; ECtHR judgment of 14 December 2021, *Melgarejo Martinez de Abellanosa v. Spain*, application no. 11200/19, § 25 – available in HUDOC.

[5] ECtHR judgment of 24 February 1994 r., *Bendenoun v. France*, application no. 12547/86, HUDOC; see *a contrario* decision of 3 December 2002 *Mieg de Boofzheim v. France*, application no. 52938/99, HUDOC.

[6] 10% of tax debt corrected in the case of *Jussila v. Finland*, § 38.

with a different purpose. In these circumstances, an investigation into tax penalties will inevitably lead to the need to consider procedural elements relating to other tax issues[7].

The literature[8] contains criticism of the Court's case-law regarding the non-application of Article 6(1) of the Convention in tax cases. The views expressed include a proposal to apply the above provision to this category of cases.

§ 3. Prohibition against being tried and punished again in Polish tax law, the case-law of the Constitutional Tribunal, and the Supreme Administrative Court of Poland

The Polish tax system is seeing an increase in the imposition of tax penalties, even though there are calls for the decriminalization of tax law. This also leads to the imposition of tax penalties and criminal penalties for tax violations. The concept of tax penalties is not understood uniformly in different legal systems. There is no legal definition of the term "tax penalty" in the Polish tax system. A tax penalty should be based on tax law and address non-compliance or improper compliance with tax law provisions. Tax penalties are negative legal consequences manifested in the form of state coercion, which should occur when the addressee fails to comply with a legal order or prohibition, *i.e.*, when they have not fulfilled their obligation. However, not every sanction will be characterized by coercion. Sometimes, an addressee who violates a legal norm will be deprived of a certain right, and this will not involve direct interference by an authority[9].

A tax penalty may arise by virtue of law or may be determined by a tax authority in an extrajudicial procedure. The purpose of tax penalties is primarily repressive and preventive. The existence of strict liability in the imposition of penalties in tax law is supported by the fact that the regulations do not use the concept of fault[10] or

[7] ECtHR judgment of 10 November 2020, *Vegotex International S.A. v. Belgium*, application no. 49812/09, §§ 71–74.

[8] *M. Balcerzak*, *A. Zalasiński*, Sądowoadministracyjna kontrola decyzji podatkowych a prawo do rzetelnego procesu (Article 6(1) of the European Convention on Human Rights), KPPod. 2002, No 1, p. 27 *et seq.*; *A. Brzesińska-Rawa*, *A. Franczak*, Poglądy nauki prawa podatkowego na stosowanie art. 6 ust. 1 EKPC w sprawach podatkowych, [in:] Ochrona praw podatnika. Diagnoza sytuacji (ed. *A. Franczak*), Warszawa 2021, s. 55 i n.

[9] *M. Korszun*, Sankcje w prawie podatkowym, [in:] Sankcje administracyjne (eds. *M. Stahl*, *R. Lewicka*, *M. Lewicki*), Warszawa 2011, p. 467.

[10] *J. Małecki*, Z problematyki sankcji w prawie podatkowym, ze szczególnym uwzględnieniem podatku VAT, [in:] Księga pamiątkowa ku czci prof. A. Kosteckiego, Studia z dziedziny prawa podatkowego, Toruń 1998, p. 162; *H. Dzwonkowski*, Sankcje podatkowe, Kancelaria Sejmu – Biuro Studiów i Ekspertyz, October 1997, pp. 3–11.

dishonesty, but rather the concept of unreliability. The basis for liability is the unlawfulness of the act, understood as conduct that is contrary to the law.

Tax penalties include penalties in the strict sense, such as fines[11], additional tax liabilities[12], and, in a broader sense, interest on arrears[13], loss of the right to preferential taxation, and the application of an increased tax rate. The literature[14] raises the question of whether tax penalties and criminal penalties can be applied simultaneously. The cumulative model stands out, allowing for the parallel application of criminal and tax penalties[15]. The second disjunctive model may involve the choice of penalties and the manner in which they are determined by the authorities[16], whereby the application of one penalty precludes the application of another, or the choice of penalties is determined by law. Poland uses the disjunctive model, in which the choice of penalties is determined by law[17]. The additional tax liability does not apply to a natural person who is criminally or fiscally liable for the same act[18].

Referring to established case-law, the Constitutional Tribunal ruled that legislators have political freedom to determine penalties for violations of the law. Where regulations impose obligations on natural or legal persons, there should also be a provision specifying the consequences of non-compliance. The lack of appropriate penalties renders the provision ineffective, and non-compliance with the obligation becomes commonplace. Article 83 of the Constitution of the Republic of Poland imposes on everyone the obligation to comply with the law of the Republic of Poland. It can therefore be assumed that, within the limits set by the Constitution, legislators have the freedom to determine sanctions for failure to fulfil obligations[19]. However, the legislator's freedom is not unlimited. The Constitution of the Republic of Poland requires legislators to respect the fundamental principles of the Polish constitutional system, foremost among which are the rule of law and the rights and freedoms of the individual. When determining penalties for violations of the law, legislators must, in

[11] Article 109(3h) ATGS, regarding errors in the JPK (from the Polish *Jednolity Plik Kontrolny*, also known as the Standard Audit File for Tax or SAF-T) files sent.

[12] Article 106b(6) ATGS, 106e(12) ATGS, Article 108(7) ATGS, Article 109a ATGS, Article 111(2) ATGS, Article 112b and c ATGS, Article 138j ATGS, Article 58a to Article 58e TO.

[13] Tax interest may also be treated as a civil penalty, performing the compensation function.

[14] *B. Gryziak*, Sankcje podatkowe, a sankcje karne – kumulacja czy alternatywa? Analiza porównawcza Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2010, Vol. 10.

[15] The cumulative model is used in the States which limited Article 4 of Protocol No. 7 to the Convention thereto (Germany, France).

[16] Belgium, Finland.

[17] Poland, Italy.

[18] Article 58e TO and Article 112 b(3h)(3) ATGS.

[19] TK judgments of 18 April 2000, K 23/99, OTK ZU 2000, No. 3, item 89, p. 445, and of 12 January 1999, P 2/98, OTK ZU 1999, No. 1, item 2 referenced therein.

particular, respect the principle of equality[20]. Therefore, penalties that are clearly inadequate, unreasonable, or disproportionately severe cannot be imposed[21].

A taxpayer who violates tax law may be liable under criminal tax law. This would therefore result in concurrent liability under criminal tax law and tax law. In the opinion of the Constitutional Tribunal, in cases where administrative liability and liability for fiscal offenses or fiscal crimes coincide, the simultaneous application of tax and criminal penalties against the same person for the same act constitutes excessive fiscalism and, consequently, is inconsistent with the Constitution of the Republic of Poland. In such cases, the taxpayer may be held liable either under the procedure specified in criminal tax regulations or on the basis of a tax penalty imposed. It should be added that while the taxpayer's fault is important in criminal tax proceedings, in the case of a violation of tax law when imposing a tax penalty, the presence or absence of fault is irrelevant[22]. The Constitutional Tribunal ruled on the issue of income tax on income not covered by disclosed sources of revenue, stating that imposing income tax on a natural person at an increased penalty rate and any prosecution for a fiscal crime or fiscal offense is not a manifestation of cumulative tax liability and criminal fiscal liability, and cannot be considered disproportionate and excessively repressive[23].

In summary, the Constitutional Tribunal ruled that it is inadmissible to impose on the same natural person for the same act in the form of an additional tax liability and a penalty for a crime or offense, recognising it as inconsistent with Article 2 of the Constitution of the Republic of Poland, which expresses the principle of a democratic state ruled by law in terms of violating the principle of *ne bis in idem*, and Article 4(1) of Protocol No. 7 to the Convention.

The issue of concurrent tax penalties and criminal penalties has also been the subject of administrative court rulings[24]. The Supreme Administrative Court of Poland, in resolutions passed by a panel of seven judges, took the position that no additional tax liability for goods and services tax can be imposed on a natural person who faces criminal tax liability. However, there are no obstacles to establishing an additional

[20] TK judgment of 29 June 2004, P 20/02, OTK ZU-A-2004, No. 6, item 61.

[21] *A. Dumas*, System podatkowy gwarancyjny czy sankcyjny?, [in:] Scientia Nobilitat Rozważania o prawie i jego stosowaniu, Kraków 2019, p. 363 *et seq.*

[22] TK judgments: of 24 January 2006, SK 52/04, OTK-A 2006, No. 1, item 6; of 22 September 2009, SK 3/08, OTK-A 2009, No. 8, item 15; of 29 April 1998, K 17/97; of 4 September 2007, P 43/0, OTK-A 2007, No. 8, item 95; of 21 April 2015, P 40/13, OTK-A 2015, No. 4, item 48. The ATGS (Article 89b(6) and Article 111(2)) expressly stipulates that no additional tax liability shall be imposed on natural persons who are liable for a fiscal offense or a fiscal crime for the same act. See *A. Dumas*, System podatkowy, p. 364.

[23] TK judgments: of 29 April 1998, K 17/97 and of 12 April 2011, P 90/08.

[24] NSA resolutions: of 16 October 2006, I FPS 2/06; of 14 March 2005, FPS 1/04.

tax liability in goods and services tax for a civil law partnership due to the lack of legal personality.

The literature[25] commonly points to the problem of distinguishing between the application of different types of penalties and the consequences of violating several different norms from different branches of law with a single act. In the event of a concurrence of different types of penalties, the question arises as to whether the negative consequences of all the concurrent norms should be applied or whether a single penalty should be applied. The problem arises as to which penalty to apply. In tax cases, tax penalties and criminal tax penalties may be imposed concurrently.

§ 4. Consequences of concurrent penalties in public international law and in the case-law of the European Court of Human Rights

In public international law, the issue of concurrent penalties is regulated in Article 4 of Protocol No. 7 to the Convention[26], according to which "No one shall be liable to be tried or punished again in criminal proceedings [...] for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State" (the *ne bis in idem* principle). The literature[27] indicates that Article 4 of Protocol No. 7 to the ECHR was introduced into the catalogue of rights and freedoms guaranteed by the Convention in connection with the entry into force of the International Covenant on Civil and Political Rights, which formulates a similar prohibition in Article 14(7). It is debatable whether the *ne bis in idem* principle constitutes an element of the standard of a fair trial, since it has been regulated outside Article 6 ECHR. The view[28] that separate regulation of the *ne bis in idem* principle does not mean that it does not contribute to the standard set out in Article 6 ECHR should be shared, as it fulfils two different functions: it protects a person who has been finally judged from being re-prosecuted for the same offense, and it serves to respect the authority and permanence of final judgments. A purposive

[25] *P. Majka*, Zbieg sankcji podatkowych i karnych w świetle Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, PrBPiS 2021, No. 4(9), p. 57 *et seq.*

[26] The Protocol was not ratified by the following states: Germany, Belgium, the Netherlands, the United Kingdom. Reservations regard the limitation of the application of the principle of *ne bis in idem* to criminal cases within the meaning of national law were submitted by France, and Austria, Italy, and Portugal submitted a declaration. Austria's declaration was deemed invalid in the Judgment of the ECtHR of 23 October 1995, *Gradinger v. Austria*, application no. 15963/90 §§ 54–55. The Tribunal refers to this issue, see ECtHR decision of 25 November 2021, *Alves de Oliveir v. France*, application no. 23612/20, §§ 1–27.

[27] *P. Hofmański*, [in:] Konwencja o ochronie Praw Człowieka i Podstawowych Wolności, Vol. II (ed. *L. Garlicki*), art. 4 of Protocol No. 7 to the ECHR, Nb 1, Warszawa 2011.

[28] *Ibid.*, Nb 2.

interpretation of this provision indicates that it applies to conduct which does not necessarily have to be defined as a criminal offense under national law. However, national law shows a growing tendency to enforce compliance with tax obligations by means of tax penalties such as tax surcharges or additional tax liabilities, without using the word "punishment"[29].

Determining whether tax penalties and criminal tax penalties overlap will depend on whether individual tax penalties are classified as criminal penalties within the meaning of the Convention[30]. In its judgment of 8 June 1976, in the case of *Engel v. the Netherlands*[31], the ECtHR formulated three criteria for determining whether criminal proceedings are being conducted in a case: first, the legal classification of the offense under domestic law; second, the nature of the prohibited act; and third, the severity of the punishment for the offender. Therefore, in the event of concurrent tax and criminal tax penalties, the *ne bis in idem* principle should be applied when, as a result of tax proceedings, a penalty could be imposed which, due to the nature of the violation or the type and severity of the penalty itself, should be considered a criminal penalty within the meaning of the Engel judgment. In its judgment of 24 February 1994, in the case of *Bendenoun v. France*[32], the Court expanded the criteria, formulating the following four criteria for classifying a penalty as criminal, namely the law establishing the penalty must apply to all citizens as taxpayers, the penalties are not intended to compensate but to deter re-offending, the penalty must be imposed on the basis of a general provision whose purpose is deterrent and punitive, and the penalties must be painful in nature. All of the above conditions must be met cumulatively in the Court's assessment. In turn, in its judgment of 23 July 2002, in the case of *Västberga Taxi Aktiebolag and Nino Vulic v. Sweden*[33], the Court took a different position on the concurrent occurrence of grounds. In *Nykänen v. Finland*[34], the Court held that a finding of a violation of the *ne bis in idem* principle should be preceded by an analysis based on the answers to the following questions: whether the first penalty imposed on the party was of a criminal nature, whether the

[29] *P. Majka*, Zbieg sankcji, p. 68.

[30] *K. Walicki*, Relacja sankcji podatkowych i karnoskarbowych, Przegl.Pod. 2023, No. 8, p. 13 *et seq.*

[31] ECtHR judgment of 8 June 1976, *Engel v. the Netherlands*, application no. 5100/71, § 82; see also ECtHR judgment of 29 August 1997, *AP, MP and TP v. Switzerland*, application no. 19958/92, HUDOC.

[32] ECtHR judgment of 24 February 1994, *Bendenoun v. France,* application no. 12547/86, § 47, HUDOC.

[33] ECtHR judgment of 23 July 2002, *Västberga Taxi Aktiebolag and Nino Vulic v. Sweden*, application no. 36985/97, see also ECtHR judgment of 16 June 2009, *Ruotsalainen v. Finland*, 13079/03, ECtHR judgment of 4 March 2014, *Grande Stevens and Others v. Italy*, application no. 18640/10 – available in HUDOC.

[34] ECtHR judgment of 20. May 2014, *Nykänen v. Finland*, applicationss no. 11828/11, §§ 34–54; *B. Rodak*, gloss to the judgment of the ECtHR of 20 May 2014, application no. 11828/11, Lex 2014.

acts committed by the party were identical, whether the first judgment was final, and whether there had been a retrial. In its judgment of 16 April 2019 in the case of *Bjarni Ármannsson v. Iceland*[35], the Court held that the applicant had been tried and punished for the same or essentially the same conduct by different authorities in two separate proceedings which did not have the requisite connection, in violation of the *ne bis in idem* principle.

It should be agreed[36] that in the Polish tax system, additional tax liabilities and tax increases resulting from rate increases should be considered criminal tax penalties within the meaning of Article 6 of the Convention and the case-law of the ECtHR[37]. The *ne bis in idem* principle laid down in Article 4 of Protocol No. 7 to the Convention could apply to these tax penalties.

Initially, the case-law of the ECtHR on the prohibition against being tried or punished again referred to traffic offenses[38]. In subsequent years, case-law also developed, formulating theses on the prohibition against being tried and punished again in tax cases. In one of the first judgments in the case of *Jussila v. Finland*[39], relating to tax penalties, the Court pointed to the punitive nature of tax surcharges in the context of Article 6(1) of the Convention, and consequently found that proceedings concerning tax surcharges are criminal proceedings also within the meaning of Article 4 of Protocol No. 7 to the Convention. In its judgment of 27 November 2014, in the case of *Lucky Dev v. Sweden*[40], the Court held that the concept of punishment under the various provisions of the Convention does not have a different meaning, as the Convention must be interpreted as a whole.

In turn, in the case of *Häkkä v. Finland*[41], the Court ruled on the concept of criminal proceedings, stating that it must be interpreted in the light of the general principles also applicable to the concepts of criminal charge and punishment in Articles 6 and 7 of the Convention. In the above judgment, the Court also pointed out that the

[35] ECtHR judgment of 16 April 2019, *Bjarni Ármannsson v. Iceland*, application no. 72098/14, § 58, HUDOC.

[36] *P. Majka*, Zbieg sankcji, p. 63 *et seq.*

[37] *K. Wojtyczek*, Ochrona praw podatnika w orzecznictwie Europejskiego Trybunału Praw Człowieka, [in:] Ochrona praw podatnika. Diagnoza sytuacji (ed. *A. Franczak*), Warszawa 2021, p. 420. Five times the flat rate on recorded income, maximum of 75%, taxation of income from undisclosed sources or not covered by disclosed sources at a rate of 75%, 20% rate on inheritance and gift tax and on civil law transaction tax.

[38] ECtHR judgments: of 23 October 1995, *Gradinger v. Austria*, application no. 15963/90, and of 7 May 2002, *W.F. v. Austria*, application no. 38275/97, HUDOC.

[39] ECtHR judgment of 23 November 2006, *Jussila v. Finland*, application no. 73053/01, § 39.

[40] ECtHR judgment of 27 November 2014, *Lucky Dev v. Sweden*, application no. 7356/10, § 51, HUDOC.

[41] ECtHR judgment of 20 May 2014, *Häkkä v. Finland*, application no. 758/11, § 37, HUDOC.

prohibition of double jeopardy applies to criminal proceedings that have been concluded by a final judgment, *i.e.*, when no further ordinary remedies are available, or when the parties have exhausted all remedies, or when the time limits for bringing them have expired[42]. This judgment also suggests that the Court accepts that no one may be prosecuted, tried, or punished twice for the same offense[43].

With regard to tax penalties, one important aspect must be taken into account: the identity of the offender. Unlike criminal penalties, tax penalties may be imposed on individuals as well as other entities. In the absence of subjective identity, the *ne bis in idem* principle will not apply[44].

In the context of the *ne bis in idem* principle, it is also important to note the judgment in *Sergey Zolotukhin v. Russia*[45], in which the Court held that Article 4 of Protocol No. 7 to the Convention must be understood as prohibiting prosecution or punishment for a second offense insofar as it arises from the same facts or facts that are essentially the same. In the Court's view, there is no obstacle to conducting two proceedings, provided that when the first set of proceedings is legally concluded, the second must be discontinued[46].

The Court's case-law[47] holds that, in the case of criminal and tax proceedings aimed at imposing a tax penalty, it must be assessed whether these proceedings are closely related in terms of the assessment of the same conduct of the same persons at the same time. It should also be analyzed whether the penalty imposed in the first set of proceedings was taken into account when determining the severity of the second penalty.

The position expressed in the case of *A and B v. Norway* differs from the Court's previous views on double jeopardy[48]. The purpose of judgment of the ECtHR of this ruling by the Grand Chamber of the Court was to clarify the unclear criteria previously applied. This ruling sets the current line of jurisprudence. In the aforementioned judgment, the Court ruled that the State Party to the Convention have an obligation under Article 4 of Protocol No. 7 to the Convention to protect the

[42] *Ibid.*, § 43; see also ECtHR judgment of 27 November 2014, *Lucky Dev v. Sweden*, § 56; see also ECtHR judgment of 21 October 2014, *Shibendra Dev v. Switzerland*, application no. 7362/10, HUDOC.

[43] *Ibid.*, § 46; see also ECtHR judgment of 27 November 2014, *Lucky Dev v. Sweden*, § 58.

[44] ECtHR judgment of 20 May 2014, *Pirttimäki v. Finland*, application no. 35232/11.

[45] ECtHR judgment of 10 February 2009, § 70 *et seq.*

[46] ECtHR judgment of 27 November 2014 *Lucky Dev v. Sweden*, § 59.

[47] ECtHR judgment of 20 May 2014, *Nykänen v. Finland*, application no. 11828/11; ECtHR judgment of 18 May 2017, *Johannesson and Others v. Iceland*, application no. 22007/11 – available in HUDOC.

[48] ECtHR judgment of 15 November 2016, *A and B v. Norway*, application nos. 24130/11 and 29758/11, § 125 *et seq.*, HUDOC.

specific interests of individuals, while at the same time recognising the need to leave it to the discretion of state authorities to choose the means of fulfilling that obligation.

In the Court's view, the State Parties to the Convention should have the legal possibility to choose a complementary legal response to certain socially unacceptable behaviors (*e.g.*, traffic violations, tax evasion, tax avoidance) by applying various procedures that form a coherent whole, in such a way as to address different aspects of this specific socially harmful problem, provided, however, that the cumulative legal response applied does not place an excessive burden on the entity concerned. In cases where Article 4 of Protocol No. 7 to the Convention applies, the Court should determine whether the measure applied in the legal system of the State concerned entails, both in terms of its subject matter and its effect, double trial or double punishment of the person concerned, or whether it is the result of an integrated system enabling a predictable and proportionate legal response to various aspects of a specific violation of the law and constitutes a coherent whole and, consequently, will not cause any injustice to that person[49].

In the judgment in *A and B v. Norway*, the Court concluded that Article 4 of Protocol No. 7 does not preclude two sets of proceedings from being conducted, even until their conclusion, if the State can demonstrate that the two proceedings are sufficiently closely linked in terms of subject matter and time, *i.e.*, that they are integrated in such a way as to form a coherent whole. Proceedings must have complementary objectives and measures used therein, while ensuring that the legal consequences of socially unacceptable behavior are proportionate and predictable for the entity[50]. The Court, referring to the issue of examining the premise of "final conclusion of one of the sets of proceedings", considered it sufficient to establish that there was a sufficiently close connection between the criminal and tax proceedings to consider them an integrated legal response to the entity's conduct. The fact that one set of proceedings was legally concluded before the other does not affect the Court's concept of a sufficiently close connection between the proceedings[51].

In its judgment in *A and B v. Norway*, the Court held that the combined application of criminal and tax penalties for the same act in certain circumstances did not violate Article 4 of Protocol No. 7 to the Convention.

The Court held that Article 4 of Protocol No. 7 to the Convention does not preclude dual proceedings, even until their conclusion, if certain conditions are met, and the State must demonstrate that the dual proceedings were sufficiently closely

[49] *Ibid.*, §§ 121 and 122.
[50] *Ibid.*, § 130.
[51] *Ibid.*, § 142.

connected in terms of subject matter and time, *i.e.*, that they formed a coherent whole. The Court's view expressed in the aforementioned judgment has been criticized in the literature[52].

In another judgment in the case of *Mihalache v. Romania*[53], the Court reiterated the view expressed in its previous case-law that the purpose of Article 4 of Protocol No. 7 to the Convention is to prohibit the repetition of criminal proceedings that have been concluded by a final judgment. However, it should be considered whether the facts of the case indicate double proceedings that are sufficiently closely related, given that the question of whether the judgment is final or not is irrelevant when there is no actual duplication of proceedings but rather a combination of proceedings considered to form an integrated whole. In finding that there is a "sufficiently close connection, both in substance and in time" between the proceedings, the Court considers that it must be determined whether that connection allows the two proceedings to be treated as part of an integrated system of sanctions under the national law in question, so that there is no duplication of proceedings but rather a combination of them in accordance with Article 4 of Protocol No. 7 to the Convention.

In the aforementioned judgment in *Mihalache*, the Court also referred to Article 4(2) of Protocol No. 7 to the Convention, stating that this provision sets the limits for the application of the principle of legal certainty in criminal cases. Article 4 of Protocol No. 7 makes a clear distinction between a second prosecution or trial, which is prohibited by paragraph 1 of that article, and the reopening of proceedings in exceptional circumstances, referred to in paragraph 2 of that article, in the event of new evidence or the discovery of a serious defect in the previous proceedings[54].

In the *Häkkä and Zolothukin* cases, the Court held that the concepts of trial by a court and the principles of criminal procedure set out in Article 4 of Protocol No. 7 to the Convention should be interpreted in the light of the general principles governing criminal prosecution and punishment within the meaning of Article 6 of the Convention[55]. In the literature and case-law of the Court[56], it is accepted that, when referring to the application of Article 6 of the Convention, the Court has adopted the principle that the guarantee of a fair trial does not apply in tax cases. An exception

[52] *T. Jasudowicz*, Podstawowe trendy, p. 26 *et seq.*; *M. Szwarc*, Łączne zastosowanie sankcji administracyjnych i karnych w świetle zasady *ne bis in idem* (uwagi na tle orzecznictwa ETPC), PiP 2017, No. 12, p. 52.

[53] ECtHR judgment of 8 July 2019, *Mihalache v. Romania*, application no. 54012/10, § 81 *et seq.*, HUDOC.

[54] *Ibid.*, §§ 128 and 129.

[55] *M. Szwarc*, Łączne zastosowanie, p. 43 *et seq.*

[56] *P. Majka*, Zbieg sankcji, p. 59 *et seq.*; *M. Balcerzak*, *A. Zalasiński*, Sądowoadministracyjna kontrola, p. 41 *et seq.*

to this rule is provided for in relation to the understanding of a criminal case, which may include cases related to the application of tax sanctions.

§ 5. Conclusions

The principle of *ne bis in idem* prohibits double punishment of the same person for the same offense. In the Polish legal system, it is interpreted from Article 2 of the Constitution of the Republic of Poland. The *ne bis in idem* principle is not only constitutional in nature, but also has international and EU dimensions. It is formulated in Article 4 of Protocol No. 7 to the Convention, which provides for the prohibition of double prosecution and punishment, and in Article 50 of the Code of Criminal Procedure, which prohibits double trial and punishment for the same act. The case-law of the Constitutional Tribunal, the Supreme Administrative Court, and the European Court of Human Rights has developed many rules on how to interpret and resolve issues of concurrent tax and criminal penalties and when the *ne bis in idem* principle is violated.

The presented analysis of case-law shows that tax penalties and criminal penalties are competitive with each other, as they perform a repressive and preventive function. Therefore, they should not be applied cumulatively, in accordance with the principle of *ne bis in idem*. However, it cannot be unequivocally stated that all tax penalties are punitive in nature. A finding of a violation of the *ne bis in idem* principle must be made in a specific case of application of national law and requires determining the identity of the person against whom the proceedings are being conducted, the identity of the act that is the subject of both proceedings, whether there was a final conviction in the first set of proceedings, and whether there was a retrial or double punishment. The multitude of tax law systems and the multitude and diversity of tax penalties make it difficult to determine whether tax and criminal tax penalties may coincide, and consequently whether the *ne bis in idem* principle may be violated.

Abstract

The principle of *ne bis in idem* means the prohibition of punishing the same person twice for the same act. In the Polish legal system, it is interpreted from Article 2 of the Constitution of the Republic of Poland. The principle of *ne bis in idem* not only has a constitutional character, but also has an international and EU dimension. It was formulated in Article 4 of Protocol No. 7 to the Convention, which prohibits double prosecution and punishment, and in Article 50 of the Charter of Fundamental Rights of the European Union, which prohibits double jeopardy for the same offense. In the case-law of the Constitutional Tribunal, the European Court of

Human Rights, and the Court of Justice of the European Union, many principles have been developed on how to interpret and resolve issues of concurrent tax sanctions and criminal sanctions, and when a violation of the *ne bis in idem* principle occurs.

Karol Kiczka*

Polish Experiences Regarding the Convention for the Protection of Human Rights and Fundamental Freedoms

§ 1. Introduction

By way of introduction to the subject matter, it must be noted that at the time of the drafting and subsequent adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (done at Rome on 4 November 1950), Poland was not a member of the community of sovereign states. The authoritarian state system imposed on Poland, in the form of the Polish People's Republic (Polska Rzeczpospolita Ludowa – PRL)[1], was formally and symbolically abolished only by the Act of 29 December 1989 amending the Constitution of the Polish People's Republic[2]. The People's Republic of Poland was a systemic formation diametrically opposed to the principles and values upon which the European Convention was founded. As a matter of order, it is worth recalling scholarly opinion that 'authoritarianism' and 'totalitarianism' are linguistic constructs that emerged on the eve of the First World War. When asked today 'what is the opposite of democracy?', we usually answer, following *G. Sartori*: totalitarianism or authoritarianism. It is generally assumed that totalitarianism constitutes the most complete negation of democracy[3]. At the same time, as *H. Arendt* observes, the danger lies in the fact that a global,

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Wrocław; ORCID: 0000-0002-3056-024X.

[1] Constitution of the Polish People's Republic adopted by the Legislative Sejm on 22 July 1952 (Polish Journal of Laws of 1976, No. 7, item 36).

[2] Article 1 of the Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Polish Journal of Laws No. 75, item 444).

[3] *G. Sartori*, Teoria demokracji [*The Theory of Democracy Revisited*], trans. *P. Amsterdamski*, *D. Grinberg*, Warszawa 1994, p. 232.

universally interconnected civilisation can produce barbarians from within itself, forcing millions of people to live in conditions that, contrary to appearances, are those of savages[4].

In the period of revolutionary change leading to the forced construction and operation of an authoritarian state such as the People's Republic of Poland, fundamental legal institutions characteristic of a state governed by the rule of law (a democratic state under the rule of law) were questioned and eliminated. Regarding the administrative court system – an indispensable institution of the rule of law – *T. Bigo* emphasised in 1957: "(...) The veil of silence regarding the administrative judiciary has been lifted, and the rehabilitation of this institution can be considered complete. The need for the restoration of administrative courts is undisputed. Currently, a debate is underway in Poland regarding the form and systemic principles this should take. (…)[5]. This discussion certainly continued for such a long time not by coincidence; it was only in 1980 that a single-tier administrative court system, which had functioned in Poland until the outbreak of the Second World War, was restored[6].

Regarding Polish experiences with the Convention, it is worth emphasising that interest in Western European legal institutions manifested – even under the conditions of the People's Republic of Poland – in the form of doctrinal studies. While not as numerous as those published today, they were significant. This situation, typical of an authoritarian state, is eloquently reflected in a review of a monograph by *J. Starościak* on the legal forms of administrative action[7]. In this review, *E. Iserzon* highlights the author's decisive break with the then-recent 'chauvinistic retreat' from global legal science. According to the reviewer, this chauvinism caused the deplorable backwardness of Polish legal science at the time: condemned to acute isolation and relying solely on their own efforts, scholars were forced to 'reinvent the wheel' and criticise 'bourgeois' theories that had long been abandoned in capitalist countries. Administrative law scholarship – as *E. Iserzon* wrote – has its own specific problems and solutions, but it belongs to the broader family of global jurisprudence and can only develop in cooperation with it. *J. Starościak* provided eloquent proof of this; he did not shy away from difficult issues or the risk of error – a *conditio sine qua non*

[4] *H. Arendt*, Korzenie totalitaryzmu [*The Origins of Totalitarianism*], Vol. 1, trans. *D. Grinberg*, *M. Szawiel*, Warszawa 1989, p. 234.

[5] *T. Bigo*, Trzy sugestie w sprawie sądownictwa administracyjnego, ZNUWr, Series A, No. 10, Prawo III, Wrocław 1958, p. 5.

[6] *R. Hauser*, *J. Chlebny*, *W. Piątek*, Naczelny Sąd Administracyjny jako kontynuator działalności Najwyższego Trybunału Administracyjnego, [in:] 100 lat sądownictwa administracyjnego na ziemiach polskich, Warszawa 2024, pp. 11–15.

[7] *E. Iserzon*, Recenzja pracy J. Starościaka, Prawne formy działania administracji, PUG 1957, No. 6, p. 236.

of academic development. Thanks to these qualities, *Starościak's* work became a vital catalyst in combating the stagnation of Polish administrative law scholarship[8].

Conversely, in the conclusions of a 1960 work on the judicial control of administration in France, *W. Brzeziński* highlighted the dynamic development of the review of administrative legality by French administrative courts. This trend moved towards both extending the scope and deepening the nature of control, reaching the outer limits of legality review. At the same time, the author noted the effectiveness of this control, based on the prestige of the Conseil d'État's jurisprudence and a strong tendency to make administrative legal remedies as accessible as possible – through the expansion of *locus standi*, procedural simplification, reduced court fees, and frequently, exemption from mandatory legal representation by a lawyer[9]. Other exceptionally rare examples of such legal scholarship from the communist period, analysing 'Western legal phenomena' in the field of administrative law, include monographs by *L. Bar* on judicial review of administration in England[10], and *F. Longchamps* on contemporary trends in administrative law science in Western Europe[11].

It was not until 1989 that the first Central European states became members of the Council of Europe, an organisation that had previously comprised only Western European nations. However, as early as 1991, *Z. M. Klepacki* predicted that Poland would likely become a member by November of that year[12]. According to *H. Izdebski*, the only aspect of the Council of Europe's activities that was relatively well known in Poland at the time – perhaps even better than in many established democracies – was the functioning of its human rights protection institutions: the then European Commission of Human Rights and, in particular, ECtHR. The author notes that *M.A. Nowicki*, an advocate and former member of the European Commission of Human Rights, distinguished himself particularly in this field[13].

Against the broadly outlined background of these specific national conditions – which understandably determined the knowledge and, more importantly, the application of the Convention – we may proceed to examine selected examples of the Polish experience. The purpose of this study is to signal the impact of the Convention on the content of selected Polish legal regulations and its significance for the application of the law, whilst also citing relevant legal scholarship from the period of

[8] *Ibid.*, p. 236.

[9] *W. Brzeziński*, Sądowa kontrola administracji we Francji, Warszawa 1960, pp. 168–169.

[10] *L. Bar*, Sądowa kontrola administracji w Anglii, Warszawa 1962.

[11] *F. Longchamps*, Współczesne kierunki w nauce prawa administracyjnego na zachodzie Europy, Warszawa 1968.

[12] *Z. M. Klepacki*, Rada Europy 1949–1991, Białystok 1991, p. 6.

[13] *H. Izdebski*, Rada Europy. Organizacja demokratycznych państw Europy i jej znaczenie dla Polski, Warszawa 1996, p. 5.

the Convention's implementation in Poland. The proposed approach will allow for a focused analysis of specific aspects of this subject, within the limits appropriate for this study.

§ 2. The European Convention in the activities of Polish public authorities

When considering the influence of the European Convention on the content of law created in Poland during the transition away from an authoritarian system, attention must be paid primarily to the work leading to the adoption of the current Constitution of the Republic of Poland[14] of 2 April 1997. *Aleksander Kwaśniewski*, Chairman of the Constitutional Committee of the National Assembly and subsequently President of the Republic of Poland, stated that the Constitution guarantees rights and freedoms to every individual living in society[15]. As the President emphasised, the Constitution draws upon the achievements of European democracy and the rule of law, and is inspired by the European Convention on Human Rights. It recognises that many rights and freedoms serve not merely the citizen, but the individual as such, by virtue of the inherent freedom and dignity of every human being. Crucially, the Constitution contains internal enforcement mechanisms, such as the right to challenge statutes and other legislative acts before the Constitutional Tribunal – whose judgments are final – and the instrument of the constitutional complaint. According to President *Aleksander Kwaśniewski*, these qualities of the Polish Constitution are also highly regarded abroad by eminent experts. Indeed, the Helsinki Foundation for Human Rights has pointed to Poland's constitutional achievements as a model for countries undergoing systemic transition[16].

Furthermore, in his analysis of the status of the individual under the Constitution of the Republic of Poland, *L. Garlicki*[17] emphasised that, from a formal perspective, the work of the Constitutional Committee represented a revolutionary breakthrough. The 'traditional' text, burdened with the sins of 'socialist constitutionalism', was replaced by entirely new formulations linked both to the text of the European Convention and to models adopted in the constitutions of established

[14] The Constitution of the Republic of Poland of 2 April 1997 (Polish Journal of Laws of 1997, No. 78, item 483; rectification Polish Journal of Laws of 2001, No. 28, item 319; as amended).

[15] *A. Kwaśniewski*, Prezydent Rzeczypospolitej Polskiej, [in:] Pięć Lat Konstytucji Rzeczypospolitej Polskiej. Materiały z konferencji na Zamku Królewskim w Warszawie 17 października 2002, Warszawa 2002, p. 10.

[16] *Ibid.*, pp. 10–11.

[17] *L. Garlicki*, Wolności i prawa jednostki w Konstytucji Rzeczypospolitej Polskiej z 1997 r. Bilans pięciu lat, [in:] Pięć Lat Konstytucji Rzeczypospolitej Polskiej. Materiały z konferencji na Zamku Królewskim w Warszawie 17 października 2002, Warszawa 2002, p. 61.

democracies[18]. Consequently, the argument that a specific solution was known and functioned well in EU Member States was treated as particularly weighty and had a significant impact on the content drafted by the Constitutional Committee[19]. According to *P. Winczorek*, reference to international regulations adopted on our continent, primarily at the initiative of the Council of Europe, held analogous significance. Particular mention, as *P. Winczorek* notes, should be made of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the European Charter of Local Self-Government, and the Framework Convention for the Protection of National Minorities[20].

Regarding the influence of the Convention on ordinary legislation, it is worth noting that one of the fundamental determinants of penal reform, as highlighted by *P. Hofmański*, was the strengthening of respect for human rights[21]. Both the changes already effected in criminal law and those projected clearly move in this direction. In this context, legal literature suggests it is desirable to address the significance of Poland's ratification of the European Convention for substantive, procedural, and executive criminal law. The human rights standards developed on the Old Continent are not yet widely known to the Polish reader. According to *P. Hofmański*, within the grounds of criminal law – and specifically the criminal trial – we deal with a permanent threat to the rights of persons who have come into conflict with the law, or who are at least within the sphere of interest of prosecution authorities. Indeed, in the opinion of the cited author, many regulations of the European Convention relate directly to the situation of such persons[22].

At the level of the application of law, the role of the European Convention and the 'radiating effect' of ECtHR judgments are illustrated by significant studies[23]; consequently, given the scope of this work, it is not necessary to refer here to specific judgments of national courts and tribunals or the ECtHR. According to *M.A. Nowicki*, the earliest communication from Poland against domestic authorities found in the

[18] *Ibid*.

[19] *P. Winczorek*, Kilka uwag w kwestii dostosowania Konstytucji Rzeczypospolitej Polskiej do wymogów prawa europejskiego, [in:] Konstytucja dla rozszerzającej się Europy (ed. *E. Popławska*), Warszawa 2000, p. 189.

[20] *Ibid*.

[21] *P. Hofmański*, Europejska Konwencja Praw Człowieka i jej znaczenie dla prawa karnego materialnego, procesowego i wykonawczego, Białystok 1993, p. 17.

[22] *Ibid*.

[23] For instance, *M.A. Nowicki*, Sądownictwo polskie a europejskie gwarancje praw i wolności, [in:] Konstytucja dla rozszerzającej się Europy (ed. *E. Popławska*), Warszawa 2000, pp. 239–246; *M. Krzyżanowska-Mierzewska*, Europejska Konwencja o ochronie praw człowieka i podstawowych wolności w Polsce – refleksje po trzydziestej rocznicy ratyfikacji, EPS, May 2024, pp. 4–18; Europejska Konwencja Praw Człowieka w orzecznictwie polskich sądów administracyjnych (ed. *K. Wojtyczek*), Warszawa 2025.

Commission's archives in Strasbourg is dated 26 March 1984[24]. By the early 1990s, long before the ratification of the European Convention, applications were already numerous. *M.A. Nowicki* notes that 65 applications appeared in 1991, 287 in 1992, and 109 in the first four months of 1993. As is well known, under the relevant regulations for the implementation of the European Convention in Poland, cases could only concern acts, decisions, and facts occurring after 30 April 1993. However, between 1 May 1993 and 1 October 1996, 2,703 files were opened at the Commission's secretariat in Strasbourg, and proceedings were initiated in 705 cases[25]. This trend is confirmed by *J. Szreniawski* regarding the activities of the public administration (the executive)[26]. In his view, dissatisfaction with the work of the public administration in Poland and the actual use of the provisions of this international agreement are evidenced by the numerous applications lodged with the ECtHR. As *J. Szreniawski* states, individuals generally complain about bureaucracy; most applications, even unfounded ones, indicate a lack of trust in state representatives, which cannot simply be attributed to an allegedly innate litigiousness. The lofty formulations of constitutional law regarding the realisation of social justice and democracy often fade when confronted with practice. This is most noticeable in the relationship between the citizen – as a client of administrative services – and the public official[27].

E. Łętowska has pointed out the momentous importance of the European Convention for the creation and application of national (domestic) law[28]. It is particularly significant that case-law regarding Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms demonstrates, as the author notes, a characteristic tendency towards an expansive interpretation. Moreover, it is recognised that the requirements of a democratic society necessitate a broadly conceived interpretation of Article 6 of the European Convention. According to *E. Łętowska*, the initially narrow concept of a 'civil right/obligation' has been gradually extended. Of great importance is the thesis that access to a court is substantive, not merely formal; therefore, a violation of the right to a court may consist in the excessive cost of justice. Directions of interpretation regarding Article 6 of the Convention, as well as standards shaped by rich case-law regarding substantive principles, include: 'equality of arms' as a guideline for mandatory adversarial proceedings; requirements

[24] *M.A. Nowicki*, Polacy w Strasburgu, Rzeczpospolita [Daily], 26th November 1996, Prawo co dnia, p. 15.

[25] *Ibid*.

[26] *J. Szreniawski*, Z zagadnień europeizacji stosowania prawa, [in:] Europeizacja polskiego prawa administracyjnego (eds. *Z. Janku*, *Z. Leoński*, *M. Szewczyk*, *M. Waligórski*, *K. Wojtczak*), Wrocław 2005, p. 91.

[27] *Ibid*.

[28] *E. Łętowska*, Konwencja Europejska w Polsce i nasze myślenie o prawie, KPP, Year I, 1992, issue 1–4, p. 157.

regarding judicial independence; the criterion of 'reasonable time'; the public nature of the hearing; and the interpretation of the 'presumption of innocence'. Furthermore, guarantees regarding the right to a court – such as informing the party, the opportunity to prepare a defence, and legal assistance (including an interpreter) – often diverge significantly from Polish judicial reality and what was previously considered 'normal' and acceptable. In this regard, *E. Łętowska* writes that we face a significant re-evaluation of our legal thinking and practice[29].

As *J. Chlebny* rightly emphasises, the European Convention has shaped standards for the protection of individual rights in the Republic of Poland in a binding manner for over thirty years[30]. Under the Constitution of the Republic of Poland, it constitutes a source of universally applicable law, is directly applicable, and takes precedence over statutes. In the early period of its validity, according to *J. Chlebny*, the Convention was cited by administrative courts – which review the activities of the executive – often only for *decorum*, most frequently in cases involving foreign nationals, which may have been attributable to adequate access to its content and individual judgments in the Polish language. The administration of justice by administrative courts in Poland consists of reviewing the legality of actions taken by the public administration. There can be no doubt, as the cited author rightly accepts, that the provisions of the European Convention constitute an independent criterion for assessing the legality of the action of the public administration. Direct application of the Convention provisions means that even the compatibility of a contested act with a domestic statute does not preclude its annulment by an administrative court on the grounds of a breach of the provisions of that international agreement. The recognition of the Convention as a benchmark for controlling the legality of public administration actions is common in the case-law of administrative courts. In the opinion of *J. Chlebny*, it is impossible to enumerate all the areas of administrative law in which judges of the Supreme Administrative Court of Poland and judges of the Regional Administrative Courts have referred to the provisions of the Convention. However, the significance of the rights and freedoms protected by its provisions has been recognised, as the cited author notes, in cases involving, *inter alia*: 1) the right to a fair trial; 2) failure to act and excessive length of administrative proceedings; 3) excessive length of proceedings before administrative courts; 4) compensation for the deprivation of real property rights under the previous political system (the totalitarian state); 5) compulsory protective vaccinations; 6) the granting of international protection to foreign nationals; 7) civil status records; 8) freedom of conscience, thought, and religion; and 9) respect for the right to private life. According to *J. Chlebny*, one can

[29] *Ibid*.

[30] *J. Chlebny*, Wstęp, [in:] Europejska Konwencja Praw Człowieka w orzecznictwie polskich sądów administracyjnych (ed. *K. Wojtyczek*), Warszawa 2025, p. IX.

point to examples of ECtHR judgments in which the Court itself positively assessed the jurisprudential practice of the Polish Supreme Administrative Court. These concern situations where either national legislation leading to a violation of the ECHR was in force, or where legislative or executive bodies took action in violation of Article 6 ECHR[31].

Conversely, as *M. Safjan* noted in the context of our subject matter, the essence of modern democracies is determined by the rule of law[32]. The rule of law is, first and foremost, the power of judges, whose competence and ability to influence the course of history, the direction of change, and the resolution of major social conflicts have increased immeasurably over the past few decades. However, precisely for this reason, as the cited author argues, the importance of judicial self-restraint is growing. This involves the ability to self-limit and to respect the delicate boundary between judicial arbitrariness and creativity, and between the search for just law and the imposition of one's own particular social, worldview, or ideological vision on society[33]. According to *M. Safjan*, judicial responsibility can never replace the responsibility of modern legislators[34].

§ 3. The European Convention in national legal scholarship

As mentioned at the outset of this paper, the prevailing political system in a given place and time influences the formation of suitable conditions for scientific work or the undertaking of certain topics (tasks), and not only in the field of jurisprudence. Undoubtedly, the subject matter of the European Convention has inspired legal scholarship from the very beginning.

In 1976, by way of example, *A. Michalska* pointed out that there were two regional systems for the protection of human rights: within the Council of Europe and the Organization of African Unity[35]. A few years later, she discussed rights related to the administration of justice in more detail, including Article 6 of the European Convention[36]. The analyses carried out by *R. Szafarz* lead to the conclusion that many Council of Europe treaties aim explicitly at harmonising the internal legal systems

[31] *Ibid*, pp. IX–X.

[32] *M. Safjan*, Polska w Radzie Europy, [in:] Polska w Radzie Europy. 10 lat członkostwa. Wybrane zagadnienia (ed. *H. Machińska*), Warszawa 2002, p. 122.

[33] *Ibid*.

[34] *Ibid*.

[35] *A. Michalska*, Podstawowe Prawa Człowieka w Prawie Wewnętrznym a Pakty Praw Człowieka, Warszawa 1976, p. 246.

[36] *A. Michalska*, Prawa Człowieka w Systemie Norm Międzynarodowych, Warszawa–Poznań 1982, pp. 152–156.

of Member States, or at least at ensuring their essential compatibility[37]. In this way, according to the researcher, Council of Europe treaties become the core of the developing 'European legal space'. Undoubtedly, the greatest and most important achievement in the Council of Europe's treaty acquis is the Convention system for the protection of human rights and fundamental freedoms. It is the most developed compared to other analogous systems existing in the world, both regional and universal[38].

According to *C. Mik*, the fundamental merit of the European Convention is that it enables democracy to be learned through a practice that combines international law and national law[39]. The protection of human rights provided for in this treaty is seen as an element of democracy, not its exclusive content. As *C. Mik* writes, tolerance ends where the exercise of these rights degenerates into abuse. At the same time, the effective application of the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms provides important assurance that human dignity and subjectivity are properly recognised. Simultaneously, contradictions and gaps in the legal order are removed, and the order is organised and based on a clear catalogue of values that fulfils the requirement of consistency and legal certainty, which is so important for the operation of a democratic social order[40].

Independently of issues raised in legal scholarship specific to EU (Community) law, *S. Biernat* draws attention to the profound significance of the separate category of European law for Polish public law[41]. In his opinion, there is a perceptible importance of the law created within the Council of Europe for the organisational (constitutional) law of public administration, substantive administrative law, administrative proceedings, and judicial review of the administration in Council of Europe Member States, including Poland[42]. In the context of the Europeanisation of administrative law undertaken in legal scholarship, *M. Jaśkowska* emphasises the role of the Council of Europe's acquis. She points out that the concept of the Europeanisation of administrative law can be treated very broadly, as a search for a certain universal system of values characteristic of a given cultural circle, namely European cultures[43]. *M. Jaśkowska* notes that the Europeanisation of law is a process stretching over time, taking place in various areas of law and in different forms. Three areas

[37] *R. Szafarz*, Rozwój prawa międzynarodowego Europy z problematyki „europejskiej przestrzeni prawnej", Warszawa 1994 p. 195.

[38] *Ibid*.

[39] *C. Mik*, Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka, PiP 1992, No. 4, p. 16.

[40] *Ibid*.

[41] *S. Biernat*, Europejskie prawo administracyjne i europeizacja krajowego prawa administracyjnego (zarys problematyki), SPE VI, Łódź 2002, p. 71.

[42] *Ibid*.

[43] *M. Jaśkowska*, Europeizacja prawa administracyjnego, PiP 1999, No. 11, p. 18.

of Europeanisation are distinguished: the reception of law; the influence of international organisations and their acts relevant to national legal orders (including, in particular, participation in the Council of Europe); and the influence of EU (Community) law[44].

On the basis of administrative enforcement law, individual rights arise from the European Convention which must be respected, as *L. Klat-Wertelecka* notes, when applying enforcement measures under Article 8 of the European Convention[45]. Furthermore, in the field of analyses relating to the limits of discretionary powers of public administration, European factors influencing the use of administrative discretion by national authorities are emphasised[46]. *A. Błaś* and *J. Jendrośka* emphasise that the limitation of so-called discretionary administrative decisions is served by the principles contained in Recommendation No. R (80) 2 of the Committee of Ministers of the Council of Europe of 11 March 1980 concerning the exercise of discretionary powers by administrative authorities.

§ 4. Summary

The considerations carried out above, having as their subject only selected Polish experiences relating to the European Convention, allow us to conclude that from the very beginning it has aroused real and widespread interest in our legal life. As the discussion confirms, all domains of public authority activity – legislative, executive, and judicial – are influenced by the content and practice of the European Convention.

Undoubtedly, the leading, initiating element of the process relating to the introduction of the Convention in Poland was the fundamental political transformation implemented in our country, followed by Poland's accession to the Council of Europe, and subsequently to NATO and the European Union. The Council of Europe – as stated by *K. Skubiszewski*, Minister of Foreign Affairs of the Republic of Poland (1989–1993) – embodies the identity of contemporary Europe. This identity is expressed in a synthesis of three great causal factors of European civilisation;

[44] *Ibid*. See: *S. Biernat*, *M. Niedźwiedź*, Znaczenie prawa międzynarodowego i unijnego dla prawa administracyjnego i administracji publicznej w świetle Konstytucji RP, [in:] Konstytucyjne podstawy funkcjonowania administracji publicznej, Vol. 2, (eds. *R. Hauser*, *Z. Niewiadomski*, *A. Wróbel*), Warszawa 2012, pp. 117–118.

[45] *L. Klat-Wertelecka*, Granice stosowania przymusu egzekucyjnego w administracji, [in:] Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi (ed. *J. Supernat*), Wrocław 2009, p. 311.

[46] *A. Błaś*, *J. Jendrośka*, Granice dyskrecjonalnych uprawnień administracji publicznej, [in:] Administracja publiczna u progu XXI wieku. Prace dedykowane Prof. zw. dr. hab. Janowi Szreniawskiemu z okazji 45–lecia pracy naukowej, Przemyśl 2000, pp. 79–87.

according to *K. Skubiszewski*, these are: Christian roots, the sense of beauty inherited from ancient Greece, and the concept of law shaped in Rome[47].

The transformations that have taken place as a result of the Convention's influence have usually been of a real dimension, as they concerned momentous practical issues for the individual, society, and the state, including during the time of change in Poland's socio-economic environment. The implementation of the European Convention in academic circulation and in the practice of law-making, application, and observance has often necessitated a re-evaluation or a new view of many legal phenomena. Undoubtedly, the Convention has made an important contribution to the progress and development, in the expected direction, of the democratic state ruled by law, operating subsequently under the conditions of the European Union. We refer here, first and foremost, to strengthening respect for and protection of human dignity as a source of human and civil rights and freedoms, and simultaneously ensuring the reliability and efficiency of public institutions.

Abstract

The study established that the Convention has had an impact on Polish public and private law, specifically within substantive, procedural, and systemic issues. This influence referred to the creation of law and its application by public administration bodies and the courts. The impact of this international agreement concerned important practical issues for the individual, society, and the state. The implementation of the Convention in socio-economic relations, in scientific circulation, and in legal transactions has often necessitated a re-evaluation or new view of many legal phenomena. The Convention has made an important contribution to the progress and development, in the expected direction, of the democratic state ruled by law, operating subsequently under the conditions of the European Union. Particular reference is made here to strengthening respect for and protection of human dignity, while simultaneously ensuring the reliability and efficiency of public institutions.

[47] *K. Skubiszewski*, Polska w Radzie Europy – Przemówienie wygłoszone podczas uroczystości przystąpienia Polski do Rady Europy. Strasburg, 26 listopada 1991 r., [in:] Polska w Radzie Europy. 10 lat członkostwa. Wybrane zagadnienia (ed. *H. Machińska*), Warszawa 2002, p. 325.

Piotr Korzeniowski*

Formation of the Model of the Legal Protection of the Climate under the Convention for the Protection of Human Rights and Fundamental Freedoms

§ 1. Introductory remarks

This article is an attempt to respond to the need to reconstruct the formation of the model of the legal protection of the climate on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms. This publication also covers reflections on certain main issues concerning the possibility of formulating a right to the environment based on the ECHR through defining its concept, essence and most important features, which are expressed predominantly in fundamental human rights related to the use of environmental resources. This analysis serves to present the model of the legal protection of the climate and to show how the provisions of the ECHR contribute to the strengthening of environmental protection at domestic level through the evolving case-law of the ECHR.

§ 2. The essence of the model of the legal protection of the climate in the application of the ECHR

The analysis of the provisions of the ECHR that may be linked to the legal protection of the climate should be conducted in three fields. Firstly, one should mention the provisions of the ECHR from which various elements of the model of the legal protection of the climate can be derived. Secondly, the notion of legal protection of the climate may be used by means of interpreting the existing provisions of the

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Lodz; ORCID: 0000-0003-2138-8609.

ECHR. Thirdly, it is possible to discuss the right related to the legal protection of the climate in its practical aspect, taking into consideration the case-law of the ECtHR.

We use such a structure in the human rights model regulated by the ECHR, and we simultaneously strive for creating universal and mutually linked academic claims. The efforts in this publication will focus on the attempt of recreating the process of shaping the model of the legal protection of the climate under the ECHR.

The legal protection of the climate is a part of a widely understood right to the environment, which is currently shaped by UN policy documents, international agreements and in the case-law of the ECtHR. Environmental protection is currently one of central issues of international law[1], EU law, and domestic law of State Parties to the Convention.

I believe there is a duly justified need to regulate the right to the environment both in international law and in domestic law. The right in question should also cover protection against adverse effects of climate change and the right to request that public authorities exercise their obligations related to the legal protection of the climate.

Currently, the formation of the right to the protection of the climate, understood as a part of the right to the environment, has new aspects, expressions, and forms. The right to clean air may serve as an example.

The domestic right to the protection of the climate is, first and foremost, related to the state and to the law established by its authorities. International organisation, when fulfilling their functions, should support the states' activity in ensuring the legal protection of the climate[2]. By the legal protection of the climate, I mean rights and obligations that are related also to the lawful individual's freedom to use environmental resources, such as air.

The model of the legal protection of the climate under the ECHR should, in particular, take into account the need to harmonise and systematise various types and functions of human rights, linked directly or indirectly to the use of environmental resources and the protection of human health. Specific types of human rights linked to the right to the environment will be dealt with in the further part of this paper, which is based on the analysis of the ECtHR case-law.

It seems vital to reiterate that the reconstruction of how the model of the legal protection of the climate has formed under the ECHR becomes necessary also in the face of radical changes in the list of contemporary human rights related to the use of environmental resources. *M.A. Nowicki* claims that "The European Convention of

[1] See more in: *J. Menkes*, Środowisko naturalne w świetle prawa międzynarodowego – aspekty teoretyczne, [in]: Prawnomiędzynarodowa ochrona środowiska naturalnego (ed. *J. Gilas*), Warszawa 1991, p. 48–77.

[2] See more in: *W. Morawiecki*, Funkcje organizacji międzynarodowej, Warszawa 1971, p. 90–104.

Human Rights is undoubtedly the most effective international instrument to protect human rights"[3]. When looking for methods of protecting individuals' right to the environment and climate protection, the ECtHR applies the provisions pertaining to: the right to life (Article 2 ECHR), the right to respect for private and family life (Article 8 ECHR), the right to property (Article 1 of Protocol No. 1) and the right to a fair trial (Article 6 ECHR).

In its judgments on a widely understood right to the environment, the ECtHR establishes whether similarity of factual circumstances justifies the finding of the same or similar legal effects. Reconstructing the formation of the model of the legal protection of the climate under the ECHR should provide an opportunity for the society affected by, for example, environmental pollution or climate change to learn how to exercise their right to the environment under domestic law. The presentation of that model should enable public administration bodies and judicial authorities of State Parties to the Convention to make more effective decisions in the area of environmental protection. The ECtHR often emphasises in its rulings that one may require of public authorities that they take measures to prevent those violations of the right to life that result from dangerous activity[4].

In order to reconstruct the model of the legal protection of the climate under the ECHR, it will be particularly useful to present the most important policy documents classified as 'soft law'[5], which concern the shaping of the international concept of the right to the environment, to which the ECtHR often refers in its judgments, and in particular in the judgment of 9 April 2024 (GC), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[6], analysed in the further parts of this paper.

[3] *M.A. Nowicki*, Europejska Konwencja Praw Człowieka. Wybór orzecznictwa, Warszawa 1998, p. XIII.

[4] ECtHR judgment of 30 November 2004, *Oneryildiz v. Turkey* [GC], application no. 48939/99, HUDOC.

[5] The 1992 Rio Declaration and its regulations are not international law norms *per se* in their strict sense [as it is an example of 'soft law'; for more information on 'soft law', see *K. Wolfke*, Międzynarodowe prawo środowiska (tworzenie i egzekwowanie), Wrocław 1979, in particular chapter 2, p. 52–81], but its actual importance is much greater. This may also be confirmed by the role played in the development of international environmental law by its predecessor, the 1972 Stockholm Declaration, treated as the constitution for this domain of international law, see *R. Paczuski*, Prawo ochrony środowiska, Bydgoszcz, 1994, p. 14 and ff.

[6] ECtHR, in particular in the judgment of 9 April 2024 (GC), *Verein KlimaSeniorinnen Schweiz v. Switzerland*, application no. 53600/20, HUDOC.

§ 3. Foundations for the formation of the international concept of the human right to the environment

The right to the environment is directly linked to human rights to use environmental resources. This right should be perceived both in the context of individuals' freedoms and in the context of their rights which allow them to request that public authorities pursue a rational environmental protection policy.

The right to the environment under the ECHR is still perceived as a particularly complex legal and political problem. Certainly, this situation is exacerbated by the fact that human rights are formulated in an excessively general manner, and no provisions refer directly to the natural environment. This status quo forces the ECtHR, in the process of applying the provisions of the ECHR, to combine certain objective conditions for recognising the right to the environment with rights such as the right to life or the right to a fair trial.

Analysing all the direct and indirect consequences of the evolution of environmental protection law for the development of the functional model of the right to the environment under the ECHR is an extremely important research task. The development of the ECtHR's views on the uniform right to the environment, which is still not expressly voiced in the case-law, is owed to international environmental law.

The birth of the right to the environment in international law was preceded by four important political developments that marked milestones in the evolution of the right in question[7]. These were:

1) Resolution No 2398 of 3 December 1968 adopted by the General Assembly during its 23rd session[8];
2) Report by UN Secretary-General U Thant of 26 May 1969, "Problems of the human environment"[9];
3) 1st UN Stockholm Conference held in Stockholm on 5 to 14 June 1972, "Human Environment";
4) 2nd United Nations Conference on Environment and Development, held in Rio de Janeiro on 3 to 14 June 1992.

[7] I analyse these matters in detail, in the context of the legal concept of ecological security, in the following publication: Bezpieczeństwo ekologiczne jako instytucja prawna ochrony środowiska, Łódź, 2012, p. 135–147.

[8] Resolution No 2398 of 3 December 1968 adopted by the General Assembly during its 23rd session concerning the problems of the human environment, New York (Collection of Documents 1968, Ch. 24 No. 12 (280)).

[9] Bulletin of the Polish Committee for UNESCO 1969, No. 1, p. 7.

Documents seminal to the further development of the right to the environment include:

1) Convention on Biological Diversity adopted in Rio de Janeiro on 5 June 1992[10];
2) UN Framework Convention on Climate Change adopted in New York on 9 May 1992[11];
3) Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted in Kyoto on 11 December 1997[12].

The formation of the legal model of climate protection under the ECHR also relates to an issue that is very important from the point of view of theory and practice of applying environmental law by the ECtHR, namely a matter of the principle of access to justice[13], regulated by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done in Aarhus on 25 June 1998[14]. The principle of access to court, as regulated in the Aarhus Convention, is a very important instrument for the implementation of the public right to the environment, typical both of the current stage of development of this right and, above all, of its future shape[15].

Ensuring the exercising of the right to the environment under the ECHR is inextricably linked to the application of the principle of access to justice.

On 16 December 2011, the UN High Commissioner for Human Rights published a report entitled "Analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights"[16]. The report was submitted in accordance with Human Rights Council Resolution No 16/11[17]. The document analysed key elements of the relationship between human rights and the environment, with a focus on the following aspects: conceptual link between

[10] Polish Journal of Laws of 2002, No. 184, item 1532.

[11] Polish Journal of Laws of 1996, No. 53, item 238.

[12] Polish Journal of Laws of 2005, No. 203, item 1684 as amended.

[13] See more in: *A. Chmielarz-Grochal*, Dostęp do sądu administracyjnego w wykonaniu wyroku Europejskiego Trybunału Praw Człowieka, PiP 2024, No. 11, p. 3–23.

[14] Polish Journal of Laws of 2003, No. 78, item 706; see also cases concerning the right to information heard by the ECtHR judgments: *Társaság a Szabadságjogokért v. Hungary* (application no. 37374/05, judgment of 14 April 2009); *Youth Initiative for Human Rights v. Serbia* (application no. 48135/06, judgment of 25 June 2013); *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirt-schaftlichen Grundbesitzes v. Austria* (application no. 39534/07, judgment of 28 November 2013); *Magyar Helsinki Bizottság v. Hungary* (application no. 18030/11, judgment of 8 November 2016) – available in HUDOC.

[15] See more in: *M. Lee*, The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation, MLR, 2023, No. 86(3), p. 756–784.

[16] https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-34_en.pdf (date of access: 1.8.2025).

[17] https://docs.un.org/en/A/HRC/RES/16/11 (date of access: 1.8.2025).

human rights and the environment; environmental risks to human rights; mutual reinforcement of environmental protection and human rights; and the extraterritorial dimension of human rights and the environment. In resolution No 16/11, several key elements of the interaction between human rights and the environment were identified, such as sustainable development and environmental protection; environmental damage; and obligations in the area of human rights.

On 8 October 2021, the Human Rights Council adopted, by a majority of 43 votes (including Poland), with 4 abstentions (China, Japan, India, Russia), Resolution No 48/13 proposed by Costa Rica, Maldives, Morocco, Slovenia and Switzerland entitled "The human right to a clean, healthy and sustainable environment"[18]. The document was supported by, among others, 1,300 non-governmental organisations, such as Greenpeace and Amnesty International, activists and business representatives. The resolution explicitly states that sustainable environment is a human right. In yet another resolution, namely Resolution No 48/14[19], adopted despite opposition from Russia and abstentions of China, Eritrea, Japan and India, the Human Rights Council established the Special Rapporteur on the promotion and protection of human rights in the context of climate change[20]. According to *S. Kolarz*, UN initiatives for taking the environment into consideration in the context of human rights and security are gaining a widespread social approval and support from some states but are not always successful due to the lack of consensus among UN members, in particular Russia and China. As *S. Kolarz* claims, although many countries, especially from the EU, Africa and Latin America, recognise the need to protect the environment and human rights, proposals to strengthen UN structures in this regard do not succeed. In the opinion of *S. Kolarz*, the difference in approach can be explained by a different level of awareness regarding climate change, a different degree of exposure to it or a different level of experiencing it, as well as different political priorities[21].

On 26 July 2022, the UN General Assembly adopted a resolution recognising the right to a healthy environment[22]. The instrument recognises that climate change and degradation of the environment are among the most pressing threats to the future of humanity and urges states to intensify efforts for a "clean, healthy and sustainable environment". By adopting the aforementioned resolution, the UN General Assembly was guided by the objectives and principles of the Charter of the United

[18] https://docs.un.org/en/A/HRC/RES/48/13 (date of access: 1.8.2025).

[19] https://docs.un.org/en/A/HRC/RES/48/14 (date of access: 1.8.2025).

[20] *S. Kolarz*, Różne wizje ochrony środowiska wewnątrz ONZ, Biuletyn Polskiego Instytutu Spraw Międzynarodowych 2022, No. 13 (2432).

[21] *Ibid*.

[22] https://docs.un.org/en/A/76/L.75 (date of access: 1.8.2025).

Nations[23], Universal Declaration of Human Rights[24] and Vienna Declaration and Programme of Action[25], and it referred to the UN Declaration on the Right to Development[26], Stockholm Declaration on the Human Environment[27], Rio Declaration on Environment and Development[28], as well as relevant international treaties on human rights, and mentioned other relevant regional instruments on human rights. In the resolution of 26 July 2022, it was also confirmed that all human rights are universal, indivisible, interdependent and interrelated, reaffirming the resolution of 25 September 2015, No 70/1, entitled "Transforming our world: the 2030 Agenda for Sustainable Development"[29], in which a comprehensive, far-reaching and people-centred set of universal and transformative goals and targets related to sustainable development was adopted along with the commitment to working tirelessly for the full implementation of this Agenda by 2030.

In its resolution of 26 July 2022, the UN General Assembly also recalled obligations and commitments of states stemming from multilateral instruments and environmental arrangements, including those on climate change, and the outcomes of the United Nations Conference on Sustainable Development held in Rio de Janeiro on 20 to 22 June 2022 and its concluding document entitled "The Future We Want"[30], in which the principles of the Rio Declaration on Environment and Development were reaffirmed. Human Rights Council Resolution No 48/13 of 8 October 2021 entitled "The human right to a clean, healthy and sustainable environment" was cited as well. Other cited documents included all the Human Rights Council resolutions on human rights and the environment, including resolutions No 44/7 of 16 July 2020, No 45/17 of 6 October 2020, No 45/30 of 7 October 2020 and No 46/7 of 23 March 2021, as well as relevant General Assembly resolutions[31].

[23] Charter of the United Nations, Statute of the International Court of Justice and Agreement Establishing the United Nations Preparatory Commission of 26 October 1945 (Polish Journal of Laws of 1947, No. 23, item 90).

[24] Universal Declaration of Human Rights of 10 December 1948; https://libr.sejm.gov.pl/tek01/txt/onz/1948.html (date of access: 1.8.2025).

[25] https://www.coe.int/t/dcr/summit/decl_vienne_pl.asp (date of access: 1.8.2025).

[26] https://docs.un.org/en/A/RES/41/128 (date of access: 1.8.2025).

[27] https://docs.un.org/en/A/CONF.48/14/Rev.1 (date of access: 1.8.2025).

[28] https://docs.un.org/en/A/CONF.151/26/Rev.1(Vol. I) (date of access: 1.8.2025).

[29] https://docs.un.org/en/A/RES/70/1 (date of access: 1.8.2025).

[30] https://docs.un.org/en/A/CONF.216/16 (date of access: 1.8.2025).

[31] See https://documents.un.org.

§ 4. Judgment of the ECtHR (Grand Chamber) of 9 April 2024 *in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (53600/20)

An important matter shaping the content of the right to the environment in the ECtHR case-law is the legal protection of the climate. According to *K. Snyder*, "Human rights understood broadly as a set of collectively agreed overarching values and norms that need to be protected and pursued and from which one may benefit, provide an alternative pathway for achieving concrete and effective results in the fight against climate change"[32]. The views of theorists who accept contemporary trends in the development of environmental law point to the equality between climate protection law, climate change law or climate law[33]. Some authors adopt the terminology of environmental law for the construction of meaning and due to the need to distinguish concepts such as: "climate protection law" or "climate law".

The concept of "the legal protection of the climate" is multi-layered and often internally contradictory. The multifacetedness of this concept arises particularly from the fact that climate is one of environmental resources. Consequently, climate protection law is a part of environmental law, just like waste management law or water law, and as such, it constitutes an important part of the *acquis* of environmental regulations. There can be no climate protection law without environmental law. The establishment of a right to the environment is also an expression of human progress and aspirations in the field of the legal protection of the climate. Formulating concepts such as "climate protection law" or "climate law" contradicts the concept of "integrated environmental protection", which covers the legal protection of the climate. It is questionable, however, whether considerations of practical nature and the desire to capture a piece of environmental law precisely was the most important factor in bringing to life such interdisciplinary concepts as "climate protection law" or "climate law". It seems that what really mattered here was the temptation to practically label a part of environmental law with a brand-new name, without resolving theoretical disputes pointing to the separate nature of legal regulations related to climate protection and environmental law. When speaking, for example, of "climate law", we are not witnessing the emergence of any new scientific specialisations dealing with theoretical issues that are different from the theoretical issues existing in research focused on environmental law. I see no new theoretical problems in the study of "climate law" that would be different than those studied under environmental law.

[32] *K. Snyder*, Prawa człowieka a zmiany klimatu. Wartość dyskursu praw człowieka dla polityk klimatycznych oraz procesu negocjacyjnego UNFCCC, [in:] Zmiany klimatu a społeczeństwo (eds. *L. Karski*, *I. Grochowska*), Warszawa, 2010, p. 186.

[33] *M. Adamczak-Retecka*, Odpowiedzialność odszkodowawcza za szkody klimatyczne z perspektywy prawa Unii Europejskiej, Gdańsk, 2017, s. 29.

An illustration of my serious doubts related to defining legal regulations on the legal protection of the climate is the case-law of the ECtHR. On 9 April 2024, the Grand Chamber of the ECtHR delivered a landmark judgment in *Verein KlimaSeniorinnen Schweiz v. Switzerland*, application no. 53600/20 (*VKSS* case). The judgment will be of great importance in the environmental jurisprudence of administrative courts. This is the first case in which the Court has found a violation of several rights enshrined in the ECHR within proceedings pertaining to climate change[34]. According to *A. Chmielarz-Grochal*, the judgment can be regarded as a "non-binding precedent (...) when assessing the legality of decisions issued in cases where violations of human rights, including the right of access to courts, are alleged. Judges may refer to it when adjudicating upon, in particular, cases concerning such issues as: granting of greenhouse gas emission permits, environmental charges, administrative fines for exceeding the permissible emissions of particulate matter and carbon dioxide under integrated permits, for failure to measure the level of emissions by the user of the environment or for failure to meet the deadlines for implementing activities set out in ambient air quality programmes, or when carrying out a judicial review of a decision on environmental conditions for implementing a project"[35].

Although the case-law of the ECtHR does not have direct and universal binding force, the ECtHR's line of reasoning in the *VKSS* case concerning the legal protection of the climate can be of large importance in the process of interpretation of substantive law by administrative courts in any environment protection case. In the *VKSS* case, two important attempts were made: (1) to create a new right guaranteed by the Convention and (2) to extend the application of the provisions of the ECHR to the legal protection of the climate in order to protect human rights safeguarded by it.

In the judgment in question, the ECtHR set a new direction for the development of a right to the environment and departed significantly from its own established case-law in environment protection cases.

In the *VKSS* case, the ECtHR has stated that the ECHR does not guarantee general environment protection *per se*. By finding that the universally known effects of global warming are a violation of the right to a normal private and family life, the ECtHR departed in the *VKSS* judgment from its established case-law, according to which the severity of the environmental impact was to be assessed on a case-by-case basis, depending on the circumstances, intensity and duration of the nuisance, and its concrete effects on the physical and mental health of applicants. According to the

[34] For a more extensive analysis of this ruling, see *K. Sulyok*, *Verein Klimaseniorinnen Schweiz and Others v. Switz.* (Eur. Ct. H.R.), International Legal Materials 2025, Vol. 64 (1), s. 1–186.

[35] *A. Chmielarz-Grochal*, Wyrok ETPC (Wielka Izba) z dnia 9 kwietnia 2024 r. w sprawie *Verein KlimaSeniorinnen Schweiz i inni przeciwko Szwajcarii* (skarga Nr 53600/20), ZNSA 2024, No. 3, p. 152.

ECtHR, Swiss legislation in itself violates the right to a normal private and family life. The Court pointed out that States Parties to the Convention had an obligation to introduce timely and effective legislative, administrative and judicial measures to mitigate the current and future impacts of climate change.

It emphasised the particularly important role of national courts in climate change cases. Furthermore, the ECtHR recognised the important function of the right of access to justice in climate protection cases.

In the *VKSS* case, the Court ruled, as to the merits of the case, that the Swiss national regulatory framework had significant gaps, in particular due to the state's inability to set national limits applicable to greenhouse gas emissions.

§ 5. Conclusions

Theoretical reflections presented in this publication, aimed at providing insight into the formation of the model of the legal protection of the climate under the ECHR, are relevant beyond the realm of theory. In the current phase of development of international environmental law and domestic environmental law of States Parties to the Convention, the application of environmental law cannot depend on incidental understanding of, for example, the right to life or the right to a court.

The new rights inferred from the provisions of the ECHR by means of interpretation can only effectively protect people if a level of awareness of environmental law issues is much higher, and understanding of the risks to human life and health caused by, for example, environmental pollution and climate change is greater[36].

The evolution of the right to the environment in international law has made the model of the legal protection of the climate under the ECHR viable. Questioning the right to the environment can lead in certain situations to socially harmful consequences resulting from the ECtHR's failure to provide a party with legal protection in cases concerning the legal protection of the climate.

The very concept of the right to the environment under the ECHR is nothing new. The analysis of the climate legal protection model in the context of the Convention shows there is no need to further negate its existence. Now the ECtHR faces the task of demonstrating its commitment to the wider application of the legal protection of the climate. The parties to the Convention should be required under its provisions to continuously enrich the safeguarding of human rights related to environment protection and the use of its resources in internal law, taking the legal protection of the climate into account.

[36] See more in: *J. Baert Wiener*, Global Environmental Regulation: Instrument Choice in Legal Context, The Yale Law Journal, January 1999, Vol. 108, No. 4, pp. 686–701.

Abstract

This paper constitutes an attempt to respond to the need to reconstruct the formalising process of the legal model of climate protection in the ECHR. In addition, this paper contains reflections on some of the crucial problems related to the legal protection of the environment carried out under the provisions of the Convention, as well as the determination of its scope, and the core, most important features of the legal protection, which are manifested mainly in the fundamental human rights associated with using environmental resources. The aim of the analysis is primarily to present the model of the legal protection of the environment and to demonstrate how the Convention contributes to the reinforcement of the legal protection of climate related issues on the national level (case *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*) through the evolving judicature of the European Court of Human Rights.

Zdzisław Kostka*

The Definition of Statutory Elements of Disciplinary Offences in Polish Acts on the Organisation of the Judiciary in Light of Selected Judgments of the European Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights have been present in the practice of every Polish lawyer for many years. It is frequently the case that a specific matter requires assessment regarding its compliance with standards derived from the ECHR. The inspiration for this study arises from situations of this kind occurring in cases concerning the disciplinary liability of judges, particularly those related to the manner in which the acts governing the structure of the courts define disciplinary offences (*delikty dyscyplinarne*).

There is a fairly widespread conviction that a characteristic feature of judicial disciplinary liability is the indeterminacy of disciplinary offences. It is pointed out that, unlike criminal liability, disciplinary law lacks a precise catalogue of offences[1]. It is sometimes assumed that this indeterminacy of disciplinary offences is the very essence of disciplinary liability and that the principle of *nullum crimen sine lege* does not apply in this regard[2]. Such assessments are difficult to challenge in light of the provisions of the statutes regulating the organisation of the Polish judiciary. Judicial disciplinary offences are defined in Article 72(1) SNU, Article 107(1) PrUSP, and

* Judge and Disciplinary Spokesman of the Supreme Administrative Court of Poland.

[1] *W. Kozielewicz*, Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy, Warszawa 2023, p. 18.

[2] *M. Skwarcow*, Odpowiedzialność dyscyplinarna sędziów oraz postępowanie przed rzecznikiem dyscyplinarnym na podstawie Prawa o ustroju sądów powszechnych (po ostatnich zmianach ustawowych i wyroku Trybunału Sprawiedliwości Unii Europejskiej z 15.07.2021 r., C-791/19), PS 2021, No. 11–12, p. 68.

Article 37(1) and (2) PrUSWoj. The aforementioned Article 72(1) SNU applies to judges of the regional administrative courts and judges of the Supreme Administrative Court (NSA) by virtue of Article 29(1) and Article 49(1) PrUSA. In the cited provisions, judicial disciplinary offences are defined in essentially the same manner. Using the literal wording of these Acts, it may be stated that a judge bears disciplinary liability for misconduct in office (disciplinary misconduct), including: an obvious and gross breach of legal provisions; refusal to administer justice; acts or omissions likely to prevent or significantly impede the functioning of a judicial authority; actions questioning the existence of a judge's service relationship, the effectiveness of a judge's appointment, or the legitimacy of a constitutional authority of the Republic of Poland; public activity incompatible with the principles of judicial independence and the independence of judges; and compromising the dignity of the office. Only judges of military courts are additionally liable for violations of military discipline and the principles of a soldier's honour and dignity. In all the cited provisions, the phrase 'including' is followed by an exemplification of misconduct in office (disciplinary misconduct), which serves, in a sense, to explain what such misconduct may entail. However, firstly, this is not an exhaustive list, as it is preceded by the phrase 'including'; secondly, these examples of misconduct in office are as indeterminate as the concept they are intended to clarify.

When analysing the current legal status regarding judicial disciplinary offences, one must also consider the historical aspect. Article 129(1) USP28 [former 1928 Act] established that '(f)or misconduct in office and compromising the dignity of the office, judges shall be subject to disciplinary penalties'. These broadly defined disciplinary offences – essentially two categories: misconduct in office and compromising the dignity of the office – remained in force regarding judges of ordinary courts[3] until 9 September 1993. The content of Article 129(1) USP28 was transposed almost verbatim into the PrUSP, and on 9 September 1993, Article 80(1) of that Act, containing the description of disciplinary offences, was amended to read: 'A judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and breach of the dignity of the office.' Thus, it was clarified that misconduct in office may also consist of an obvious and gross breach of legal provisions. Notably, this form of disciplinary offence applied only to judges of ordinary courts and, from 17 June 2011, to judges of military courts. Conversely, subsequent Acts on the Supreme Court continued to define the disciplinary offence in the form of misconduct in office and compromising the dignity of the office. It was not until the Act of 20 December 2019 amending the Law on the Organisation of Ordinary Courts, the Act on the Supreme Court, and certain other Acts[4] –which entered into

[3] These provisions also applied to judges of the administrative courts operating at that time.

[4] Polish Journal of Laws of 2020, item 190, as amended.

force on 14 February 2020 – that the currently applicable description of disciplinary offences was established. An exception is the offence consisting of a refusal to administer justice, which was added by the Act of 9 June 2022 amending the Act on the Supreme Court and certain other Acts[5], effective from 15 July 2022.

As the above analysis demonstrates, for many years the Polish system of judicial disciplinary liability effectively operated with two disciplinary offences possessing very generally defined statutory elements: misconduct in office (including an obvious and gross breach of the law) and compromising the dignity of the office. The amendments resulting from the Act of 20 December 2019 and the Act of 9 June 2022 have changed little in this regard. Primarily, one can still distinguish the disciplinary offence of misconduct in office, including an obvious and gross breach of legal provisions. Furthermore, the disciplinary offence of compromising the dignity of the office continues to exist. However, unlike the legal state prior to 14 February 2020, this offence is now classified as a type of misconduct in office rather than a separate disciplinary offence. Regarding the remaining manifestations of misconduct in office, these are merely examples (types) added to clarify the pre-existing disciplinary offence of misconduct in office[6]. Therefore, we are still dealing with disciplinary offences defined by general statutory elements. The general – or, phrased differently, imprecise – statutory definition of the elements of disciplinary offences has been a significant issue in cases before the ECtHR where the applicants were judges subject to disciplinary penalties.

Among many such cases, one may point to *N.F. v. Italy*[7] and *Maestri v. Italy*[8], where this issue was considered in the context of Article 11 ECHR; the cases of *Kudeshkina v. Russia*[9], *Guz v. Poland*[10], *Danileţ v. Romania*[11], and *Panioglu v. Romania*[12], where it was considered in light of Article 10 ECHR; and *Xhoxhaj v. Albania*[13] and *Oleksandr Volkov v. Ukraine*[14], where the legal basis for measures taken against judges was examined in light of allegations of a violation of Article 8 ECHR.

[5] Polish Journal of Laws of 2022, item 1259.

[6] For more on the reasons and purpose of introducing these new types of misconduct in office, see: *M. Skwarcow*, Odpowiedzialność dyscyplinarna, pp. 71–72.

[7] ECtHR judgment of 2 August 2001, *N.F. v. Italy*, application no. 37119/97, HUDOC.

[8] ECtHR judgment of 17 February 2004, *Maestri v. Italy*, application no. 39748/98, HUDOC.

[9] ECtHR judgment of 26 February 2009, *Kudeshkina v. Russia*, application no. 29492/05, HUDOC.

[10] ECtHR judgment of 15 October 2020, *Guz v. Poland*, application no. 965/12, HUDOC.

[11] ECtHR judgment of 20 February 2024, *Danileţ v. Romania*, application no. 16915/21, HUDOC.

[12] ECtHR judgment of 8 December 2020, *Panioglu v. Romania*, application no. 33794/14, HUDOC.

[13] ECtHR judgment of 9 February 2021, *Xhoxhaj v. Albania*, application no. 15227/19, HUDOC.

[14] ECtHR judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, application no. 21722/11, HUDOC.

It appears that the case of *Oleksandr Volkov v. Ukraine* provides interesting comparative material regarding the Polish legal situation. This case concerned, *inter alia*, the disciplinary offence of 'breach of oath'. In the practice of Polish judicial disciplinary proceedings, the wording of the judicial oath frequently appears as a specific legal basis for a disciplinary offence, which will be discussed in greater detail later in this study. The second case worth analysing closely is *Guz v. Poland*, as it explicitly addressed the Polish legal framework regarding the precision of the definition of judicial disciplinary offences.

In *Oleksandr Volkov v. Ukraine*, the applicant, a Ukrainian judge of the Supreme Court, was disciplinarily punished by removal from office[15]. During the disciplinary proceedings – which included proceedings before the High Council of Justice (the Ukrainian equivalent of the Polish National Council of the Judiciary), a parliamentary committee, the Verkhovna Rada of Ukraine (acting as a disciplinary court in this matter), and the Higher Administrative Court of Ukraine (acting as an appellate court) – the applicant was charged with, among other things, a 'breach of oath'. The Constitution of Ukraine included a provision whereby a judge could be dismissed from office in the event of, *inter alia*, a breach of oath. According to the text of the oath, the judge swore to honestly and conscientiously perform the duties of a judge, and to administer justice in accordance with the law, objectively and fairly. The applicant alleged a violation of Articles 6, 8, and 13 ECHR. The Court found the allegations concerning the violation of Articles 6 and 8 ECHR to be well-founded; regarding the final allegation, it deemed it unnecessary to examine the complaint. From the perspective of this study, the Court's approach to the allegation of a violation of Article 8 ECHR is significant.

According to the applicant, his removal from the office of judge constituted an interference with his private life protected under Article 8 ECHR. The Court agreed with this assertion, which, moreover, was not disputed between the parties[16]. Consequently, the ECtHR proceeded to assess whether the interference was justified, including whether it was lawful.

[15] See, *i.a.*, *K. Warecka*, Strasburg: dymisja sędziego ukraińskiego Sądu Najwyższego naruszyła prawo do rzetelnego procesu. Oleksandr Volkov przeciwko Ukrainie – wyr. ETPC z 9.1.2013 r., skarga Nr 21722/11, Lex 2014 and *M.A. Nowicki*, Oleksandr Volkov przeciwko Ukrainie, [in:] *M.A. Nowicki*, ETPC. Wybór orzeczeń 2013, Lex 2014.

[16] It is worth noting that in *Denisov v. Ukraine*, the Court held that the removal of a judge from their specific function does not constitute interference with private life within the meaning of Article 8 of the ECHR. It seems this different approach resulted from the fact that in that case, the applicant was not removed from the office of judge, but merely removed from the function of court president. The removal of a judge from office was also recognised by the Court as an interference with private life in *Xhoxhaj v. Albania*.

In making this assessment, the ECtHR primarily assumed that the lawfulness of the interference must be evaluated, firstly, on whether it had a basis in domestic law. Secondly, the ECtHR considered the quality of that law to be crucial: specifically, whether it was accessible to the person concerned, whether that person could foresee its consequences for themselves, and whether it was compatible with the rule of law. Referring to its earlier case-law, the ECtHR stated that domestic law must be sufficiently foreseeable to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to measures affecting their rights under the Convention[17]. Regarding the invocation of a provision imposing a sanction for 'breach of oath' as the legal basis for punishing the judge, the Court noted that at the time the applicant allegedly committed the imputed acts, substantive law did not provide any description of the offence of 'breach of oath'. It also stated that the basis for determining the scope of this offence was derived from the text of the judicial oath. The Court assessed that the text of the judge's oath allowed for broad discretion in interpreting a 'breach of oath'. It also addressed new provisions which were not applicable in the applicant's case, noting that although they detailed the external characteristics of this disciplinary offence, they still provided a wide margin of discretion for the disciplinary authorities[18]. In this context, the Court referred to the opinion of the Venice Commission regarding the aforementioned new Ukrainian legislation. This opinion stated that: 'Precision and forseeability of the grounds for disciplinary liability is desirable for legal certainty and particularly to safeguard the independence of the judges; therefore an effort should be made to avoid vague grounds or broad definitions. However, the new definition includes very general concepts, such as 'the [commission] of actions that dishonour a judicial office or may cause doubts [as to] his/her impartiality, objectivity and independence, [or the] integrity, incorruptibility of the judiciary' and 'violation of moral and ethical principles of human conduct' among others'[19].

The above statements by the Court, as well as the Venice Commission, might suggest that the rather general definition of judicial disciplinary offences applied in the Polish legal order does not meet the requirements provided for in the Convention. Additionally, this thesis could be supported by the fact that attempts have been made to enrich the modest statutory descriptions of the elements of disciplinary offences in the case-law of disciplinary courts by referring to other provisions of the PrUSP, including directly to the wording of the oath. Indeed, the case-law of the Supreme Court (Disciplinary Court) frequently invokes Article 82(1) of the same Act, which stipulates that a judge is obliged to act in accordance with the judicial oath.

[17] §§ 169–170 of the judgment in *Oleksandr Volkov v. Ukraine*.
[18] §§ 173–174 of the judgment in *Oleksandr Volkov v. Ukraine*.
[19] § 79 of the judgment in *Oleksandr Volkov v. Ukraine*.

Occasionally, a reference to the oath is included explicitly in the description of the act alleged to constitute a disciplinary offence, and Article 82(1) PrUSP constitutes an element of the legal classification of the offence[20]. It is also pointed out that the act of taking the judicial oath is not merely emblematic or symbolic, but has a material character, as the wording of the oath delineates boundaries, the crossing of which signifies the commission of misconduct in office and gives rise to disciplinary liability[21]. The legal nature of the judge's duty to act in accordance with the oath – rather than merely its moral dimension – is also recognised in legal scholarship[22].

However, it appears that in *Oleksandr Volkov v. Ukraine*, the ECtHR did not rule out the possibility of recognising disciplinary offences defined by reference to general elements – or even by reference to the judicial oath – as a proper legal basis for restrictions on Convention rights. The Court acknowledged the specific nature of disciplinary liability, which lies in the difficulty of foreseeing all possible factual scenarios that might constitute disciplinary offences. It admitted that in certain areas, defining laws with a high degree of precision may prove difficult, and that a certain degree of flexibility may even be desirable to enable national courts to apply the law in light of their own assessment of what measures are necessary in the specific circumstances of each case. It stated that the fact that statutory wording is not always precise is a logical consequence of the principle that laws must be of general application. In the Court's view, the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice. Such conditions, which impose limits on the requirement of statutory precision, are relevant – as the Court indicated – particularly in the case of disciplinary law[23].

The Court also presented a comparative analysis showing that in many European countries, the grounds for the disciplinary liability of judges are defined in a rather general manner. Exceptionally, Italian law defines a closed list of thirty-seven different breaches of a disciplinary nature concerning the conduct of judges, both in the exercise of their functions and outside of them. Based on the experience of other states, the ECtHR stated that the grounds for disciplinary liability are usually defined in general terms, and examples of detailed statutory regulations in this area do not necessarily confirm the appropriateness of the legislative techniques employed or the foreseeability of this field of law[24]. For this reason, in the opinion of the Court,

[20] Judgments of the Supreme Court (Disciplinary Court) of: 22 June 2015, SNO 15/17; 27 October 2017, SNO 36/17; 1 April 2009, SNO 18/09; 28 May 2008, SNO 32/08 – available in Legalis.

[21] Judgment of the Supreme Court (Disciplinary Court) of 1 December 2015, SNO 74/15, Legalis.

[22] *M. Laskowski*, Uchybienie, pp. 109–110.

[23] §§ 175–176 of the judgment in *Oleksandr Volkov v. Ukraine*.

[24] § 82 and § 177 of the judgment in *Oleksandr Volkov v. Ukraine*.

a reasonable approach to assessing statutory precision should exist in the context of disciplinary law, because, due to objective necessity, the *actus reus* of such punishable acts is defined using general language. Otherwise, statutory provisions may not cover the matter fully and would require constant verification and updating due to the numerous new circumstances arising in practice. Thus, a description of a punishable act in a statute, based on a list of specific behaviours but drafted for general application to an indeterminate number of persons, does not guarantee that the principle of the foreseeability of the law is adequately met[25].

Generalising the Court's reasoning, it may be assumed that the Court recognised that a lack of legal precision in defining disciplinary offences does not, in itself, necessitate a finding that a decision based on such a provision fails to constitute an interference by public authority 'prescribed by law'. It is also necessary to consider the practice of applying such provisions and whether procedural safeguards exist to prevent their arbitrary application. The Court considered the availability of independent and impartial review to be the most important safeguard against arbitrariness by the disciplinary body[26].

Ultimately, the ECtHR in *Oleksandr Volkov v. Ukraine* held that the provisions forming the basis for the applicant's removal from judicial office (equivalent to an interference by public authority in his private life) did not meet the criterion of interference prescribed by law because, firstly, there was no consistent and rigorous practice in their application, and secondly, there were no appropriate legal safeguards against their arbitrary application.

Relating the above position of the Court to the Polish legal situation, two factors must be taken into account. Firstly, there is a long-standing practice in Poland of applying provisions stipulating that a disciplinary offence consists of misconduct in office, including an obvious and gross breach of the law and compromising the dignity of the office. Secondly, this long-standing practice took place during a time when independent and impartial review of the decisions of disciplinary courts was ensured. It suffices to point out that from 1 October 2001, when the PrUSP entered into force, until 3 April 2018, when the amendments regarding the establishment of the Disciplinary Chamber of the Supreme Court entered into force, the disciplinary courts for judges of ordinary courts were the Courts of Appeal in the first instance and the Supreme Court in the second instance. The individual panels of disciplinary courts were designated by lot from among all judges of a given court, excluding presidents, vice-presidents, and disciplinary ombudsmen[27]. The disciplinary court for judges of the Supreme Court until 3 April 2018 was the Supreme Court, adjudicating in the

[25] § 178 of the judgment in *Oleksandr Volkov v. Ukraine*.

[26] § 184 of the judgment in *Oleksandr Volkov v. Ukraine*.

[27] Articles 110 and 111 PrUSP in the wording applicable from 1 October 2001 to 3 April 2018.

first instance in a panel of three judges, and in the second instance in a panel of seven judges. The panels of these courts were drawn by lot by the College of the Supreme Court from among all Supreme Court judges, excluding its presidents and disciplinary ombudsmen[28]. Analogous regulations applied and continue to apply to judges of the Supreme Administrative Court and, since 1 January 2004, to judges of regional administrative courts[29].

As previously mentioned, the second ruling of the Court worth analysing for the purposes of this study is the judgment of 15 October 2020 in *Guz v. Poland*. In this case, the Court directly assessed the provisions of Polish statutes establishing judicial disciplinary offences in terms of their recognition as a legal basis for disciplinary liability, and thus for interference with rights guaranteed by the ECHR.

This case concerned a district court judge who, while applying for a higher judicial post in 2009, allegedly behaved in a manner prejudicial to the dignity of the office during the procedure of assessing his candidature. As indicated in the judgment of the Supreme Court (Disciplinary Court)[30] of 20 July 2011 (SNO 31/11), the applicant was found guilty by the Court of Appeal (Disciplinary Court) of having prejudiced the dignity of the office of judge on three occasions during the proceedings for his appointment to a higher judicial position. Specifically, in writing and during the deliberations of the General Assembly of Judges, he referred critically – yet not objectively and without the required restraint – to the evaluation of his work prepared for the purposes of those proceedings by the visiting judge (inspector). This act was classified as a disciplinary offence under Article 107(1) PrUSP, for which the applicant was issued a disciplinary penalty of admonition. The applicant appealed against the judgment; however, the Supreme Court (Disciplinary Court) upheld it. It is worth emphasising that although the Court of Appeal did not refer to the judicial oath in either the description of the act or its legal classification, it explicitly cited it in the justification of its judgment. The Supreme Court did likewise, additionally citing Article 82 PrUSP.

In his application to the ECtHR, the applicant alleged only a violation of Article 10 ECHR. The construction of this Convention provision is similar to that of the aforementioned Article 8 of the Convention. The first part of the provision guarantees everyone the right to freedom of expression, while the second stipulates that the exercise of this freedom may be subject to such formalities, conditions, restrictions,

[28] Article 52 Supreme Court Act of 20 September 1984 and Article 53 of the Supreme Court Act of 23 November 2002.

[29] Article 12d of the Act of 11 May 1995 on the Supreme Administrative Court (Polish Journal of Laws No. 74, item 368 as amended) and Articles 9 and 48 PrUSA.

[30] The judgment is available in the Legalis and Lex databases and on the Supreme Court website in an anonymised version; however, there is no doubt that it concerns the applicant in *Guz v. Poland*.

and penalties as are prescribed by law. The parties to the proceedings before the Court agreed that the decisions taken against the applicant by the disciplinary courts constituted an interference with the exercise of his right to freedom of expression. Consequently, the Court proceeded to assess the application of Article 10(2) ECHR, which included evaluating whether this interference was 'prescribed by law'.

The Court recalled that the expression 'prescribed by law' in Article 10(2) ECHR not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. It indicated that one of the requirements flowing from the expression 'prescribed by law' is foreseeability. In the Court's view, a norm cannot be regarded as a 'law' within the meaning of Article 10(2) ECHR unless it is formulated with sufficient precision to enable the citizen to regulate their conduct: they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. As in *Oleksandr Volkov v. Ukraine*, the Court stated that these consequences need not be foreseeable with absolute certainty. It noted that whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly – as it indicated – many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The Court made the foreseeability of the law dependent, as it were, on its addressees. It stated that the level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover, and the number and status of those to whom it is addressed. The Court pointed out that it had previously ruled that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails[31]. As evidenced by the judgment cited by the ECtHR, this concerned the right to freedom of expression of parliamentarians[32]. However, in *Guz v. Poland*, the Court accepted that this could also apply to judges. This is worth emphasising, as it can hardly be denied that judges are by their very nature specialists in law; this specialist status can also, as the discussed Court judgment shows, be applied to disciplinary law in its substantive dimension.

In this context, the Court directly assessed the provision stipulating that a disciplinary offence is 'compromising the dignity of the office' from the perspective of

[31] §§ 74–77 of the judgment in *Guz v. Poland*.

[32] ECtHR judgment of 17 May 2016, *Karácsony and Others v. Hungary*, applications nos. 42461/13 and 44357/13, HUDOC.

foreseeability. It acknowledged that the phrase 'compromising the dignity of the office' contains an element of vagueness and is subject to interpretation by the courts. However, it noted that in the judgments delivered during the applicant's proceedings, the disciplinary courts referred to the case-law of the Supreme Court, which had elaborated on this concept, indicating that it should be interpreted in conjunction with other provisions binding on judges. Listing these provisions, reference was made to Articles 61 and 82 PrUSP, and furthermore to the wording of the judicial oath. The Court also indicated that the disciplinary courts had taken into account the relevant provisions of the Code of Professional Ethics for Judges[33].

Concluding, the Court stated that the applicant, being a judge, was well-informed regarding the law and aware of the rules designed to preserve the integrity and dignity of the judicial office. Consequently, it found that Article 107(1) PrUSP, together with the interpretation provided by the domestic courts, was sufficiently clear to enable the applicant to foresee to a reasonable degree the possible consequences of his conduct. Ultimately, the Court held that the interference by the public authority with the applicant's right to freedom of expression was prescribed by law[34]. As a side note, it may be observed that this did not, however, lead to the allegation of a violation of Article 10 ECHR being dismissed as unfounded. The Court accepted that a violation of the cited provision had occurred, as the interference with the applicant's exercise of his right to freedom of expression was not necessary in a democratic society. In the Court's view, the domestic courts failed to strike a fair balance between the need to protect the authority of the judiciary and the protection of the reputation and rights of others, on the one hand, and the need to protect the applicant's right to freedom of expression on the other[35].

The above observations lead to the conclusion that, in light of the ECtHR judgments discussed above, the manner in which judicial disciplinary offences are defined in the Polish acts on the organisation of the courts – in the form of misconduct in office and compromising the dignity of the office – meets the requirements prescribed by the ECHR for applicable law, despite its indeterminacy. This prompts the statement that a judge, taking into account the wording of the oath sworn upon appointment[36] and the statutory provision obliging them to act in accordance with that

[33] Resolution No. 16/2003 of the National Council of the Judiciary of 19 February 2003 on the adoption of a collection of principles of judicial professional ethics; https://krspl.home.pl/pl/dla-sedziow/c,65,zbior-zasad-etyki-zawodowej-sedziow-uchwaly/p,1/100,uchwala-nr-162003-krajowej-rady-sadownictwa-z-dnia-19-lutego-2003-r (date of access: 21.7.2025).

[34] §§ 78–80 of the judgment in *Guz v. Poland*.

[35] § 97 of the judgment in *Guz v. Poland*.

[36] According to Article 66 PrUSP, the wording of the oath is as follows: 'I solemnly vow as a judge of an ordinary court to serve the Republic of Poland faithfully, to uphold the law, to perform the duties of a judge conscientiously, to administer justice in accordance with the law, impartially and according

oath[37], should be able to foresee which conduct will satisfy the statutory elements of misconduct in office and which act may constitute compromising the dignity of the office. When formulating such a perhaps rigorous assessment, one must primarily bear in mind that generally formulated disciplinary provisions are addressed to judges – that is, to persons who not only possess high professional qualifications but who are also, according to the legislator, expected to be characterised by an impeccable character [Article 61(2)(2) PrUSP, Article 6(1)(2) PrUSA, Article 30(1)(4) SNU, and Article 22(1)(2) PrUSWoj].

Abstract

In the article, the author analyses the provisions of the Polish judicial organisational acts that define disciplinary offenses, pointing out their vagueness. Next, the author evaluates these provisions in light of two judgments by the European Court of Human Rights concerning complaints filed by judges who had been subjected to disciplinary sanctions. In these cases, the European Court of Human Rights examined, among other issues, whether the legal basis for the disciplinary sanctions applied to the judges met the requirement of being established by law, as stipulated in Article 8(2) and Article 10(2) ECHR. Ultimately, the author concludes that the way disciplinary offenses of judges are defined in the Polish judicial organisational acts, in the light of selected rulings, fulfils the Convention's requirements for applicable law, despite its vagueness.

to my conscience, to preserve legally protected secrecy, and to be guided in my conduct by the principles of dignity and honesty'.

[37] Article 82(1) PrUSP.

Michał Kowalski*

The Evolution of the Right to an Administrative Court under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

§ 1. Introductory remarks

The right to an administrative court is a universally recognised human right at both global[1] and regional[2] levels of human rights systems[3]. They are guaranteed by the Constitution of the Republic of Poland[4] and relevant statutory solutions[5]. Its roots give it fundamental and multifaceted dimension[6]. The momentous seventy-fifth anniversary of the ECHR and the theme of the study determined thereby have directed the optics of this article towards presenting the process of forming the standards for the right to administrative court in the Council of Europe[7]. A synthetic legal analysis

* Judge of the Supreme Administrative Court of Poland, dr hab. prof. ALK, Kozminski University, Warsaw; ORCID: 0000-0002-8112-0922.

[1] Article 14 ICCPR. See also *M. Kowalski*, Standard światowy ONZ, [in:] System Prawa Sądownictwa Administracyjnego, Vol. 1. Zagadnienia ogólne (eds. *G. Łaszczyca*, *W. Piątek*), Warszawa 2023, p. 270 *et seq.*

[2] Article 6 ECHR; see also *M. Kowalski*, Standard regionalny Rady Europy, [in:] System, Vol. 1, pp. 290 *et seq.*; *J. Chlebny*, Standard unijny ochrony sądowej, [in:] System, Vol. 1, p. 309 *et seq.*

[3] See also *M. Kowalski*, Prawo do sądu administracyjnego. Standard międzynarodowy i konstytucyjny oraz jego realizacja, Warszawa 2019.

[4] See also *R. Hauser*, Konstytucyjny model polskiego sądownictwa administracyjnego, [in:] Polski model sądownictwa administracyjnego (eds. *J. Stelmasiak*, *J. Niczyporuk*, *S. Fundowicz*), Lublin 2003.

[5] PPSA.

[6] Presidents of the NSA: *A Zieliński*, *R. Hauser*, *J. Trzciński*, *M. Zirk-Sadowski*, *J. Chlebny*, Słowo od Prezesów Naczelnego Sądu Administracyjnego, [in:] Wolności i prawa człowieka i obywatela w orzecznictwie sądów administracyjnych. Księga Jubileuszowa na 100-lecie utworzenia Najwyższego Trybunału Administracyjnego (ed. *J. Chlebny*), Warszawa 2022, p. 9 *et seq.*

[7] *M. Kowalski*, Prawo pomocy w systemie ochrony praw człowieka, Warszawa 2013, p. 220.

was therefore made of the directives stemming from the case-law of the European Court of Human Rights in Strasbourg and the provisions of selected recommendations of the Committee of Ministers of the Council of Europe[8]. They can be ascribed certain characteristics, such as the possibility of turning them into a legal disagreement, being subject to constructive interpretation, and forming an integral but not hermetic whole (law as integrity)[9]. They should therefore be taken into account when preparing specific legal solutions and institutions, and play an important role in the national judicial process of applying the law[10]. The most important elements of the current European standard of the right to administrative court applicable in the Polish legal system will be reconstructed in this spirit. Finally, an attempt will be made to indicate a possible future relation between the conventionally established standard of the right to administrative court, which has already been established over the years, and the most recent directives based on the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, which draws attention, among others, to the resulting benefits, but also to the risks associated with the widespread use of artificial intelligence in the context of the need to protect fundamental rights[11].

§ 2. Overview of the Council of Europe standard

The primary purpose of the CoE is to promote the rule of law, democracy, human rights, and social development[12]. The ECHR[13] is of fundamental importance in terms of the European human rights protection. In order to ensure compliance with the obligations arising for parties under the Convention, the ECtHR was established, acting on a permanent basis[14]. Article 6(1) ECHR is the fundamental provision in terms of reconstructing the European standard of the right to administrative

[8] *M. Kowalski*, Między jawnością a sprawnością postępowania przed sądem administracyjnym (kilka refleksji związanych z pandemią i jej zakończeniem) PiP 2023, No. 12, pp. 126–140.

[9] *R. Dworkin*, Sprawiedliwość według jeży – testament Ronalda Dworkina – *J. Zajadło*, Przedmowa do opracowania, Warszawa 2025, p. 14.

[10] *M. Kowalski*, Sprawność proceduralna sądów administracyjnych – analiza wybranych mechanizmów procesowych, [in:] Ius est ars boni et aequi. Studia ofiarowane Profesorowi Romanowi Hauserowi, Sędziemu NSA, ZNSA 2021, Special Edition, p. 299.

[11] *M. Kowalski*, Sztuczna inteligencja a usprawnienie postępowania przed sądami administracyjnymi. Kilka refleksji na tle doświadczeń wybranych systemów prawnych, Prawo i Więź 2025, No. 1, pp. 429–442.

[12] *R. O'Connell,* Law, Democracy and the European Court of Human Rights, Cambridge–New York 2020, p. 41 *et seq.*

[13] *R.K.M. Smith,* International Human Rights Law, New York, 2020, p.72 *et seq.*

[14] *K., Dzehtsiarou,* Can the European Court of Human Rights Shape European Public Order?, Cambridge, 2022, p. 96 *et seq.*

tribunal, as it provides the right to a fair trial[15]. It stipulates that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Proceedings before the court are public, but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice[16].

Historically, it has been indicated that the scope of applying the right to tribunal under Article 6 ECHR with regard to cases before administrative courts is limited. This limitation arises from the wording of civil rights and obligations and criminal charges in this provision. Over the years, this position has been declining in popularity, and the Court's case-law itself has evolved significantly towards extending its cognisance by cases traditionally dealt with by administrative courts[17].

From this point of view, the ruling in the case of *Ringeisen v. Austria* was groundbreaking. It concerned proceedings before an administrative authority whose ruling confirming a real estate purchase agreement was decisive in terms of transferring ownership. The ECtHR determined that the concept of civil rights and obligations should be understood in an autonomous manner, meaning independently of its understanding in the legal orders of individual member states of the CoE. Accordingly, it was held that the regime under Article 6 ECHR can also be applied to relations between an individual and a public authority[18].

Thanks to the determinations stemming from the Court's case-law, the right to administrative court has a significant impact on shaping the European standard in this respect. It is because a clear evolutionary line can be drawn towards extending the ECtHR's cognition by cases traditionally dealt with by administrative courts. This process takes place through the specific phenomenon of judicial case-law, which

[15] *K. Spryszak*, Znaczenie realizacji standardów "miękkiego prawa" dotyczących sądownictwa w systemie Rady Europy, [in:] Dylematy wokół prawa do sądu (eds. *R. Ciapał*, *R. Piszko*, *A. Pyrzyńska*), Warszawa 2022, p. 113 *et seq.*

[16] *M. Bond*, An introduction to the European Convention on Human Rights, Strasbourg 2010, p. 31.

[17] *M. Kowalski*, Sądowa kontrola administracji – źródła standardu międzynarodowego i strukturalne systemy jego realizacji, [in:] O prawach człowieka. Księga Jubileuszowa Profesora Romana Wieruszewskiego (eds. *G. Baranowska*, *A. Gliszczyńska-Garbias*, *A. Hernandez-Połczyńska*, *K. Sękowska-Kozłowska*), Warszawa 2017, p. 325.

[18] ECtHR judgment of 16 July 1971, *Ringeisen v. Austria*, application no. 2614/65, HUDOC.

significantly modifies and makes more flexible the literal wording of Article 6 ECHR for the cases at hand[19].

Since 1 January 2004 to date, various references to the ECHR have been cited in nearly 20,000 justifications of judgments of the Supreme Administrative Court and regional administrative courts. The procedure before administrative courts provides for the possibility of reopening proceedings following a judgment of the ECtHR. Pursuant to the provisions of Article 272 § 3 APAC, it is possible to request resumption of proceedings in the event that such a need arises from a decision of an international body acting on the basis of an international agreement ratified by the Republic of Poland. When proceedings are resumed by a Polish administrative court, the guarantees provided under Article 6 ECHR apply within the framework of these proceedings[20].

In addition to the Convention regulations directly influencing the legal system, the recommendations of the Committee of Ministers of the Council of Europe, which constitute the essence of the Strasbourg's case-law[21], play an important role in shaping the standards of administrative court procedure in the member states of the CoE. The recommendation of 15 December 2004 on the judicial review of administrative acts is of primary importance[22].

The recommendation also formulates the five most relevant concepts from the point of view of judicial review of administration, which are: the scope of judicial review, access to judicial review, independence and impartiality of the court, the right to a fair hearing, and the effectiveness of judicial review[23].

Regarding the scope of judicial review of administration, it was indicated that all administrative acts should be subject to judicial review and the court should be able to assess any breach of the law, including lack of jurisdiction, breach of procedure, or abuse of power[24]. In terms of access to administrative court, it was indicated that judicial review of the administration should be available to natural and legal persons in relation to administrative acts that have a direct impact on their legal situation.

[19] *Z. Kmieciak*, Instancyjność postępowania administracyjnego w świetle Konstytucji RP, PiP 2012, No. 5, pp. 3–4.

[20] *D. Vitkauskas*, *G. Dikov*, Protecting the right to a fair trial under the European Convention on Human Rights – A handbook for legal practitioners (2nd edition) (2017), https://rm.coe.int/protecting-the-right-to-a-fair-trial-under-the-european-convention-on-/168075a4dd (date of access: 1.7.2025).

[21] *M. Kowalski*, Rola i pozycja sędziego sądu administracyjnego, [in:] Metodyka pracy w sądach administracyjnych (eds. *R. Hauser*, *J. Drachal*), Warszawa 2015, pp. 20–21.

[22] Recommendation Rec (2004) 20 of the Committee of Ministers to Member States on judicial review of administrative acts, https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines (date of access: 1.7.2025).

[23] *J. Chlebny*, Europejskie standardy procedury administracyjnej i sądowoadministracyjnej, [in:] Postępowanie administracyjne w Europie (ed. *Z. Kmieciak*), Kraków 2005, p. 31.

[24] *M. Kowalski*, Rola i pozycja sędziego, pp. 20–21.

They may be required to exhaust the remedies provided for under national law before bringing an action before the tribunal. The administrative court procedure in a case should not be prolonged and the time limit for filing a complaint with the tribunal should not be too short. The cost of litigation should not be a disincentive to go to court, and legal aid should be available to the impoverished when in the interests of justice[25].

With regard to the concept of judicial independence and impartiality, it was indicated that a specialised administrative court established by law or a court belonging to the structure of the ordinary judiciary may have jurisdiction in administrative matters. Judicial independence, as defined under Article 6 ECHR, aims to guarantee every individual the fundamental right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judges should have unfettered freedom to decide cases following the letter of the law and their interpretation of events. In doing so, strong guarantees are needed so that they can perform their duties and maintain the authority and dignity of the court[26].

With regard to the efficiency of proceedings, it was indicated that individual judges have a duty to effectively manage the cases for which they are responsible, including the enforcement of judgments that fall within their jurisdiction[27]. With regard to solutions stabilising a judge's professional position, it was recognised that the indefinite appointment of a judge can only be limited by a significant breach of discipline, a breach of law, or when a judge is otherwise unable to perform their duties. Judges can only retire early at their own request or for health reasons[28]. On the issue of a judge's remuneration, it was indicated that it should be equivalent to their duties and responsibilities[29].

The fourth general principle provided for by the recommendation on the judicial review of administrative acts is the right to a fair hearing, which consists of directives such as a reasonable time for hearing a case, equality of the parties to the proceedings, access to the administrative file of the case, the principle of adversarial proceedings. Each case should therefore be dealt with within a reasonable time, the assessment of which should take into account the complexity and nature of the case, and the conduct of the parties to the proceedings and the administrative authority. The duration of the administrative appeal procedure should also be taken into account if exercising

[25] Original text of recommendation is available at: https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines (date of access: 1.7.2025).

[26] *S. Prechal*, Directives in EC Law, Oxford 2006, p. 131.

[27] §§ 31–32 of the Recommendation on judges: independence, efficiency and responsibilities.

[28] §§ 49–50 of the Recommendation on judges: independence, efficiency and responsibilities.

[29] *M. Kowalski*, Prawo do sądu administracyjnego – standard Rady Europy a polska regulacja Konstytucyjna, [in:] Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne (eds. *J. Jaskiernia*, *K. Spryszak*), Toruń 2017, p. 572.

this procedure is a condition for bringing an action before an administrative court – the concept of the total length of the proceedings[30].

The right to a fair hearing should guarantee equality of arms between the parties to the proceedings, which means that it is the duty of the member states to guarantee such equality for all parties to the proceedings, in particular with regard to the exercise of their right to present their positions during the trial. A potential threat to this principle arises from the fact that one of the parties to the administrative court proceedings is a public administration body[31].

Another procedural guarantee is access to the administrative file, as the authority should make available to the tribunal the documents and information relevant to the case, and all information concerning it. National law may provide for exceptions thereto, but only in particularly important cases.

An element of the right to a fair hearing is the principle that proceedings should be adversarial in nature. The proceedings should be built on the adversarial principle, guaranteeing that each party has the opportunity to respond on the merits to the statements and evidence presented by the opposing party. The administrative court proceedings should be public. The recommendation provides for public hearings, indicating that possible exceptions to this rule can only be envisaged on an exceptional basis. In accordance with Article 6 ECHR, the judgment should be pronounced in public. The decision of the court should give written reasons for the judgment. The reasons should be individualised and cannot be limited to merely stating the legal grounds for the decision. The reasons provided by the tribunal should include a reference to the arguments raised by a party, but it is not necessary for a tribunal to deal with every point raised in argument.

With two-instance proceedings (the decision of the tribunal that reviews an administrative act should (...) be subject to appeal to a higher tribunal), judicial decisions made as a result of the review of administrative acts, particularly in serious cases, should allow for the possibility of an appeal to a court of second instance, unless the case is subject to a direct decision by a higher court. In doing so, attention is drawn to the need to guarantee the possibility of an avenue of appeal in cases involving, among others, heavy administrative sanctions. Instance review is intended to prevent arbitrariness of judicial decisions. The court of second instance deciding the case should meet the requirements under Article 6 of the ECHR[32].

The effectiveness of judicial review of administration means that the court should have adequate powers to restore the status of legality. In particular, it should have the

[30] See also: *Z. Kmieciak*, Instancyjność postępowania administracyjnego, p. 5.
[31] See also: *J. Chlebny*, Europejskie standardy procedury, p. 34.
[32] See also: *J. Chlebny*, Europejskie standardy procedury, p. 36.

power to overturn the administrative decision and refer the case back to the authority for reconsideration in accordance with the guidelines of the judicial decision. The court should also have the power to award costs and damages according to the circumstances and type of case at hand[33].

In this light, the guidelines of the Committee of Ministers of the Council of Europe have had an important influence on the formation of the European standard of administrative court procedure[34]. Some of them provide recommendations directly relating to the administrative court proceedings model, such as the recommendation on the judicial review of administrative acts, or on the independence, efficiency, and role of judges. Other relate directly to administrative proceedings, such as the recommendation on good administration[35]. Recommendations not only provide specific guidelines for the legislator, which should be implemented as part of current state policy and taken into account in the process of creating specific legal solutions, but can also be a point of reference in the process of judicial application of the law[36].

§ 3. Concluding remarks

Poland's accession to the regional system of the CoE was a crucial stage in the process of Europeanisation and standardisation of the administrative court proceedings in Poland. The syllogistic limitation of the Convention right to a fair hearing stemming from the wording of civil rights and obligations or any criminal charge provided for under Article 6 ECHR was nullified by the consistent jurisprudence of the Strasbourg Court. The recommendations of the Committee of Ministers of the CoE, which synthesise the ECHR acquis and reflect the experience of individual countries with regard to models of judicial review of administration, play a key role in shaping the standards of the right to administrative court in member states of the CoE. The legal system of the CoE is constantly evolving and closely interplays with national systems. The direction of transformation of the Convention system is, in my view, inspired by solutions that work in individual national systems and, conversely, pan-European regional experience influences the universalisation of solutions transferred to national law.

The directives stemming from the case-law of the ECtHR and the provisions of the recommendations form a coherent system which gives way to the main

[33] See also: *M. Kowalski*, Prawo do sądu, p. 572.

[34] *A.Carroll*, Constitutional and administrative law, Edinburgh 2017, 413 *et seq.*

[35] *B. Grabowska-Mroz*, *M. Wierzbowski,* The Role of the Council of Europe in Improving General Principles of Administrative Law in Poland – Remarks on the 25th Anniversary of Accession to the European Convention on Human Rights, [in:] Good Administration and the Council of Europe. Law, Principals, Effectiveness (eds. *U. Stelkens, A. Andrijauskaite*), Oxford, New York, 2020, p. 478 *et seq.*

[36] *J. Chlebny*, Europejskie standardy procedury, 37.

prerequisites shaping the European standard of law and the administrative court procedure. Some of them directly relate to the shaping of the right to administrative court, such as the recommendation on the judicial review of administrative acts, or on the independence, efficiency, and role of judges. Other recommendations, such as those on good administration, can significantly impact the process of judicial review of administration, providing interpretative and control directives used to assess standards of administrative performance. Since 1 January 2004 to date, references to the recommendations have been cited in various contexts in nearly eight hundred justifications of judgments of the Supreme Administrative Court and provincial administrative tribunals[37].

The Convention standards appear more than once in the jurisprudence of Polish administrative courts, nevertheless the pattern of their citation is most often limited to confirming or reinforcing the argumentation in a ruling issued on the basis of Polish law. They are rarely treated as legal grounds for a ruling in their own right, but more often as a general standard that is nevertheless clearly discernible in the case-law. However, in my view, this is due to the overlap between most of the constitutional and convention standards applicable to administrative justice in Poland.

Currently, the issue of artificial intelligence is increasingly prominent in the European regional human rights protection system. Unfortunately, one might have an impression that the pace of technological development, including artificial intelligence algorithms, is far outpacing the pace of development of relevant legal regulations and judicial decisions in this area. In the preamble to the Convention adopted on 5 September 2024 of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law[38], it is indicated that its drafters "are conscious of the accelerating developments in science and technology and the profound changes brought about through activities within the lifecycle of artificial intelligence systems, which have the potential to promote human prosperity (...) [r]ecognising that activities (...) may offer unprecedented opportunities to protect and promote human rights, democracy and the rule of law" but are also "[c]oncerned that certain activities within the lifecycle of artificial intelligence systems may undermine human dignity and individual autonomy, human rights, democracy and the rule of law"[39].

The Convention aims to address specific challenges that arise throughout the lifecycle of artificial intelligence systems, and to encourage consideration of the wider risks and impacts associated with these technologies. Such views also appear in recent

[37] Data generated from CBOSA website, www.orzeczenia.nsa.gov.pl.

[38] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, https://rm.coe.int/1680afae3c (date of access: 1.7.2025).

[39] *Ibid*.

foreign studies. An Irish judge indicates that artificial intelligence can improve the efficiency of the justice system. However, it should be stated that the use of artificial intelligence in the administration of justice, sometimes referred to as algorithmic justice, raises serious concerns and may constitute an interference with due process of law, including the judicial and administrative process[40]. In other words, artificial intelligence can improve the efficiency of the judiciary, but so-called algorithmic justice can pose a serious threat to constitutional and Convention fundamental rights[41].

Abstract

The right to an administrative court is of primary importance both at the level of global and regional systems of human rights protection. In Poland, it is guaranteed by the Constitution of the Republic of Poland, as well as by appropriate statutory solutions, in particular the Law on the organisation of administrative courts and the Law on proceedings before administrative courts. When it comes to its roots, it has a fundamental and multi-dimensional element. The important anniversary and the subject of the study determined by it have directed the optics of this text to present the process of shaping the standards of the right to an administrative court in the system of the Council of Europe. Therefore, both the directives resulting from the case-law of the European Court of Human Rights in Strasbourg and the provisions of selected recommendations of the Committee of Ministers of the Council of Europe have been subjected to appropriate legal analysis. They should be taken into account in the process of creating specific solutions and legal institutions, and also play an important role in the national judicial process of applying the law. In this spirit, the most important elements of the current European standard of the right to an administrative court applicable in the Polish legal system will be reconstructed. The final reflection will attempt to indicate a possible future connection between the conventional standard of the right to an administrative court, which has been shaped over the years, and the latest directives arising from the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, which draws attention, among other things, to the benefits arising from it, but also to the significant risks associated with the widespread use of artificial intelligence in the context of the need to protect fundamental rights.

[40] Some conclusions from Judge *Leonie Reynolds*' speech on technology and the rule of law delivered at the International Seminar of the European Justice Training Network Institute Justice (EJTN, REFI) in Rome on 2–3 May 2024. See more *M. Kowalski*, The impact of artificial intelligence on the future functioning of administrative courts, Prawo i Więź 2024, No. 12.

[41] *M. Kowalski*, Sztuczna inteligencja, p. 439.

Wojciech Maciejko*

Administrative Obligation to Work as Element of "normal civic obligations" under the Convention for the Protection of Human Rights and Fundamental Freedoms

§ 1. Introductory remarks

Article 4(2) ECHR, introduces a normative value which the Polish lawmakers have approached variedly in domestic legislation. This provision incorporates the prohibition of the performance of forced or compulsory labour. The lawmakers have referred to compulsory labour and the conditions under which public authorities – especially public administration authorities – formulate acts compelling people to perform work, in various constitutional aspects, with their approach dependent on the values associated with work, which naturally differed across the respective political systems. However, the Polish lawmakers did not withdraw from all their intentions in this regard when changing their constitutional intentions. What we can observe today is the lack of chronological correspondence between the development of the constitutional matter and the approaches – accompanying the new constitutional solutions – to the question whether compulsory labour is admissible and to the question under what conditions a citizen can be compelled to perform work.

It is not the prohibition of introducing an institution of forced or compulsory labour itself which seems to be problematic, but the scope of exceptions to this prohibition, especially those which give public administration authorities a mandate to compel citizens to work without their consent. The list of cases excluded from the definition of forced or compulsory labour – *i.e.*, the cases in which a state may legally

* Judge of the Supreme Administrative Court of Poland, dr hab., Andrzej Frycz Modrzewski Krakow University; ORCID: 0000-0002-8746-3563.

return to compelling citizens to work – is relatively narrow, at least from the perspective of the internal structure of Article 4(3) ECHR. What may raise doubts, however, is the semantic capacity of some estimative phrases which, depending on the determination of their content, allows work orders to be subsumed under the exceptions allowed for in the ECHR, or alternatively allows conclusions to be drawn regarding other nonconventional and potentially unauthorised cases of public authorities compelling citizens to perform work.

§ 2. Cases excluded from the prohibition of compulsory work that are adequate to the role of public administration

The formula that involves a list of exceptions to the prohibition of compelling citizens to work within the framework of forced or compulsory labour, as laid out in Article 4(3) ECHR, is based a legislative treatment that excludes certain forms of performance of work from the semantic scope of "forced or compulsory labour" referred to in Article 4(2) ECHR. All exclusions [rendered separate under (a) to (d) in the structure of Article 4(3) ECHR], begin with the phrase "the term 'forced or compulsory labour' shall not include "[...] any work" or "[...] any service", and the qualitative normative description of that exclusion follows right after that phrase. The quantifier 'any' does not narrow the scope of the exception. On the contrary, it is as if it establishes a second layer to the prohibition which seems not only to extend it as such, in line with the methodology for general prohibitions and exceptions thereto, but also to shape, almost hand in hand with the rule, the principles in accordance with which public authorities should make value assessments as to what is and is not allowed in compelling a citizen to work. A certain group of cases, shaped by Article 4(3)(a)–(d) ECHR as a list of exceptions to the prohibition of compulsory labour, where each of them is preceded by the phrase 'any' (in 'any work,' or 'any service'), does not limit the exception, but appears to weaken the rule. It underlines that any similarity between the legal situation and the situation which is described in the provision that constitutes the exception abolishes the rule – *i.e.*, the prohibition – and legitimises public authorities' interference, relatively broadly, with the sphere of compelling citizens to perform work.

For sure, compelling a citizen to perform work – a personal performance constituting the *designatum* of work within a private relation, or even within employment under public law – falls within the scope delimited and justified by the role of the State, as normatively proven and observed already in the ECHR itself. All exceptions [under (a) to (d) of Article 4(3) ECHR] show a strong relation to the role of the state. As regards the function of Article 4 ECHR, the case-law of the ECtHR is relatively well grounded. The ECtHR believes that the prohibition of both forced and compulsory work introduced under Article 4 ECHR is a solution which serves

to protect one of the fundamental values in democratic societies. It underlines at the same time that exceptions to the prohibitions under Article 4(3) ECHR, though not formally exceptions in the normative sense, ultimately allow us to construct a legal norm which features a rule and exceptions thereto thanks to the legal definition of "forced and compulsory labour". They illustrate what is and what is not work prohibited under the ECHR. The ECtHR has devoted a lot in its case-law to the question of exceptions from compulsory work referred to in Article 4(3)(d) ECHR which allows a competent authority to compel a citizen of a State Party to the Convention to perform "work [...] which forms part of normal civic obligations". The "civic" aspect of work was underlined particularly by the ECtHR in its judgment of 20 June 2006, 17209/02[1], indicating that the state may recognise such spheres in which public tasks are performed as may not do without engaging citizens to perform certain work, even against their will, with certain intentions enshrined in domestic constitutional and statutory solutions. The judgment in that case shows that measures compelling citizens to work (*e.g.*, as juror or expert) adopted in the (Maltese) legal system belong to the normal civic obligations within the meaning of Article 4(3)(d) ECHR, as the participation of the social factor in the administration of justice had considerable value for the legal system of that very state, a value substantiated from the perspective of a citizen of that state; hence, the sanctions imposed on citizens avoiding the performance of such work despite being called for jury service – including imprisonment – are substantiated by the state.

In its case-law, the ECtHR has also emphasised that the prohibition of compulsory labour is a juridical value expressed not only in the ECHR. Much earlier than that, Article 2(2)(b) and (e) ILO Convention No. 29, excluded the prohibition of forced work in cases where work forms part "of the normal civic obligations of the citizens of a fully self-governing country" and where it covers "minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services". The relation between Article 4(3) ECHR and Article 2(2) ILO Convention No. 29 was something to which the ECtHR turned its attention in its judgment of 7 July 2011, 37452/02, assessing whether it was admissible to exclude from affiliation to the old-age pension system a person who was forced to work as a result of a prison sentence[2]. That relation is important especially

[1] ECtHR judgment of 20 June 2006, *Zarb Adami v. Malta*, application no. 17209/02, HUDOC.

[2] The ruling states that it was not a violation of Article 4 ECHR for competent state authorities (equivalent of prison service) to compel a convict to perform work against remuneration, part of which was used as a maintenance contribution, in an administrative regime which did not cover the said work

since both conventions feature a key condition for setting aside the prohibition of compulsion to work – that of "normal civic obligations" – with Article 2(2)(e) ILO Convention No. 29 additionally including among the normal civic obligations those which are minor services performed for the community. This cannot be without impact on the way how Article 4(3)(d), which only uses the clause of "normal civic obligations", is perceived.

A valuable assessment of an exception from the prohibition of introducing compulsory labour in a state's internal system was included by the Polish Supreme Administrative Court in its judgment of 8 August 2008 in II OSK 941/07[3], in which it assumed that the compulsion to work for state authorities within the framework of compulsory military service did not qualify as unauthorised compulsory work which would infringe Article 4(3)(d) ECHR and be assessed as persecution of a foreigner in the country of their origin. Military service, even if its essence would point to the worker's status as soldier, has value for the common interest and serves to ensure external security, which is a major public good. For these reasons, the cassation appeal against the judgment of the first-instance court – dismissing the complaint against the decision of the Refugee Council refusing to grant the status of a refugee and finding no grounds to grant consent for tolerated stay – was dismissed.

The prohibition of forced labour as set out in the ECHR is relatively difficult to correlate with the respective institutions of Polish law which, one way or another, do introduce compulsory labour pursuant to acts of public administration authorities. Perhaps Poland's experiences regarding the postwar employment relationship model and the constitutional approach to work performed for the state, as shaped by the postwar reality, were neither expected nor accounted for when formulating international solutions.

§ 3. The scope of "normal civic obligations" that set aside the prohibition of compulsory work in Polish law

There is clear legislative intention at the heart of the case excluded under Article 4(3)(d) of the Convention. The normal civic obligations, substantiating the compulsion of a citizen to work are such obligations within which the basic function of the state is visible, serving to pursue the fundamental intentions of the state's system, especially those structurally related to the principle of a democratic state. In the course of the development of Polish labour law, one can observe that there have been two

with old-age pension insurance and did not count the time worked by the convict towards their old-age pension. The legally constructed exception from the prohibition of compulsory labour may generate negative impacts in the sphere of social insurance, HUDOC.

[3] II OSK 941/07, Legalis.

approaches to the question of a "civic labour obligation". One, with a constitutionally based systemic value, was centred on the principle of the working people of town and country; thus, it operated in a general and permanent manner. As a rule then, citizens were due to display to the state their contribution to building systemic values through their own work, throughout the entire course of their professional activity (which was, after all, imposed under provisions of public law) under forms specified by the state, as a rule, in the form of an employment relationship. The other was a positive enumeration, *i.e.*, a normative set of regulations which see the essence of the employment relationship as a source of values for the state, said regulations fuelled by public interest, where the axiology of the state's functioning is more important than the comfort of a citizen lying in certainty that nobody will ever compel them to work.

The right to work may involve making an act of will to establish an employment relationship, but for some reasons it will only be limited to intent, and will not correspond to a concurring will of a potential employer for an employment relationship to be established. The basis of employment relationships arises from civil law and lies in the concurring will of the contracting parties: the employee and the employer. And this is how unemployment is presented in a system where the state leaves the citizen the freedom to make decisions on how they earn their living, from whatever relationship they wish (ownership, employment), as well as the freedom to choose between alternative sources of such sustenance, *i.e.*, property rights and employment relationships. In some systemic conditions, the state, however, does have the mandate to supersede the citizen's will in both aspects of self-sustenance. In other words, it is possible to shape the constitutional system in a way that makes society relatively uniform, and thus closer to the constitutional view on equality, by introducing a systemic obligation of engaging in activities to earn a living in one way or another. The citizens in general were referred to by the constitutional lawmakers under Article 1(2) and (later introduced) Article 69(3) of the 1952 Constitution as "the working people of town and country", and were granted power under these provisions. The original version of the 1952 Constitution featured a preamble in line with which the Polish People's Republic was a republic of the working people and gave effect to the liberation ideals of the working masses. Work thus understood was ideologically tied to Poland's regained independence and abolishment of a system of capitalists and landlords which communists thought to exploit individuals; the idea of the working people introduced after World War II was supposed to go against that system. It was the working people of town and country which, in accordance with Article 48 and 57 of the 1952 Constitution were supposed to obtain and consolidate (through their work), the gains, goods and values subject to state protection. The 'systemic' approach to the compulsion to work for the benefit of society – and so a prohibition of refraining from the provision of work – raised doubts from the perspective

of "normal civic obligations" within the meaning of Article 4(3)(d) of the Convention, especially due to the wide scope of such compulsory work. *Ex definitione* then, a citizen, one of the working people of town and country, couldn't not work; by not working, they would be placing themselves outside of the people thus understood, and so the status of a citizen was itself under question, since the citizens as a collective constituted the working people of town and country. The difference between the right to work expressed directly in Article 68 of the 1952 Constitution and the right to work expressed in the currently applicable Article 65(1) of the Constitution of the Republic of Poland is that, instead of prohibiting compulsory labour aside from cases set forth in statute, the right to work in the old system was already constitutionally thought to be such a far-reaching blessing that nobody would ever think not to enjoy it for the benefit of the general public. In that case, not availing oneself of such an opportunity was seen in the constitutional sphere as a citizen's tort, careless behaviour which required stigmatising the person who did not fall in line with the loyal citizens.

§ 4. Work referral

In the event that the lawmakers impose particular (so, not systemic) variations of normal civic obligations, the intentions shaped in the aforementioned case-law of the ECtHR and the Supreme Administrative Court should be met. An exception to the prohibition of compulsory work should be derived from the fundamental functions of the state, and serve the pursuit of its fundamental systemic intentions. Despite the considerable dispersal of regulations that introduce compulsory work arising from the activities of public administration, basic cases can be identified of such relationships where a citizen has to perform work without their will.

Sometimes, labour is a thing common for regulations in both administrative law and criminal law; at the same time, in those areas, the norms which normally govern work, *i.e.*, provisions of labour law, are done away with. The lawmakers have observed that, outside of jobs, the will to earn a living takes the form of such criminal offences as fraud (Article 286 CC), scam (Article 298 CC), theft (Article 278 CC), counterfeiting money and tender (Article 210 CC), *i.e.*, acts which are subject to sanctions under criminal law because of the socially reprehensible attitude of avoiding work in favour of actions that are unacceptable in a correctly functioning society, to the detriment to someone else's property. Persons committing such offences, in line with the intentions of statutes regulating criminal law, should be adapted to work through the process of social rehabilitation, especially during their term of imprisonment or community service. Hence the key role of the Prison Service authorities in issuing acts and taking actions under which a person who serves a sentence is compelled to work within the framework of the aforementioned exception to the prohibition of compulsion to work by the state. The axiology of those acts and actions is

expressed in Article 67 § 1 and 3 CEC which show that punishment should instil in the sentenced person a will to cooperate in shaping socially desirable attitudes, especially a sense of responsibility and the need to observe the legal order, and thus to refrain from reoffending; this should be done through individualised efforts involving most of all work, especially such work as contributes to gaining relevant professional skills. The Prison Service authorities, under Article 2(1) and Article 2(2)(1) PS Act constitute a division of public administration bodies which provide rehabilitative activities by arranging for labour of sentenced persons.

§ 5. Gratuitous work pursuant to a decision of the head of the penitentiary

Compulsion to provide work under public law does not always take form of a work "order", *i.e.*, a form which compels a citizen to undertake specific actions pursuant to an act of a public administration authority. It may also take form of such interference with an engagement on the part of a public administration authority as deforms, or distorts, the employment relationship so far that it loses the structural elements of engagement. This kind of work is work that is performed against the background of Article 121 § 9 in conjunction with Article 123a § 1–3 CEC and involves depriving the relation in which the sentenced person performs work pursuant to a permit from the head of the penitentiary from its remunerative element. Howsoever such work may be provided at the initiative of the interested party (seeking the permit), the coercion into agreeing that they will provide work against no mutual performance, against no remuneration, is undoubtedly an exceptional instrument stipulated for by public law. In other words, despite working under the procedure proscribed, such work, after it is performed, does not give the worker the right to claim compensation. After all, the works referred to by the lawmakers as cleaning and auxiliary works for public administration (a Prison Service unit) serve a different function.

§ 6. Employee mobilisation allotment and citizens' personal performance

A worker's skills arising from the nature of their employment relationship, or the creative or service-related properties of a job may in some conditions become a value for the administration of the Armed Forces of the Republic of Poland from the perspective of the obligation to defend the territory of the state, and thus in conditions where an external threat against it arises. The administrative legal institution which allows making these intentions come true in a state is the employee mobilisation allotment which allows a compulsory relation to be made public in a way that

approximates a worker's position to that of a soldier. As legal scholarship underlines, mobilisation allotment is one variation of a much broader category of service assignments. Therefore, mobilisation allotment always places citizens among public officials, usually the soldiers of the Armed Forces of the Republic of Poland. Service assignment itself is "a set of properties of an official indicating the conditions in which they are is to serve", and is usually specified in an administrative decision on the appointment to an official post in a state's formation[4].

In line with Article 2(23) PF Act, employee mobilisation allotment involves appointment, by name, of a given employee to a post defined by the war establishment. The establishment itself, in turn, is a normative act of the internal management issued at a military unit, laying out the features and specific nature of the unit (including the office serving the Minister of National Defence; under Article 2(8) PF Act). The war establishment is therefore a normative description of the organisational arrangements at the military unit, and may stipulate that the unit needs an employee who is already employed at an employer, even from outside the ministry (administration) of national defence. Employee mobilisation allotment is governed under Division XVII of the PF Act titled "Military service in the event of mobilisation and in wartime". Because of these reasons, performance of work by an employee who is subject to an employee mobilisation allotment is placed among the forms of military service that involves fulfilling the obligation to defend the Republic of Poland.

§ 7. Summary

In the conventional view, performance of work is something the state cannot compel its citizens to, nor can it create legal mechanisms allowing for forced labour. After all, where the state sees in work – or rather in the act of working (shaping one's attitudes through work) or deliverables (services, achievement of a certain state of affairs) – a value close to its fundamental functions and to the relationship between the citizen and the state, work ceases to be conditionally covered by the prohibition of forced work. Work thus understood is work understood within the meaning of Article 4(3) ECHR, and may be classified as a "civic obligation". Moreover, compulsory work within the framework of obligations arising from the status of a person as a citizen – who thanks to their status as a citizen precisely, in some way, has agreed to a certain legal system acceptable under public law – turns into what is referred to in the ECHR as a "normal" obligation, *i.e.*, an obligation which is a natural and straightforward result of the principles which the state follows in its methodology of developing the legal system, including public security and order. Any threat

[4] *A. Korcz-Maciejko*, Charakter prawny rozkazu personalnego, Rzeszów 2016, pp. 138–140, unpublished doctoral dissertation.

to this order, either through reprehensible attitudes of citizens or any internal or external threats to the state, as of primary importance from the systemic perspective of the state, may be eradicated also with adequate means of compelling citizens to perform work, through administrative acts, without infringing ECHR standards. This methodology involves either compulsory professional activation of people who pose a threat to the legal order or "employment" of citizens in works usually handled by public officials who protect public security and order in extraordinary situations.

Abstract

The subject of the study is issues related to the obligation to work, which may be imposed on a citizen within the limits permitted by art. 4 sec. 3 of the Convention on Human Rights and Fundamental Freedoms. This regulation introduces an exception to the prohibition of forced labour, indicating that the state uses its legitimacy to establish such a breach when work threatened by coercion is justified in the given realities by „ordinary civic duties". Key importance was assigned to the semantic capacity of civic duties, which serve to implement the tasks of the state and have been inscribed in a derivative relationship with citizenship from the point of view of the realities of the operation of a public-law association. The study attempts to locate the value attributed by the state to work in a historical perspective against the background of subsequent constitutional orders. Finally, contemporary cases of ordering a citizen to work within the limits permitted by justified reasons for the functioning of a law-abiding state were indicated.

Małgorzata Masternak-Kubiak*

Implementation of the Conventional Right to Information during the Period of Political Transformation. Considerations in Light of the Judgment of the Supreme Administrative Court in Łódź of 6 February 1996, SA/Łd 2722/95

Transparency in public life is standard practice in a democratic state governed by the rule of law. It fits into the overall legal mechanisms that enable social control over public authorities. The purpose of this transparency, expressed in the ability to "keep an eye on those in power", is to ensure effective anti-corruption protection and to conduct economic exchange free from corruption, based on the principles of free competition and legality. One of the legal instruments designed to ensure transparency in public life is the right of access to public information. This right is a fundamental determinant of a democratic system, as it ensures that individuals can participate in the implementation of various types of public tasks, thus realizing the servant role of the state and guaranteeing the subjective treatment of individuals"[1].

In a modern democratic state, the legitimacy of public authorities should essentially be limited to creating a parliamentary majority and, along with it, a government endowed with parliamentary investiture, or creating local government bodies representing the inhabitants of a given territory. It would seem that with the end of the general election, the sovereign (the citizens) should retreat to the position of passive observers and recipients of public authority actions. However, the sovereign (the people) wants to have knowledge about the widest possible range of matters dealt with by the

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Wrocław; ORCID: 0000-0002-0395-3128.

[1] *B. Opaliński*, Dostęp do informacji publicznej jako emanacja zasady jawności życia publicznego, PPP 2019, No. 7–8, pp. 35–36.

public authorities, which, after all, act on its behalf and for its account[2]. Therefore, transparency is an instrument that allows participation in the public life of the country and local government community, preventing corruption and mismanagement, as well as an instrument of social control over public revenues and expenditures[3].

Transparency can be understood as the absence of obstacles to accessing information about the activities of public authorities. In this sense, transparency is the counterpoint to secrecy. It is an offer "aimed at citizens, in the belief that they are actively seeking knowledge about social reality"[4]. *T. Górzyńska* notes that secrecy (concealment): "expresses monocratic, bureaucratic, unfriendly tendencies, while transparency is associated with openness, participation, and partnership-based administration"[5]. Informed citizens, aware of their agency and influence on the exercise of public power, are therefore the beneficiaries of open government.

In Poland, the idea of transparency remained overshadowed for a long time by other principles and values related to the functioning of the state and the law. The demand for transparency in the actions of public authorities has not been the subject of in-depth theoretical reflection either. It can be assumed that it was only the emergence and development of the so-called information society that undermined the omnipresent secrecy and anonymity of public authorities[6]. The political transformation that took place after 1989 had a fundamental impact on the departure from the previous model of public administration, based on limited access to information and its regulation, in favour of a model based on the transparency of public authorities' activities[7].

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An important element of transparency in public life is the principle of transparency in the budgets of local government units. The legislator has made this rule applicable to the entire financial management of the municipality. "Members of the local community should be aware of the fact that since local government institutions

[2] See *B. Banaszak*, *M. Bernaczyk*, Konsultacje społeczne i prawo do informacji o procesie prawotwórczym na tle Konstytucji RP oraz postulatu „otwartego rządu", ZNSA 2012, No. 4, pp. 16–17.

[3] *T. Górzyńska*, Prawo do informacji i zasada jawności administracyjnej, Kraków 1999, p. 304.

[4] *A. Rost*, Prawne formy udziału obywateli w rządzeniu państwem, Poznań 1993, p. 15.

[5] *T. Górzyńska*, Zasada jawności administracji, PiP 1988, No. 6, p. 14.

[6] See *M. Bernaczyk*, *P. Kuczma*, Jawność działania władz publicznych jako zasada ustroju RP, [in:] Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 roku (eds. *B. Banaszak*, *M. Jabłoński*), Wrocław 2010, p. 221.

[7] See *M. Masternak-Kubiak*, Jawność życia publicznego jako wartość konstytucyjna w orzecznictwie sądów administracyjnych, [in:] Prywatność a jawność – Bilans 25-lecia i perspektywy na przyszłość (ed. *A. Mednis*), Warszawa 2016, p. 67.

are funded, among other things, by the taxes they pay, this creates a natural right to receive information about how their money is being spent"[8].

A transparent budget is one that not only can be accessed by anyone who is required to familiarize themselves with its contents at the appropriate time (*e.g.*, members of representative bodies), but is also easily accessible and understandable to everyone throughout the country. "There are many reasons for transparency in budgetary management. Therefore, publishing (sharing) data on the financial condition of the state or municipality, discussing it, and ensuring the transparency of budget deliberations has an educational significance, as it encourages the public to participate in public life. Without transparency in public finances, it is also difficult to avoid possible administrative abuse, corruption, and wastefulness"[9].

The principle of budget transparency had, among other things, its axiological justification in the provision of Article 61 the Local Government Act (currently the Act on municipal government[10] – note *M.M-K*), which, since its entry into force, stipulates that the financial management of a municipality should be transparent, and, in particular, that the management (mayor) should immediately announce the budget resolution and report on its implementation in accordance with the procedure provided for local law acts, and that it should inform the residents of the municipality about the assumptions of the draft budget, the directions of social and economic policy, and the use of budget funds (paragraph 3).

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In its judgment of 6 February 1996 (SA/Łd 2722/95, Legalis), the Supreme Administrative Court ruled that imposing on the executive body of a municipality a statutory obligation to provide information referred to in Article 61(3) of the Local Government Act as a form of implementing the principle of transparency of municipal financial management, without specifying the forms of fulfilling this obligation, does not exclude the possibility of disclosing official documents within the scope of Article 61(3) of the Local Government Act, *i.e.*, information on the assumptions of the draft budget, social and economic policy directions, and the use of budget funds. However, there are no legal grounds for residents of the municipality to request information beyond the scope of Article 61(3), including access to the minutes of

[8] *P. Sitniewski*, Zasada jawności działania jst, [in:] Prawo samorządu terytorialnego (ed. *P. Sitniewski*), Białystok 2009, p. 247.

[9] *J. Małecki*, Glosa do wyroku NSA z 6 lutego 1996 r., SA/Ł 2722/95, OSP 1997, z. 5, item 106, p. 273.

[10] Consolidated text: Polish Journal of Laws of 2024, item 1465.

municipal council meetings, which does not mean, however, that such information cannot also be provided at the request of specific residents or groups of residents[11].

The Supreme Administrative Court pointed out that the complaint generally concerned the refusal to disclose the minutes of the management board and was justified by the violation of the appellant's rights as a member of the local government community, resulting, *inter alia*, from the provisions of Article 61(1) and (3) of the Local Government Act. The appellant explained that: "He was not only interested in general information about how the funds allocated for the needs of auxiliary units were distributed, but also in determining how much of the funds were used to finance [...] among other things, by earmarking funds for social initiatives without specific criteria, which led to the arbitrary use of these funds".

In its reasons for the judgment, the Supreme Administrative Court ruled that: "The right of municipality residents to information on financial management, concerning the use of budget funds (as well as budget assumptions and social and economic policy directions) is enshrined in Article 61(3) of the Local Government Act and is a form of implementing the principle of transparency in municipal financial management. However, the applicable law does not provide grounds for extending the scope of this right to all information that may originate from official documents, including minutes of municipal council meetings. Thus, there is currently no legal basis for residents of the municipality to request information beyond the scope of Article 61(3), including full access to minutes, which does not mean that such information cannot be provided, including at the request of specific residents or groups of residents". According to the Supreme Administrative Court, such a request should be assessed in the context of the right to information, which is part of the broader right to freedom of expression established in the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Poland […]. Pursuant to Article 10 of the Convention: "Everyone has the right to freedom of expression; this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...)"[12].

It should be noted that the Convention for the Protection of Human Rights, due to the fact that the Act of 2 October 1992, on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (Polish Journal of Laws

[11] See *M. Mucha*, Obowiązki administracji publicznej w sferze dostępu do informacji, Wrocław 2002, p. 118; *K. Tarnacka*, Prawo do informacji w polskim prawie konstytucyjnym, Warszawa 2009, p. 71.

[12] This provision, which guarantees the right to freedom of expression, is treated in the case-law of the ECtHR as granting freedom to all types of expression of opinions and ideas or information, regardless of their content and the person expressing them (see *M.A. Nowicki*, Wokół Konwencji Europejskiej. Krótki komentarz, Kraków 2002, pp. 298–301; see also the Supreme Court judgment of 2 June 2003, III KK 161/03, Legalis).

of 1992, No. 85, item 427), consent was given for the President of the Republic of Poland to ratify the Convention, and by a government statement of 7 April 1993, on the ratification by the Republic of Poland of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 (Polish Journal of Laws of 1993, No. 61, item 285) announced its entry into force, it became binding law in Poland, which must be observed[13]. Since the ECHR came into force, its provisions have had a direct impact on the shape of rights and freedoms.

The system for protecting the rights and freedoms under the ECHR is based on two principles. First, the principle of subsidiarity means that responsibility for implementing the rights and freedoms enshrined in the Convention lies with national authorities. Only when they fail to fulfil this task does the Human Rights Court make the appropriate decision. In turn, the principle of solidarity means that the Court's case-law becomes part of the Convention and is a legally binding component thereof. "It therefore has effects for all States Parties to the Convention, regardless of which of them was affected by the ruling. They must take into account the possible implications that judgments in other cases may have for their own legal systems and legal practice"[14]. The provisions of the ECHR are self-contained and autonomous in nature, and therefore, with regard to internal relations, they operate on their own authority and are directly applicable in a state that is a signatory to this international agreement. Since this act came into force in Poland, they have been directly applied by the courts. The human rights set out in the Convention, as well as their definition and specification in the case-law of the ECtHR, played a major role in the interpretation of Polish law with regard to the development of standards for the protection of individual rights, especially during the period of political transformation between 1993 and 1997.

An example of this line of jurisprudence is the Supreme Court judgment of 11 January 1996 (III ARN 57/95)[15]. The Supreme Administrative Court, after reviewing the extraordinary appeal against the judgment of the Supreme Administrat-

[13] The direct applicability of the ECHR is justified by an additional argument. It was ratified after approval by the Sejm in the form of an act dated 2 October 1992, based on the then Article 32g(2) of the Constitution of the Republic of Poland: "The ratification of international agreements entailing a significant financial burden on the state or requiring changes in legislation requires the prior consent of the Sejm". See *M. Masternak-Kubiak*, Umowa międzynarodowa w prawie konstytucyjnym, Warszawa 1997, pp. 69–71.

[14] *J. Jaskiernia*, Uwarunkowania skuteczności wykonywania orzeczeń Europejskiego Trybunału Praw Człowieka, Prawa Człowieka. Humanistyczne Zeszyty Naukowe 2002, No. 8, Katowice, p. 50. See also *L. Garlicki*, *M. Masternak-Kubiak*, Władza sądownicza RP a stosowanie prawa międzynarodowego i prawa Unii Europejskiej, [in:] Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne, Warszawa 2006, pp. 178–179.

[15] OSNAPU 1996, No. 13, item 179.

ive Court of 22 December 1993, SA/Wr 1146/93[16], clearly stated that a request by a resident of a municipality for access to official files created in connection with the performance of the functions of the executive body (council) of the municipality should be granted by an employee of the office, unless this is contrary to the provisions of law. This position is supported by both the special status of the municipality's residents, who by law form a local government community and are therefore interested in having information about the exercise by the management board of its statutory powers concerning, directly or indirectly, actually or potentially, their legal or factual interests, and, moreover, by the solutions adopted in European law, which guarantee citizens the right of access to information (acts) held by public administration bodies. In particular, reference should be made to the provisions of Recommendation No. 19(81) of the Committee of Ministers of 25 November 1981, on access to information held by public authorities, and to the Directive of the Council of the European Communities of 7 June 1990, on free access to information on the environment. The above legal acts should be taken into account when interpreting Polish law on access to files, regardless of whether they can be considered an integral part of it or merely proposals addressed to the legislator, as they establish the minimum standard for the implementation of the right set out in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 (Polish Journal of Laws of 1993, No. 61, item 284) the right to freedom of expression, and furthermore set the direction for legal regulations in this area, which should be adopted by the Polish legislature[17].

During the period of political transformation, Polish legislation did not explicitly guarantee either the subjective right to information or the right of citizens to access the official files of public authorities. In its ruling of 6 February 1996, the Supreme Administrative Court noted that "In the provisions of the Constitution of the Republic of Poland concerning civil rights, dating from 1952, which remain in force, we do not find the right to information that is included in most modern constitutions. However, the right to information stems from the broader right to freedom of expression.

Not finding provisions establishing the right to information in the text of the current Constitution, the Supreme Administrative Court found this right, as directly effective, in the provisions of the Convention. It confirmed that the right to information, including access to official documents, applies in the Polish legal system, citing

[16] Wok. 1994, No. 7, p. 33.

[17] This position of the Supreme Court should be fully accepted, adding only that it develops the view of the Court already expressed earlier, namely in the Resolution of the panel of 7 judges of 11 February 1993 (III AZP 28/92, OSNCP 1993, No. 7–8, item 117) on the validity of the European Convention on Human Rights. The Court ruled that "[...] The Convention is directly binding on all authorities, without requiring transposition".

the provisions of the European Convention on Human Rights. It should be noted that the possibility of providing residents of the municipality with information exceeding the scope of Article 61(3) of the Local Government Act resulted not only from the provisions of the ECHR ratified by Poland. These powers also stemmed from another convention ratified by Poland, namely the European Charter of Local Self-Government, drawn up in Strasbourg on 15 October 1985[18]. The preamble to the European Charter of Local Self-Government states, among other things, that citizens have the right to participate in the conduct of public affairs and that this is one of the democratic principles common to all member states of the Council of Europe. However, in order for citizens to effectively exercise this right, they must have the relevant information, and therefore municipal authorities not only may provide such information (unless there are explicit statutory prohibitions in this regard), but are also obliged to provide it, with further consequences in the form of a complaint to the administrative court pursuant to Article 101a of the Local Government Act"[19].

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In view of the constitutional deficit in the protection of rights and freedoms, the courts, including the Supreme Administrative Court, applied ratified international legal standards, giving them direct effect. It should be noted that the amendment of 29 December 1989, to the Constitution of 1952[20] established Article 1, proclaiming the Republic of Poland a "democratic state ruled by law...", which was also significant for case-law on the application of international law. The Small Constitution of 1992[21], maintaining in force some of the provisions of the Constitution of 1952, preserved the binding force of the principles of a democratic state ruled by law.

The provisions of the Polish Constitution do not provide a legal definition of a "democratic state ruled by law", so it must be assumed that a rational constitutional legislator had to refer to certain existing models and standards commonly recognised as appropriate for a democratic state ruled by law. One such element is the implementation of treaty norms binding on a given country, and thus also the effectiveness of these norms in shaping the internal legal order. The principle of a democratic state governed by the rule of law shapes the legal system and determines the actions of the

[18] Polish Journal of Laws of 1994, No. 124, item 607.

[19] *J. Małecki*, Glosa do wyroku NSA z 6 lutego 1996 r., SA/Ł 2722/95, p. 274.

[20] Act of 29 December 1989, amending the Constitution of the Polish People's Republic, Polish Journal of Laws No. 75, item 444.

[21] Constitutional Act of 17 October 1992, on mutual relations between the legislative and executive branches of the Republic of Poland and on local government (Polish Journal of Laws No. 84, item 426, as amended).

institutions that protect that system[22]. Defining a state as a "state governed by the rule of law" requires adapting the content of the law itself, as well as its interpretation, to the standards appropriate for a democratic state governed by the rule of law. Among these standards, it is worth mentioning the effective shaping of national legislation through international agreements binding on Poland.

During the period of political transformation, the Supreme Administrative Court often referred directly to international law, recognising its direct effectiveness. By way of example, reference can be made to the judgment of the Supreme Administrative Court of 26 November 1991, II SA 927/91[23], in which it was held that: "No interpretation of any legal provision that would violate constitutionally guaranteed civil rights or be contrary to international acts ratified by Poland, or that would be contrary to other provisions of applicable laws, is permissible". Similarly, in its judgment of 20 November 1990 (II SA 759/90), the Supreme Administrative Court[24] expressed the view that [...] the vague concept of "other important reasons" as a basis for termination of employment must be interpreted in accordance with the basic principles of the Act of 16 September 1982, on civil servants [...], with the guarantees of civil rights and freedoms resulting from the Constitution of the Republic of Poland (in particular with the principle of equality before the law) and the provisions of the International Covenant on Civil and Political Rights, in particular Article 25(c) thereof, which stipulates that every citizen has the right and opportunity, without any discrimination and without unreasonable restrictions, to access public service in their country on the basis of general principles of equality"[25]. The Supreme Administrative Court expressed a similar opinion in its judgment of 5 June 1991 (II SA 35/91)[26], stating that: "The adoption of the general principle of administrative court jurisdiction in cases concerning complaints against administrative decisions was the implementation of long-standing international standards. Already in Article 10 of the Universal Declaration of Human Rights of 1948, it was established that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations". This principle was reiterated in Article 14(1) of the International Covenant on Civil and Political Rights, adopted on 16 December 1966. These norms of international law concerning the judicial protection of individual rights are classified as self-executing norms. […] Fun-

[22] See more broadly *M. Wyrzykowski*, [in:] Komentarz do Konstytucji RP, Vol. I, Warszawa 1995, pp. 1–4.

[23] ONSA 1993, No. 1, item 10.

[24] ONSA 1991, No. 1, item 4.

[25] See *J. Świątkiewicz*, Jak kształtowało się orzecznictwo Naczelnego Sądu Administracyjnego, [in:] Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005, Warszawa 2005, p. 442.

[26] ONSA 1991, No. 3–4, item 64.

damental norms of international law concerning the protection of human and civil rights must be important guidelines for the interpretation of domestic law"[27].

In summary, it should be noted that in its judgment of 6 February 1996 (II SA/Łd 2722/95), the Supreme Administrative Court clearly recognised that the principle of transparency also includes the right of municipality residents to request information beyond the scope of Article 61(3) of the Local Government Act, including the disclosure of protocols in their entirety (currently, this view has clear normative support in the provisions of the Constitution of the Republic of Poland and the Act on Access to Public Information).

The thesis adopted in the reasons for the judgment, that the possibility of providing residents of a municipality with information exceeding the scope of Article 61(3) of the Local Government Act results directly from the provisions of the ECHR ratified by Poland, shows that during the period of political transformation, the legal system of the Republic of Poland, as a state governed by the rule of law, became open to international law. International law was increasingly treated by the courts as part (an element) of the internal legal order.

The Supreme Administrative Court confirmed that the right to information, including access to official documents, applies in the Polish legal system, referring directly to the self-executing provisions of a ratified international agreement. In view of the constitutional deficit in the protection of individual rights and freedoms, the Supreme Administrative Court unequivocally recognised that the provisions of the ECHR constitute a necessary and obvious criterion for assessing national law.

Abstract

The openness of public life, as a standard in a democratic state governed by the rule of law, is a systemic part of all legal mechanisms enabling the exercise of social control over public authorities. An important element of the transparency of public life is the principle of transparency of the budget of local government units. This principle has its axiological justification in the provision of art. 61 of the Act of 8 March 1990 on local government (currently the Act on municipal government). This provision, from the beginning of the Act's validity, stipulates that the financial management of the commune should be public, and in particular that the executive body of the commune should immediately announce the budget resolution and the report on its implementation in the manner provided for with acts of local law, and should inform the residents of the commune about the assumptions of the draft budget, the directions of social and economic policy and the use of budget funds. In

[27] See *A. Preisner*, Prawo międzynarodowe w orzecznictwie sądów polskich, [in:] Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym (ed. *M. Kruk*), Warszawa 1997, p. 137.

its judgment of 6 February 1996, file reference SA/Łd 2722/95, the Supreme Administrative Court found that: „The right of residents of a commune to information on financial management, concerning the use of budget funds (as well as on the budget assumptions and directions of social and economic policy), is based on the provisions of Article 61 section 3 of the Local Government Act and is a form of implementing the principle of transparency of the commune's financial management. According to the Supreme Administrative Court, the applicable law does not provide grounds for extending its scope to all information, the source of which may be official documents, including minutes of the commune board meetings. In this judgment, not finding in the text of the current Constitution any provisions establishing the right to information, the NSA found this right, as directly effective, in the norms of the European Convention on Human Rights. It directly stated the validity of the right to information in the Polish legal system, including the right to access official documents, referring directly to the norms of the Convention ratified in 1993. The adoption of such a position shows that during the period of systemic transformation in the years 1989–1997, the legal system of Poland, as a state of law, became open to international law. Given the constitutional deficit in the scope of protection of fundamental rights and freedoms of the individual, the regulations of the Convention constituted a necessary and desirable criterion for the assessment of domestic law. It clearly results from the content of the judgment of 6 February 1996 that international law was treated by the administrative court as a fragment (element) of the domestic legal order.

Artur Mudrecki*

Protection of Taxpayers' Rights in Terms of Fair Trial, Additional Protocol No. 1, Protection of Private and Family Life in the Case-Law of the European Court of Human Rights – Selected Issues

§ 1. Introductory remarks

The Convention for the Protection of Human Rights and Fundamental Freedoms is the most important international agreement in the field of human rights protection[1]. It is a multilateral international agreement and an important link in the protection of human rights. The 75th anniversary of the adoption of this legal act prompts reflection on the role that the convention plays in the observance of human rights. A country that wants to earn the title of democratic should create conditions for the effective protection of its citizens against abuses of power.

The European Court of Human Rights in Strasbourg plays a key role as the guardian of the human rights enshrined in the ECHR. The effectiveness of compliance with the ECHR lies in the possibility for a party to lodge a complaint with the ECtHR in individual cases. The rulings of the ECtHR influence the case-law of courts in Poland, including administrative courts. They may also lead to legislative changes. At this point, it is worth expressing regret that Poland has not acceded to the additional Protocol allowing courts in Poland to refer questions to the ECtHR. A good example of dialogue with an international court is the possibility of referring preliminary questions to the CJEU.

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., Kozminski University, Warsaw; ORCID: 000-0002-3731-5271.

[1] *A. Mudrecki*, Rzetelny proces podatkowy, Warszawa 2015, pp. 33–34.

§ 2. ECHR case-law on tax matters

The article will review selected judgments of the ECtHR in terms of the Court's jurisdiction based on Article 6(1) ECHR, and then present judgments concerning taxes related to violations of Additional Protocol No. 1. The article will also cover rulings concerning the protection of taxpayers' private and family life. Given the size of the article, only examples of rulings will be presented.

A. The taxpayer's right to a fair trial

The right to a fair trial, as enshrined in Article 6 ECHR, should be interpreted in procedural terms and applies, *inter alia*, to evidentiary proceedings[2].

In its judgment of 3 May 2001, in the case of *J.B. v. Switzerland*[3], the Court dealt with the right to a fair trial, the right not to provide evidence against oneself, and the failure of a taxpayer to provide information in proceedings concerning tax evasion. The justification indicates that the concept of "criminal prosecution" within the meaning of Article 6 ECHR is autonomous. In its earlier case-law, the Court has established that three criteria must be taken into account when assessing whether a person has been "charged in a criminal case" for the purposes of Article 6 ECHR. These include the classification of the act as prohibited under national law, the nature of the act, and the severity of the penalty for committing such an act. The Court further stated that "proceedings leading to the imposition of a fine for the offense of tax evasion fall, in principle, within the scope of Article 6(1) ECHR".

The proceedings in this case pursued various objectives, namely to determine the amount of tax due from the applicant and, if the conditions were met, to impose an additional tax and a fine on him for tax evasion. Nevertheless, this set of proceedings was not explicitly classified as either a set of proceedings concerning the imposition of additional taxation or a set of proceedings concerning tax evasion.

It should also be noted that the parties did not dispute that from the beginning of the proceedings and throughout their course, the tax authorities could impose a fine on the application for committing a criminal offense in the form of tax evasion. In accordance with the settlement agreement concluded on 28 November 1996, the applicant was indeed fined CHF 21 625,95. However, this penalty was not intended to be financial compensation, but rather to emphasize its fundamentally punitive and deterrent nature. Furthermore, the amount of the fine imposed was not insignificant – there can be no doubt that this fine was of a "punitive" nature.

[2] *D. Haris*, *M. O'Boyle*, *F. Bates*, *C. Buckley*, *U. Kilkelly*, *P. Cummper*, *Y. Aral*, *H. Larrdy*, Law of the European Convention on Human Rights, Oxford 2009, p. 202.

[3] ECtHR judgment of 3 May 2001, *J.B. v. Switzerland*, application no. 31827/96, HUDOC.

According to the ECtHR, regardless of whether the proceedings pursued other objectives, by imposing the fine in question on the applicant, they amounted, in the light of the ECtHR's case-law, to a decision on the merits of a criminal charge.

As a result, the ECtHR ruled that Article 6 ECHR applies in its criminal dimension.

The Court held that, despite the absence of an explicit reference in Article 6 ECHR, the right to remain silent and the right not to incriminate oneself are universally recognised international standards that constitute the essence of the concept of a fair trial under Article 6 ECHR. The right not to incriminate oneself presupposes that it is the authorities who must prove the case without resorting to evidence obtained by means of coercion or pressure against the will of the "person accused in a criminal case". By protecting the accused from undue coercion by the authorities, these immunities contribute to preventing miscarriages of justice and ensuring the objectives of Article 6 ECHR.

In view of this and in this light, the Court found that there had been a violation of the right under Article 6(1) ECHR not to be compelled to incriminate oneself (see §§ 44–51 and 63–71 of the judgment).

The cited judgment shows that the ECtHR granted protection to the taxpayer and found that Switzerland had violated Article 6(1) ECHR due to a violation of the right to a fair trial, and in particular due to the failure to provide evidence to its own detriment.

B. ECtHR jurisdiction in tax matters

In general, the ECtHR allows for the possibility of examining the fairness of proceedings before administrative courts, although the wording of Article 6(1) ECHR refers to civil and criminal matters. Although the right to a fair trial has not been extended to every situation in which a person could be a beneficiary of the right to a court, Article 6 ECHR has a very broad application[4].

However, tax cases are subject to significant restrictions on referral to the ECtHR. In its judgment of 12 July 2001, in *Ferrazzini v. Italy*[5], the ECtHR ruled that tax cases do not fall within the scope of civil matters as defined in Article 6(1) ECHR. The grounds for the ruling stated that rights and obligations do not always have to be of a civil nature. In the field of taxation, the changes that may have taken place in democratic societies have not altered the fundamental obligation to pay tax. Tax matters remain one of the main prerogatives of public authorities, with the relationship

[4] *D. Haris*, *M. O'Boyle*, *E. Bates*, *C. Buckley et al.*, Law of the European Convention, p. 329.

[5] ECtHR judgment of 12 July 2001, *Ferrazzini v. Italy*, application no. 44759/98, HUDOC.

between taxpayers and tax authorities being predominantly public in nature. Given that conventions and protocols must be interpreted as a whole, the Court noted that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of the state to apply such laws as it deems necessary to secure the payment of taxes. In conclusion, it was recognised that tax disputes go beyond the scope of civil rights and obligations, regardless of the financial consequences that inevitably result from them for the taxpayer[6]. In light of the ECtHR ruling in question, tax matters are not subject to the protection provided for in Article 6(1) ECHR.

The ruling was not unanimous (eleven judges voted in favour and six were against). According to *B. Brzezinski*, there is little chance that the Court will change its position. However, national courts have different approaches to the application of Article 6 ECHR. They are not bound by this position due to the legal nature of the provisions of the Convention, which establishes minimum standards of protection and does not preclude either raising standards or extending this protection to rights in other areas of social life[7]. Given that the above-mentioned judgment was issued by the Grand Chamber of the ECtHR, it is difficult to expect a change in the Court's approach to this issue[8].

In their critical opinion on the judgment in question, *M. Balcerzak* and *A. Zalasiński* pointed out that in many previous cases, the Court had considered administrative court proceedings concerning the legality of an administrative act affecting an individual's property to be matters falling within the scope of civil rights and obligations. In most cases, a tax decision determining the scope of a taxpayer's rights and obligations arising from the tax-law relationship will affect the taxpayer's assets, and therefore the subject of the tax dispute will be the taxpayer's property rights and obligations. However, it is still possible to apply Article 6(1) ECHR to cases indirectly related to tax law (*e.g.*, certain claims for damages, actions for the refund of unduly collected tax, or cases related to criminal tax law or sanctions)[9].

M. Kazek, referring to the recommendations of the Council of Europe, calls for a broad interpretation of Article 6(1) ECHR also in tax matters (*e.g.*, in relation to court costs, the right to legal aid, the exclusion of a judge, the duration of proceedings) in the case-law of Polish courts, pointing out that Article 45(1) of the Polish

[6] *M.A. Nowicki*, Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004, Kraków 2005, pp. 562–565.

[7] *B. Brzeziński*, Koncepcja praw podatnika i ich ochrony jako przedmiot badań naukowych, KPPod 2005, No. 1, pp. 25–26.

[8] *A. Leszczyńska*, Europejska Konwencja Praw Człowieka oraz Podstawowych Wolności jako instrument ochrony praw podatnika, KPPod 2004, No. 1, p. 38.

[9] *M. Balcerzak*, *A. Zalasiński*, Sądowoadministracyjna kontrola decyzji podatkowych a prawo do rzetelnego procesu (art. 6 ust. 1. Europejskiej Konwencji Praw Człowieka), KPPod 2002, No. 1, pp. 37 and 43–44.

Constitution has a broader scope of application than the analysed provision of the Convention and allows for the application of the principles of a fair trial[10].

C. ECtHR case-law on tax matters based on Additional Protocol No. 1

In many judgments, the ECtHR has granted protection to taxpayers on the basis of the legal provisions of Additional Protocol No. 1.

One example is the judgment of 9 January 2007, in the case of *Intersplav v. Ukraine*[11]. The ECtHR dealt with an issue related to the right to VAT refunds. In this case, the dispute did not concern the specific amount of VAT refund or compensation for delay, but the applicant's entitlement to a VAT refund and compensation under general law. It should be noted that, having met the criteria and requirements set out in national legislation, the application could reasonably expect a refund of the VAT paid in the course of his business activities, as well as compensation for any delay. Even though a specific application for a VAT refund may be subject to scrutiny and objections by the competent national authorities, the relevant provisions of the Goods and Services Tax Act do not require prior judicial review of such an application in order to verify the company's entitlement to such a refund.

As regards the objection raised by the Government concerning the finding in the decision on the admissibility of this complaint that the authorities had no objections to the amount of VAT refund claimed by the applicant, it should be noted that this conclusion was drawn from the evidence presented. The case file shows that the tax authorities did not question the amount of VAT refund due to the applicant, but simply refused to approve it without giving any clear reason, erroneously citing their lack of jurisdiction in VAT refund cases. However, it is true that on numerous occasions, and only once successfully, the calculation of compensation for delay in VAT refunds presented by the applicant was challenged by the tax authorities in court proceedings. This circumstance does not negate the conclusion adopted by the ECtHR in relation to the original VAT refund proceedings.

It should be recognised that it is not necessary to determine the exact content and scope of the legal interest in question, and the above circumstances indicate that the applicant had a financial interest recognised by the law of the respondent State, which interest is protected by Article 1 of Protocol No. 1 (see §§ 31–32 of the judgment).

The content of the judgment cited above shows that the ECtHR granted protection to a Ukrainian taxpayer in relation to the refund of goods and services tax. There

[10] *M. Kazek*, Stosowanie art. 6 Europejskiej Konwencji o Ochronie Praw człowieka przez sądy administracyjne w sprawach podatkowych, MoPod 2012, No. 4, pp. 26–29.

[11] ECtHR judgment of 9 January 2007, *Intersplav v. Ukraine*, application no. 803/02, HUDOC.

is no doubt that the taxpayer's right to a refund of this tax stems from the principle of neutrality and is linked in this case to the protection of property rights.

It should be emphasized here that disputes concerning value added tax are much more frequently dealt with by the CJEU. Due to the large number of cases examined, the judgments of this Court are more thoroughly reasoned than those of the ECtHR.

On 5 October 2023, the ECtHR issued a judgment in the case of *Andrzej Ruciński v. Poland*[12]. The Court found that the restrictions imposed on the applicant's private and business assets for a period of three years constituted an individual and excessive burden on him, violating the "fair balance" that should be maintained between the protection of property rights and the requirements of the general interest. In view of the above, the Court found that there had been a violation of Article 1 of Protocol No. 1 to the ECHR and invited the Government and the applicant to submit, within three months of the date on which the judgment became final, written observations on the amount of compensation to be awarded to the applicant.

D. The taxpayer's right to protection of private and family life

In another, more recent judgment of 9 March 2023, in the case of *L.B. v. Hungary*[13], the ECtHR dealt with the protection of personal data concerning the taxpayer's place of residence. The grounds for the judgment indicate that the contracting states enjoy a wide margin of discretion in assessing the necessity of adopting a procedure for publishing the personal data of taxpayers who have failed to meet their tax obligations, as a measure aimed, *inter alia*, at ensuring the proper functioning of the tax collection system as such. However, the state's freedom of decision-making is not unlimited in this respect. In this context, the Court must verify whether the competent national authorities – legislative, executive, or judicial – have correctly balanced the conflicting interests and, at least in principle, have duly taken into account not only (i) the public interest in disseminating the information in question, but also (ii) the nature of the information disclosed; (iii) the consequences and risks of violating the right to privacy of the persons concerned; (iv) the potential reach of the medium used to disseminate such information, *i.e.*, in this case, the Internet; and (v) fundamental principles of personal data protection such as the principles of purpose limitation, storage limitation, data minimization, and accuracy. In this regard, the existence of procedural safeguards may also play an important role. The Court

[12] ECtHR judgment of 5 October 2023, *Andrzej Ruciński v. Poland*, application no. 22716/12, HUDOC.

[13] ECtHR judgment of 9 March 2023, *L.B. v. Hungary*, application no. 36345/16, HUDOC.

therefore examined whether the national authorities had acted within the limits of their margin of discretion in choosing the measures necessary to achieve the legitimate objectives.

Although the Court acknowledges that the legislator's intention was to strengthen tax enforcement and that the addition of information on the taxpayer's place of residence ensured the accuracy of the published information, it does not appear that the legislator took into account the adoption of measures ensuring a response in line with the principle of data minimization. The Court sees no evidence that these circumstances were taken into account either in the draft tax law of 2003 or in the draft amendments to that law of 2006.

In short, the defendant State has not demonstrated that the legislature sought to strike a fair balance between the competing individual and public interests in order to ensure the proportionality of the interference.

In light of the above, considering the systematic publication of taxpayer's data, which included the address of the taxpayer's place of residence, the Court cannot conclude, despite the margin of appreciation enjoyed by the respondent State, that the reasons put forward by the national legislature in adopting the contested system of publication of tax debtors' data, however relevant, were sufficient to show that the contested interference was "necessary in a democratic society", and that the authorities of the defendant State had struck a fair balance between the conflicting interests at stake. Consequently, there has been a violation of Article 8 ECHR (see §§ 128–140 of the judgment).

§ 3. Final remarks

75 years of the ECHR in force provides effective protection for individuals. The European Court of Human Rights in Strasbourg, operating within the structures of the Council of Europe, plays a key role in setting European standards for the protection of human rights. It interprets the rights contained in the Convention.

Since 2001, following the judgment of 12 July 2001 in *Ferrazzini v. Italy*, the ECtHR has granted protection to taxpayers not on the basis of Article 6 ECHR, but on the basis of Additional Protocol No. 1. Only when a tax case has been classified as civil or criminal is it possible to consider the jurisdiction of the Court in relation to Article 6 ECHR. In some cases, the ECtHR has granted protection to taxpayers in cases of violations of the principle of protection of private and family life.

The Court's judgments influence the legislation of individual countries and are used in the jurisprudence of the Supreme Administrative Court in tax cases.

Regrettably, Poland has not acceded to the additional Protocol allowing courts in Poland to refer questions to the ECtHR. There is no doubt that engaging in such

a dialogue could enrich the case-law of courts in Poland and, in some cases, lead to favourable legislative changes for taxpayers.

Abstract

For 75 years, the European Convention on Human Rights has provided effective protection for individuals. The European Court of Human Rights in Strasbourg – operating within the structures of the Council of Europe – plays a central role in setting European standards for the protection of human rights. It interprets the rights contained in the Convention. Since 2001, following its judgment of 12 July 2001, application no. 44759/98 in the case of *Ferrazzini v. Italy*, the ECtHR has protected taxpayers not on the basis of Article 6 ECHR, but on the basis of Additional Protocol No. 1. It is only when a tax case is classified as civil or criminal that the Court's opinion may be taken into account on the basis of Article 6 ECHR. In some cases, the ECtHR has granted protection to taxpayers in cases of violation of the principle of protection of private and family life. An interesting line of case-law has been presented by the ECtHR on the principle of proportionality. The judgments of the Court influence the legislation of individual states and are used in the jurisprudence of the Supreme Administrative Court in tax cases.

Piotr Przybysz*

Remedying the Legal Consequences of Nationalisation Acts Issued in Poland after World War II – Reflections from the Perspective of the European Convention on Human Rights

In the initial years following the conclusion of World War II, the new authorities in Poland issued a series of legal acts concerning the seizure of real property ownership. The motives underlying these actions were not uniform. While they were intended to shape the foundations of a new socio-economic system[1], they also served to regularise property ownership issues arising from events such as the shifting of state borders and the mass migration of populations during and after the war[2]. Furthermore, it was necessary to regularise the status of, *inter alia*, post-German property[3], as well as real property owned by Polish citizens that had been seized by the Third Reich[4]. During this period, the distinction between nationalisation – understood as the seizure of property ownership by the State pursuant to a normative act – and expropriation, which concerns a specific individual and a specific property and

* Judge of the Supreme Administrative Court of Poland, dr hab.; ORCID: 0000-0003-1273-424X.

[1] See, *e.g.* the Decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of land reform (Polish Journal of Laws of 1945, No. 3, item 13).

[2] See, *e.g.* the Decree of 5 September 1947 on the transfer to the State of property left behind by persons resettled to the USSR (Polish Journal of Laws of 1947, No. 59, item 318); the Decree of 27 July 1949 on the takeover by the State of ownership of rural real property not in the actual possession of the owners, located in certain districts of the Białystok, Lublin, Rzeszów and Kraków Voivodeships (Polish Journal of Laws No. 46, item 339).

[3] See the Decree of 8 March 1946 on abandoned and post-German property (Polish Journal of Laws of 1946, No. 13, item 87).

[4] Decree of 7 April 1948 on the expropriation of estates seized for public utility purposes during the war of 1939–1945 (Polish Journal of Laws of 1948, No. 20, item 1380).

is effected by an individual administrative act, became blurred. The seizure of real property also occurred without a legal basis, through *de facto* actions.

The legal provisions in force at the time did not exclude the possibility of challenging the regularity of a property seizure. However, the procedures and principles of defence against such seizures varied. Furthermore, previous owners were not always aware of the loss of their ownership rights, as they were not notified individually, but rather through public announcements.

The contemporary legislator has not, to date, introduced a general regulation regarding reprivatisation claims concerning real property seized in the post-war period. Attempts to regulate this issue have been undertaken repeatedly; it is estimated that there have been more than 20 legislative initiatives in this regard. The most recent initiative was a parliamentary bill on the settlement of reprivatisation claims, submitted to the Sejm of the 9th term[5]. This bill concerned the regularisation of the legal status of real property that was nationalised or otherwise seized for the benefit of the State Treasury or other public law entities – including local government units – between 1944 and 1962, in flagrant violation of the law or without a legal basis, as well as the payment of appropriate compensation to natural persons who were the owners or co-owners of such property. Although the bill was referred for a first reading at a sitting of the Sejm on 14 April 2021, no further work was undertaken, and the project was discontinued at the end of the 9th term of the Sejm.

However, the absence of a general regulation concerning reprivatisation claims does not imply that the possibility of obtaining compensation for real property lost during World War II or in the post-war period is entirely precluded.

The issue of compensation for so-called "Bug River property" (mienie zabużańskie) has been regularised. This term refers to real property left outside the current borders of the Republic of Poland as a result of the expulsion of owners from, or their abandonment of, the former territory of the Republic of Poland in connection with World War II. Ownership of these properties was taken over by the republics comprising the Union of Soviet Socialist Republics, on whose territory the properties were located. The Republic of Poland assumed the obligation to pay appropriate compensation for this Bug River property. Notably, the currently binding Act of 8 July 2005 on the realisation of the right to compensation for property left outside the present borders of the Republic of Poland was enacted to implement the provisions contained in the judgment of ECtHR of 22 June 2004 in the case of *Broniowski v. Poland* (31443/96)[6].

[5] Parliamentary Paper No. 1093 of 25 November 2020.

[6] ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, HUDOC.

Also deserving of attention are the provisions of the Act of 21 August 1997 on Real Estate Management[7], in particular: Article 215 concerning compensation for an agricultural holding or a single-family house on Warsaw land; Article 216 referring to the appropriate application of provisions on expropriation to real property taken over or acquired for the benefit of the State Treasury under a different procedure pursuant to numerous regulations from the years 1948–1972; and Article 129(5), which provides a basis for determining compensation in situations where a deprivation of rights to real property occurred without the determination of compensation, and where applicable regulations provide for such compensation.

Furthermore, it should be noted that between 1948 and 1971, the Polish Government concluded 12 indemnity agreements with the governments of other states. These agreements transferred the obligation to pay compensation for property owned by citizens of those states, which had been seized by the Polish State after World War II, to the competent authorities of the respective foreign states. The Polish State transferred specific sums to individual states, from which compensation was subsequently paid.

In contemporary times, the legal successors of many pre-war owners are taking action to either recover lost real property or obtain appropriate compensation. They utilise both the aforementioned legal regulations and apply for a declaration of invalidity of administrative decisions issued in the post-war period, pursuant to Article 156(1)(2) CAP, on the grounds that such decisions grossly violated the law. A declaration of invalidity regarding a decision on the seizure of real property means that such a decision produced no legal effects *ab initio* (from the moment of its issuance), thereby opening the path to recovering the lost property or obtaining compensation for the lost ownership. Conversely, a refusal to declare the invalidity of a decision may be the subject of a complaint to an administrative court.

The control of public administration activities by administrative courts is exercised based on the criterion of legality. Applicants may allege violations of both domestic law and the provisions of ratified international agreements.

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is among the sources of universally binding law of the Republic of Poland, as stipulated in Article 87(1) of the Constitution of the Republic of Poland. The obligation to apply its provisions rests upon public authorities, courts, and tribunals. Consequently, it is fully admissible to formulate a complaint to an administrative court alleging a violation of the Convention's provisions. In cases concerning the remedying of the legal effects of nationalisation acts issued after World War II, it appears fully justified to assess the correctness of the actions of public authorities through

[7] Consolidated text: Polish Journal of Laws of 2024, item 1145.

the prism of Article 1 of Protocol No. 1 to the ECHR, as it contains guarantees for the protection of property.

It is pointed out that although Article 64 of the Constitution of the Republic of Poland – guaranteeing the protection of ownership, other property rights, and the right of inheritance – is formulated differently than Article 1 of Protocol No. 1, in practice, the understanding of the norms contained in these provisions within the case-law of the ECtHR and the Polish Constitutional Tribunal (TK) is similar, and at times fully convergent[8]. In such a situation, all aspects of the protection of the right to property within the meaning of Article 1 of Protocol No. 1 can and should be the subject of considerations by national courts, conducted against the background of Article 64 of the Constitution of the Republic of Poland. However, it must be noted that Regional Administrative Courts (courts of first instance), pursuant to Article 134(1) PPSA, adjudicate within the limits of a given case without being bound by the allegations and motions of the complaint or the legal basis invoked. They may, therefore, assess the compatibility of the contested decision with the Constitution of the Republic of Poland or with the Convention even if the applicant does not raise such allegations. Conversely, the Supreme Administrative Court of Poland examines the case within the limits of the cassation appeal, taking into consideration *ex officio* only the invalidity of the proceedings (Article 183(1) PPSA). Therefore, if the cassation appeal does not allege a violation of Article 1 of Protocol No. 1 or other provisions of the ECHR, the Supreme Administrative Court of Poland will not review the contested judgment in this respect.

An analysis of the justifications of judgments delivered by the Supreme Administrative Court of Poland indicates that Article 1 of Protocol No. 1 is rarely invoked. It should be noted primarily that it is inadmissible to bring complaints against Poland concerning events that took place prior to 1 May 1993, *i.e.*, before the date of entry into force of Poland's declaration recognising the right of individual petition. Such complaints must be rejected pursuant to Article 35(4) ECHR as incompatible *ratione temporis* with Article 35 ECHR[9]. Furthermore, it should be indicated that the original text of the Convention did not provide for the protection of property. The right to the peaceful enjoyment of possessions belonging to every natural or legal person was guaranteed in Article 1 of Protocol No. 1 to the ECHR. This Protocol was ratified by Poland on 10 October 1994. Consequently, in accordance with generally recognised principles of international law, the liability of the Republic of Poland for a violation of this provision can only arise in respect of events occurring

[8] *L. Garlicki*, *S. Jarosz-Żukowska*, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz (eds. *L. Garlicki*, *M. Zubik*), Vol. II, Warszawa 2016, Article 64, thesis 7.

[9] ECtHR decision of 6 July 2000, *Kępa v. Poland*, application no. 43978/98, HUDOC.

after the ratification of the Protocol[10]. However, this does not exclude the possibility of taking into account facts occurring before that date, insofar as they created a situation extending beyond that date or may be relevant for the understanding of facts occurring thereafter[11].

The manner in which the Court understands the concept of "possessions" (property) is broad. The "possessions" referred to in this Article should be understood as comprising both "existing possessions" and assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right[12]. The Strasbourg Court has further indicated that Article 1 of Protocol No. 1 aims to protect the peaceful enjoyment of existing property, but does not guarantee the right to acquire property or the right to its restitution[13].

The right to obtain so-called compensatory property in exchange for lost Bug River property – although its realisation was to be effected by an administrative decision allocating State property – was recognised by the Strasbourg Court as a "possession" within the meaning of Article 1 of Protocol No. 1, because Article 81 of the Act on Land Management and Expropriation of 1985 constituted the legal basis for the State's obligation to realise this right[14]. This entitlement had an uninterrupted legal basis in national legislation in force after 10 October 1994 and was defined by the Polish Supreme Court in its judgment of 21 November 2003 (I CK 323/02) as a "claim against the State Treasury".

A finding of interference with the right of property is not tantamount to a violation of Article 1 of Protocol No. 1. As the Strasbourg Court indicates, "an interference with the right to the peaceful enjoyment of possessions must strike 'a fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use"[15]. Thus, it must be demonstrated that the deprivation of property by public authorities was not effected in the public interest,

[10] ECtHR decision of 6 April 2000, *Potocka and Others v. Poland*, application no. 33776/96, HUDOC.

[11] ECtHR decision of 16 September 2003, *Hutten-Czapska v. Poland*, application no. 35014/97, HUDOC.

[12] ECtHR decision of 23 January 2018, *Wysowska v. Poland*, application no. 12792/13, HUDOC.

[13] ECtHR decision of 12 December 2000, *Futro v. Poland*, application no. 51832/99, HUDOC.

[14] ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, § 133.

[15] ECtHR judgment of 6 December 2011, *Gladysheva v. Russia*, application no. 7097/10, HUDOC.

or that it did not occur subject to the conditions provided for by law and by the general principles of international law.

In the aforementioned *Broniowski v. Poland* judgment, the Strasbourg Court found that the Republic of Poland, by introducing statutes in the 1990s which hindered the realisation of the applicant's entitlement, aimed to achieve objectives such as the restitution of local self-government, the restructuring of the agricultural sector, and the acquisition of financial resources for the modernisation of military institutions. The Court indicated that during the political, economic, and social transformation that Poland was undergoing at the time, the resolution of these problems by the authorities was essential. The Court therefore accepted that the Polish State was entitled to take measures in the general interest of the community to achieve the above objectives. Simultaneously, despite significant social constraints resulting from the transformation of the entire state and economy, a difficult economic situation, and the unsatisfactory state of public finances, the Polish State attempted to satisfy the Bug River claims. In such situations, the State enjoys a wide margin of appreciation; however, this cannot entail consequences incompatible with Convention standards. The imposition of successive restrictions on the exercise of the Applicant's right to credit, and the application of practices that rendered this right effectively unenforceable and useless, meant that it became an illusory right, thereby destroying its very essence. Consequently, the Court held that there had been a violation of Article 1 of Protocol No. 1. At the same time, the Court recognised that the violation originated in a systemic problem connected with the malfunctioning of domestic legislation and practice, caused by the failure to establish an effective mechanism for implementing the property rights recognised in respect of persons seeking compensation for Bug River property.

As part of the execution of this judgment, the Act of 8 July 2005 on the realisation of the right to compensation for property left outside the present borders of the Republic of Poland was enacted. Actions were also taken to guarantee the factual possibility of obtaining compensation for Bug River property. As a result, beginning on 4 December 2007, the Strasbourg Court began to strike out similar applications from its list of cases, and on 23 September 2008, it closed the pilot judgment procedure, within the framework of which the judgment in *Broniowski v. Poland* had been delivered. The Court found that the level of compensation established by the 2005 Act – amounting to 20% of the original value of the property – fulfils Poland's obligations under Article 1 of Protocol No. 1, and that the implemented compensation procedures are effective[16]. The Committee of Ministers of the Council of Europe

[16] ECtHR decision of 4 December 2007, *Wolkenberg and Others v. Poland*, application no. 50003/99, and *Witkowska-Tobola v. Poland*, application no. 11208/02, HUDOC.

adopted Resolution CM/ResDH(2009)89[17], in which it recognised that Poland had executed the aforementioned judgment of the Court. It must be emphasised that the compatibility of the 2005 Act with the requirements arising from Article 1 of Protocol No. 1 does not preclude disputes regarding the interpretation of specific provisions of that Act[18].

The ECtHR judgment of 7 July 2012 in *Plechanow v. Poland*[19] concerned legal issues arising against the background of the so-called "Bierut Decree" of 1945[20].

The applicants' legal predecessor had submitted an application, pursuant to Article 7 of the 1945 Decree, for the grant of temporary ownership of the property of which he was the previous owner. The Presidium of the National Council of the Capital City of Warsaw, in a decision of 6 January 1964, dismissed this application and stated that the ownership of all buildings situated on the property had been transferred to the State Treasury. In a decision of 30 November 1999, the Local Government Appeal Board declared that the aforementioned decision, regarding a portion of the property, had been issued in violation of the law. The Board indicated therein that its decision entitled the applicants to seek compensation for damage caused by an administrative decision issued in violation of the law. The applicants brought a claim in a civil court against the Municipality of Warsaw-Centrum for damages for the issuance of the decision in violation of the law. However, the claim was dismissed on the grounds that the defendant should have been the State Treasury, not the Municipality. The applicants' appeal was dismissed, and the Supreme Court refused to accept the cassation appeal for consideration. The applicants subsequently filed a constitutional complaint with the Constitutional Tribunal, alleging a violation of the right to a court and a fair trial due to the defective application of Article 393 of the Code of Civil Procedure. The Constitutional Tribunal discontinued the proceedings, indicating that it had already examined the same issue in its judgment of 31 March 2005 (SK 26/02).

In their application to the ECtHR, the applicants alleged, relying on Article 1 of Protocol No. 1 and Article 6 ECHR, that as a result of defective rulings by national courts and a lack of legal certainty, they had been deprived of compensation

[17] The Resolution adopted by the Committee of Ministers of the Council of Europe on 30 September 2009 at the 1065th meeting of the Deputy Ministers.

[18] See especially: NSA(7) resolution of 16 December 2013, I OPS 11/13, according to which incorporation into a kolkhoz or nationalisation on other grounds does not, in itself, exclude the right to compensation; and NSA(7) resolution of 9 October 2017, I OPS 3/17, according to which the submission of an application for confirmation of the right to compensation by one entitled person initiates proceedings effective also with regard to other entitled persons.

[19] ECtHR judgment of 7 July 2012, *Plechanow v. Poland*, application no. 22279/04, HUDOC.

[20] Decree of 26 October 1945 on the ownership and use of land in the area of the Capital City of Warsaw (Polish Journal of Laws of 1945, No. 50, item 279).

for damage caused by the issuance of an unlawful administrative decision. The applicants also raised an allegation under Articles 6 and 13 ECHR that they had been deprived of the possibility of a fair hearing of their case (specifically, that they were deprived of the right of access to a court) and of an effective remedy regarding the allegations brought by them under Article 1 of Protocol No. 1, due to the fact that the Supreme Court had refused to examine their cassation appeal without providing sufficient grounds.

The Court confirmed the position expressed in the aforementioned *Broniowski v. Poland* judgment, stating that it possesses temporal jurisdiction to examine the complaint where the applicants challenge the acts and omissions of the State regarding the realisation of a compensation claim arising from the decision of the Local Government Appeal Board issued in 1999, which declared the invalidity of the decision of the Presidium of the National Council of the Capital City of Warsaw of 1964. The declaration that the 1964 decision was issued in violation of the law created a financial interest on the part of the applicants, which was recognised by Polish law and protected under Article 1 of Protocol No. 1. The Government's objection that the applicants failed to present documents to the Court establishing their standing in the case – allegedly failing to prove their status as heirs of the previous owner or to present documents confirming his legal title to the disputed property – was deemed irrelevant. The Court emphasised that the application did not concern the deprivation of the applicants' property, but rather their claim for compensation; their standing to participate in the proceedings for the declaration of invalidity of the 1964 decision and in the compensation proceedings had not been questioned.

The Court reaffirmed the position expressed in earlier rulings that the genuine and effective exercise of the right protected by Article 1 of Protocol No. 1 does not consist merely of the State's duty to refrain from interference, but may also give rise to positive obligations. In particular, States have an obligation to provide a judicial mechanism for the effective resolution of disputes concerning property rights and to ensure the compatibility of these mechanisms with the substantive and procedural guarantees enshrined in the Convention. Significant shortcomings in dispute resolution procedures may give rise to issues in the context of Article 1 of Protocol No. 1. The Court further indicated that the Convention does not impose any specific obligation on States to remedy injustice or damage caused prior to their ratification of the Convention. However, if such a solution is adopted by the State, it must be implemented in a sufficiently clear and coherent manner so as to avoid, as far as possible, ambiguity and legal uncertainty for the persons affected by the implementation measures. In the Court's opinion, assistance in identifying the proper defendant falls within the State's positive obligations when a state authority bears responsibility for the damage caused. In the case at hand, the applicants became victims of

administrative reforms, inconsistency in case-law, and a lack of certainty and coherence of the law in this area. The issue of liability for damage caused by erroneous administrative decisions had not been unequivocally clarified at the time the applicants' claim was heard, and divergences in case-law persisted for many years. Under these circumstances, the applicants were unable to obtain due compensation for the damage suffered. Burdening the applicants with the duty to identify the competent authority as the defendant, and thus depriving them of the possibility to claim damages, was a disproportionate requirement that failed to strike a fair balance between the public interest and the applicants' rights. The Court therefore held that Poland had failed to fulfil its obligation to undertake positive measures aimed at guaranteeing the applicants' right to the effective enjoyment of their property protected by Article 1 of Protocol No. 1, thereby upsetting the "fair balance" between the requirements of the public interest and the necessity of protecting the applicants' rights.

A common method of "circumventing" the legal lacuna resulting from the absence of a reprivatisation act became the filing of applications for a declaration of invalidity of decisions transferring real property ownership to the State. The consequence of declaring a decision invalid was the necessity to issue a new ruling in the given case, which in many instances was favourable to the interested persons. An unfavourable ruling, however, could be challenged in the course of administrative proceedings and subsequently appealed to an administrative court. A finding that the challenged decision had produced irreversible legal effects led to the necessity of issuing a decision pursuant to Article 158(2) CAP stating that the decision had been issued in violation of the law. In such cases, the possession of property within the meaning of Article 1 of Protocol No. 1 by the interested persons was confirmed.

Applications for a declaration of invalidity were made on the basis of Article 156(1)(2) CAP, which stipulates that a decision issued without a legal basis or in gross violation of the law shall be declared invalid. Crucially, Article 156 CAP, in the wording effective since 1980, did not place a temporal limit on the possibility of declaring a decision invalid on this basis. A harbinger of change in this regard was the judgment of the Constitutional Tribunal of 12 May 2015 (P 40/13, Legalis). The provision of Article 156(2) CAP was found to be partially incompatible with Article 2 of the Constitution of the Republic of Poland to the extent that it did not exclude the admissibility of declaring the invalidity of a decision issued in gross violation of the law when a significant period of time had elapsed since the decision was issued, and the decision had served as the basis for the acquisition of a right or a legitimate expectation. This judgment was issued in response to a question of law referred by the Regional Administrative Court in Warsaw in a case concerning land located in Warsaw seized under the "Bierut Decree". It is noteworthy that the referring court indicated that, in the circumstances of the case, the applicants had a legitimate

expectation under Article 1 of Protocol No. 1 to obtain effective enjoyment of the real property owned by their legal predecessor. The Constitutional Tribunal held that in view of the ruling on the incompatibility of Article 156(2) CAP with Article 2 of the Constitution of the Republic of Poland, it became unnecessary to examine the issue of its incompatibility in this respect with Article 1 of Protocol No. 1. The proceedings regarding this allegation were thus discontinued. This judgment is a scope judgment ruling on a legislative omission, meaning that it did not result in a normative change within the scope indicated therein.

The aforementioned judgment of the Constitutional Tribunal was executed by the Sejm *via* the Amendment Act of 11 August 2021 amending the Code of Administrative Procedure[21]. As a result of this amendment, it became admissible to declare a decision invalid only within ten years of its service or announcement. In the event that more than ten years but less than thirty years have elapsed from the date of service or announcement of the decision, it is admissible to initiate proceedings for a declaration of invalidity; however, the authority may not declare the decision invalid, but may only state that the contested decision was issued in violation of the law (Article 158(2) CAP). After the lapse of thirty years from the date of service or announcement of the decision, the possibility of initiating proceedings to declare the decision invalid is excluded (Article 158(3) CAP). Simultaneously, by virtue of Article 2(2) of the Amendment Act, administrative proceedings regarding the declaration of invalidity of a decision or order, initiated after the lapse of thirty years from the date of service or announcement of the decision or order and not concluded by a final decision or order before the date of entry into force of the Amendment Act, were discontinued by operation of law. This latter provision became the subject of controversy due to the role played by Article 156(1)(2) CAP in the absence of a reprivatisation act. The amendment in question, on the one hand, prevented so-called "wild reprivatisation", which involved numerous abuses; yet on the other hand, it practically rendered it impossible for the heirs of original owners to apply for compensation or the restitution of property nationalised or placed under state management after World War II, thereby excluding the possibility of obtaining confirmation of the possession of property referred to in Article 1 of Protocol No. 1. Originally, the discussed amendment to the CAP was contained in the aforementioned parliamentary bill on the settlement of reprivatisation claims. Had the legislative work on that bill been finalised with the enactment of a law, reprivatisation *via* the declaration of invalidity of decisions would have been superseded by the norms of the newly enacted statute.

In numerous complaints to administrative courts, it was alleged that Article 2(2) of the Amendment Act was incompatible with, *inter alia*, Article 1 of Protocol No. 1.

[21] Polish Journal of Laws of 2021, item 1491.

The Supreme Administrative Court of Poland held that such incompatibility does not exist[22]. Conversely, the Commissioner for Human Rights, in a motion to the Constitutional Tribunal dated 28 December 2021, requested a declaration that Article 2(2) of the Amendment Act is incompatible with, *inter alia*, Article 64(1) and (2) of the Constitution of the Republic of Poland, but did not allege incompatibility with Article 1 of Protocol No. 1.

A complaint was lodged with the Strasbourg Court by a group of individuals alleging that the Amendment Act of 11 August 2021 violates Articles 6 and 13 ECHR and Article 1 of Protocol No. 1. The complaint was justified on the grounds that, pursuant to the Amendment Act, proceedings for the declaration of invalidity of decisions issued in the 1950s – under which the applicants' legal predecessors were deprived of real property ownership – were discontinued by operation of law, leaving the applicants with no legal remedies. The Court indicated that the nature, scope, and specific features of proceedings for the declaration of invalidity do not allow for Article 6(1) ECHR to be applied to such proceedings. Consequently, the application was declared inadmissible in its entirety[23].

Summarising these considerations, it must be stated that the provisions of the ECHR and Article 1 of Protocol No. 1 can be utilised to a limited extent for the purpose of removing the legal effects of nationalisation acts issued after World War II. For applicants to succeed, it is necessary to demonstrate that Poland, subsequent to the ratification of the Convention and Protocol No. 1, confirmed the right to compensation or to the restitution of the seized real property.

Abstract

The legal possibilities of eliminating the effects of the takeover of ownership of many properties by the State after the end of World War II, which took place both on the basis of legal provisions and without a legal basis, are limited, because the contemporary legislator has not yet introduced a general regulation concerning reprivatization claims in relation to properties taken over in the post-war period. Questioning, before the European Court of Human Rights, the correctness of the actions of public authorities taken several decades ago with reference to the provisions of the European Convention on Human Rights and Article 1 of Protocol No. 1 is excluded due to the lack of competence of the Court *ratione* temporis. However, it is permissible to invoke the protection resulting from Article 1 of Protocol No. 1 if the contemporary legislator confirms the will to compensate for damages incurred several

[22] See, *e.g.*, judgment of the NSA of 6 May 2024, I OSK 57/23, Legalis.

[23] ECtHR decision of 13 December 2022, *Borkowska and Others v. Poland*, application no. 5815/22, HUDOC.

decades earlier. The legal successors of the injured parties must therefore use the possibilities offered to them by the applicable law. The possibility of obtaining confirmation of possession of property within the meaning of Article 1 of Protocol No. 1, in relation to real estate lost in the post-war period, by declaring the judgments issued at that time invalid or finding them to have been issued in breach of the law, was closed in 2021. This is without prejudice to Article 1 of Protocol No. 1.

Robert Sawuła*

The Hearing of a Case "in camera" by an Administrative Court (Selected Remarks on the 75th Anniversary of the Adoption of the European Convention on Human Rights)

§ 1. Preliminary remarks

The passage of 75 years since the drafting of the ECHR, and its subsequent ratification by Poland[1], provides an occasion for reflection. Undertaking such reflection from the perspective of the Polish administrative judiciary is fully justified. One of the fundamental norms of the Convention is the right to a fair trial[2]. It follows from Article 6(1) ECHR, *inter alia*, that: "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

* Judge of the Supreme Administrative Court of Poland, dr hab., WSPiA University of Rzeszów; ORCID: 0000-0002-4908-9902.

[1] Consent for ratification was expressed in the Act of 2 October 1992 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (Polish Journal of Laws No. 85, item 427).

[2] It is indicated in legal literature that the English term *fair trial* denotes a "just process" (uczciwy proces) or "fair hearing" (uczciwa rozprawa), which is intended to best reflect the meaning of Article 6 ECHR; indeed, the provision concerns primarily the human rights that must be respected during a hearing before a court. See: *M. Wędrychowski*, Prawo do „uczciwej rozprawy" w Europejskiej Konwencji Praw Człowieka, PS 1991, No. 5–6, p. 64; cf. also *P. Hofmański*, *A. Wróbel* [in:] Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Vol. I, Komentarz do artykułów 1–18 (ed. *L. Garlicki*), Warszawa 2010, pp. 326 *et seq.*

The impact of the ECHR on the domestic legal order is unquestionable[3]. Although cases examined by Polish administrative courts do not, in principle, fall within the scope of the concept of "civil rights and obligations" within the autonomous meaning of the ECHR, one must nevertheless share the views which highlight that such cases are increasingly encompassed by the jurisdiction of the ECtHR[4].

Attention will be drawn here to the issue of the publicity of the court hearing and the subjective limitation of this publicity, in the aspect of the regulation contained in the Law on Proceedings before Administrative Courts (PPSA), taking the form of the so-called "hearing in camera" (literally: "at closed doors")[5].

§ 2. Convention and constitutional framing of the principle of publicity of the judicial process

The principle of the public examination of cases by a court finds reflection in the Constitution of the Republic of Poland, Article 45(1) of which states that: "Everyone shall have the right to a fair and public hearing of his or her case, without undue delay, before a competent, impartial and independent court". This applies to all court proceedings, and above all to hearings conducted within them: the principle implies creating access for the public to the courtroom and allowing for the quiet observation of the proceedings[6]. This solution is complemented by the norm of Article 45(2) of the Constitution of the Republic of Poland, according to which: "Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly". The exclusion or restriction of the publicity of proceedings is of an exceptional nature[7]; this requirement applies to all stages of

[3] By way of example, one may point to the Act of 17 June 2004 on the complaint about a breach of the right of a party to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings without undue delay (Polish Journal of Laws 2023, item 1725), which provides for the competence of the NSA to declare the excessive length of administrative court proceedings.

[4] Cf. *A. Zieliński*, Postępowanie przed NSA w świetle „prawa do sprawiedliwego procesu sądowego", PiP 1992, No. 7, pp. 17 *et seq.*; *A. Wróbel*, Prawo do sądu, [in:] Konferencja naukowa: Konstytucja RP w praktyce, Warszawa 1999, p. 209; *J. Chlebny*, Sądowa kontrola administracji w świetle rekomendacji Rady Europy, PiP 2005, No. 12, pp. 33 *et seq.*

[5] This is, however, a metaphor of sorts, for it is obvious that there is no literal "closing" of the courtroom in the court building where court sessions are held, or in another building where a hearing is conducted – for instance, where holding a session outside the court building facilitates the conduct of the case or contributes significantly to cost savings (Article 94(1) PPSA). Rather, it is a figurative term for a situation in which the circle of persons entitled to participate in a hearing conducted in this manner is restricted.

[6] *L. Garlicki*, Polskie prawo konstytucyjne, Zarys wykładu, Warszawa 2004, p. 369.

[7] Cf. for example, *W. Skrzydło*, Konstytucja Rzeczypospolitej Polskiej, Komentarz, Warszawa 2013, p. 56.

judicial proceedings, save for the deliberations of judges preceding the ruling. Publicity constitutes an additional guarantee of the impartial operation of the court[8]. The exclusion of the publicity of a hearing on the basis of the grounds contained in Article 45(2) of the Constitution of the Republic of Poland refers to so-called external publicity. Conversely, the internal publicity of judicial proceedings – understood as, *inter alia*, the right of an individual to participate in the proceedings – is immanently inscribed in the concept of *a fair trial* and should be examined primarily from the perspective of Article 45(1) of the Constitution of the Republic of Poland[9].

§ 3. Normative bases for the publicity of an administrative court case

The provisions of the PPSA transpose the constitutional principle of the publicity of a court hearing[10]. Article 10 PPSA stipulates that: "The examination of cases shall be public, unless a specific provision states otherwise". The weight of this principle stems from the fact that its violation – consisting of examining a case in a session held in private (except, naturally, for exceptions resulting from specific provisions) or failing to notify a party of the venue and date of the hearing – constitutes a ground for the nullity of the proceedings, if as a result the party was deprived of the ability to act and, consequently, of the possibility to defend their interests[11]. In turn, Article 90 PPSA specifies that: Unless a specific provision states otherwise, court sessions shall be public, and the adjudicating court shall examine cases at a hearing (§ 1); The court may refer a case to a public session and schedule a hearing also where the case is subject to examination in a session held in private (§ 2). Legal literature emphasises that any fair procedure – otherwise termed a reliable, lawful, honest procedure – should contain a number of constant elements and guarantees safeguarding against bias and dishonesty on the part of public administration bodies and courts. This principle means that all or the majority of procedural acts necessary to issue a ruling in a case, as well as the pronouncement of the ruling, take place, as it were, before the eyes of

[8] *P. Tuleja*, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz (ed. *P. Tuleja*), Warszawa 2023, p. 170.

[9] Cf. *A. Krawczyk*, [in:] Polskie sądownictwo administracyjne – zarys systemu (ed. *Z. Kmieciak*), Warszawa 2015.

[10] In the literature, there is no doubt that this principle should be considered as applying to the entire system of Polish law – cf. *J.P. Tarno*, [in:] *W. Chróścielewski*, *J.P. Tarno*, *P. Dańczak*, Postępowanie administracyjne i postępowanie przed sądami administracyjnymi, Warszawa 2021, p. 482. Furthermore, it is deduced that the constitutional principle of publicity must be taken into account when assessing the legal solutions adopted in this regard – *B. Adamiak*, w: *B. Adamiak*, *J. Borkowski*, Postępowanie administracyjne i sądowoadministracyjne, Warszawa 2018, pp. 516–517.

[11] *J.P. Tarno*, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Warszawa 2008, p. 64.

the parties and, potentially, the public. These persons may observe the course of the proceedings, and the parties may furthermore actively participate therein. The realisation of this principle in judicial proceedings is intended to subject the conduct of the proceedings to public scrutiny[12].

There are few instances where, by virtue of a specific provision – save for situations encompassed by the PPSA regarding the examination of an administrative court case in a session held in private – the examination of a case outside of a hearing is excluded. These instances boil down to a statutory predetermination that an administrative court case is to be examined outside of a hearing, combined with the administrative court's inability to utilise the solution contained in Article 90(2) PPSA[13]. The factual effect of the publicity of a hearing is the possibility for any adult person – other than the parties and summoned persons – to enter the courtroom[14].

§ 4. The essence of a session "in camera" in the administrative court process

The limitation of the external publicity of a hearing in administrative court proceedings occurs in two distinct forms, accompanied by divergent premises regulated in Article 96(1) or Article 96(2) PPSA. In the first instance, the initiator of the session in camera is the "court", which orders the holding of the session in camera of its own motion. In the second instance, the exclusion of the publicity of the hearing is triggered by a motion from a party; in the justification of such a motion, it is necessary to present convincing argumentation[15]. The assessment of the fulfilment of this premise falls to the court.

The essence of a session in camera in the administrative court process boils down to restricting the catalogue of persons who may be present in the courtroom to: "the parties, their statutory representatives and counsels, the prosecutor, and persons of

[12] *M. Romańska*, [in:] Prawo o postępowaniu przed sądami administracyjnymi, Komentarz (ed. *T. Woś*), Warszawa 2009, p. 145; *J.P. Tarno*, [in:] *J.P. Tarno*, *E. Frankiewicz*, *M. Sieniuć*, *M. Szewczyk*, *J. Wyporska*, Sądowa kontrola administracji. Podręcznik akademicki, Warszawa 2006, p. 74.

[13] An example is Article 38 of the Act on the Protection of Classified Information (OchrInfU), which mandates the examination in a session held in private of a case concerning decisions and rulings issued by a competent authority regarding the issuance of a security clearance, the revocation of a security clearance, or the discontinuation of verification proceedings or control verification proceedings.

[14] It follows from the wording of Article 95(1) PPSA that the presiding judge may permit minors to be present at the session. Furthermore, it would not be possible to treat a hearing as being conducted "in camera" if, for example, the public were removed by the presiding judge of the panel due to causing a disturbance in the proceedings, following the exercise of the judge's sessional police powers.

[15] *M. Jagielska*, *A. Wiktorowska*, *K. Zalasińska*, [in:] Prawo o postępowaniu przed sądami administracyjnymi, Komentarz (eds. *R. Hauser*, *M. Wierzbowski*), Warszawa 2021, p. 627.

trust – two from each side"[16]. It is clear that the applicants and the authority whose act, inaction, or excessive length of proceedings is the subject of the application (complaint) may be present in the courtroom as parties to the proceedings. It is furthermore evident that participants with the rights of a party may be present in the courtroom, both those who are mandatory participants and those admitted to participate in the proceedings by the court. The participation of the statutory representatives and counsels of the above persons in a session conducted in camera is indisputable. The presence of the prosecutor in the courtroom during a session held in camera – especially where the premise for holding it is the consideration of a threat to state security, public order, or the disclosure of circumstances constituting classified information – also appears fully justified.

A separate remark should be made regarding so-called "persons of trust". The legislator has not specified any criteria for their designation, other than defining their number – "two from each side" – which is interpreted in the literature on civil procedure as a substitute for the public in general[17]. It is the parties who are entitled to designate such persons; the failure to designate them, or the designation of only one, does not *prima facie* appear to be an obstacle to holding a session of this type. The designation of such a "person of trust" is binding on the court; the person need not meet any formal criteria, provided they are an adult entitled to enter the courtroom (Article 95(1), first sentence, PPSA).

§ 5. Session "in camera" *versus* "hearing with exclusion of publicity"

It also requires consideration whether a session 'in camera' within the meaning of Articles 96 and 97 PPSA is synonymous with a 'hearing conducted with the exclusion of publicity' within the meaning of Article 22(1), first sentence, PrUSA. The latter provision states that: "The President of the Supreme Administrative Court, the president of a regional administrative court, and other persons appointed to direct and supervise administrative activity shall have the right to inspect the activities of the competent regional administrative court, may be present at a hearing conducted with the exclusion of publicity, and may demand explanations and the rectification of deficiencies"[18]. Accepting both these concepts as synonyms would, in practice, mean

[16] The order to hold a session in camera thus has the effect that no third parties other than persons of trust may participate therein – cf. *Z. Miczek*, Jawność posiedzeń sądowych w postępowaniu cywilnym i jej wyłączenia, Ius et Administratio 2005, No. 2, p. 93.

[17] *A. Kościółek*, Zasada jawności w sądowym postępowaniu cywilnym, Warszawa 2018, p. 518.

[18] In the commentary to the PrUSA, this entitlement was not particularly highlighted, being treated collectively as an element of supervision in terms of subject matter exercised by the President of the Supreme Administrative Court, the president of the Regional Administrative Court, and other persons

a significant expansion of the catalogue of persons entitled to be present at a session conducted in camera. Furthermore, the term "other persons appointed to direct and supervise administrative activity" may give rise to interpretative doubts[19].

Certain difficulties arise in determining the proper form of a decision ordering that a hearing be held in camera when the court issues such an order *ex officio*. According to *B. Dauter*, the court should make this determination by way of a procedural order, as expressly stated in the final sentence of Article 96(2) PPSA, rather than on the basis of the phrase "the court shall order" found in §§ 1 and 2 of the provision under commentary[20]. This regulation appears to be modelled on the corresponding provisions of the Code of Civil Procedure. Contemporary civil-procedure scholarship favours the use of a procedural order for "ordering" that a public hearing be held in camera[21].

While accepting the procedural order as the proper form of the court's decision on holding a session in camera, one cannot disregard the fact that the timing of such an order may differ depending on whether it is issued *ex officio* or upon a party's motion. It cannot be ruled out that the judge-rapporteur may become convinced that one of the premises for holding a session in camera, as set out in Article 96(1) PPSA, is met before the commencement of a hearing that has already been scheduled. Thus, once the hearing has been scheduled but before the hearing date itself, if there is a sufficiently firm conviction that one of the protected values listed in the cited provision is threatened or that there is a risk of disclosing classified information, the court may – in a session held in private – decide *ex officio* to hold all or part of the session in camera. A procedural order adopted in such a private session before the hearing would be subject to service on the parties (Article 163(2) PPSA), thereby allowing them to designate "persons of trust". A procedural order concerning the holding of a session in camera is not subject to interlocutory appeal and therefore does not require a written justification.

Although a literal interpretation of Article 96(2) PPSA does not expressly authorise the exclusion of publicity for only part of a session, a systemic and teleological

appointed to direct and supervise administrative activity – cf. *T. Kuczyński*, [in:] *M. Masternak-Kubiak*, *T. Kuczyński*, Prawo o ustroju sądów administracyjnych, Komentarz, Warszawa 2009, pp. 198 *et seq.*

[19] I see no particular value – apart from potential prior complaints regarding the abuse of the 'in camera' form of hearing – for which the law should enable the participation in a session in camera of the persons listed in Article 22(1), first sentence, PrUSA.

[20] *B. Dauter*, [in:] *B. Dauter*, *A. Kabat*, *M. Niezgódka-Medek*, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz, Warszawa 2016, p. 465. The author indicates that the court's procedural order specifying the extent to which publicity is excluded – in whole or in part – is entered into the record without a separate operative part; nevertheless, it is justified to include in the order's text the statutory premise that formed the basis for its issuance.

[21] Cf. *A. Kościółek*, Zasada jawności, pp. 522–523.

interpretation supports the view that the court may exclude publicity in whole or in part also upon a party's motion – particularly where the party seeks the exclusion of publicity only for a specific portion of the session[22].

A further consequence of holding a session in camera is that, following the public pronouncement of the judgment, the presiding judge or the judge-rapporteur will ordinarily present an oral account of the principal reasons for the ruling, but may in this situation refrain from doing so (Article 139(3), second sentence, PPSA). Another consequence is the criminal liability associated with publicly disseminating information from a court hearing conducted with the exclusion of publicity[23].

§ 6. Premises for holding a hearing "in camera" before an administrative court

The pivotal issue in conducting a hearing with restricted publicity is the court's conviction that at least one of the statutory premises for holding the session in camera has been met. While in cases involving the need to protect the private life of a party or other important private interest, this is subject to the administrative court's assessment in the context of the party's motion and its justification, in relation to one of the premises in Article 96(1) PPSA boiling down to a threat to designated values (morals, state security, or public order), the administrative court must acquire the conviction that such a threat is real. Reaching a conclusion regarding the potential disclosure of circumstances constituting classified information will generally be less complex. In practice, this will consist of determining whether information to which an authorised person has assigned a particular classification of secrecy may be revealed.

One of the premises for restricting the publicity of a hearing is the conviction that a public examination of the case poses a threat to morals. The very definition of morality presents difficulties[24], as evidenced by how this concept is understood, for example, by philosophers[25], and moral philosophers in particular. They usually strive to obtain an answer to the question of what morality concerns, and what criteria allow

[22] *B. Dauter*, [in:] *B. Dauter*, *A. Kabat*, *M. Niezgódka-Medek*, Prawo o postępowaniu, p. 466.

[23] Pursuant to Article 241(1) CC, any person who makes public, without authorisation, the information relating to the criminal investigation before such information has been revealed in the judicial proceedings is liable to a fine, to community service, or to a custodial sentence of up to two years. Article 241(2) CC further provides that, the same penalty shall be imposed on anyone who publicly disseminates information from a court hearing conducted with the exclusion of publicity.

[24] This is not facilitated by the use of the term "public morality" in Article 31(3) of the Constitution of the Republic of Poland as well.

[25] Independently of doubts regarding the manifold links between law and morality, cf. *e.g. H.L.A. Hart*, Eseje z filozofii prawa, (transl. *J. Woleński*), Warszawa 2024, pp. 68–101.

one to distinguish that which is moral from that which is immoral[26]. It is worth highlighting that the oath of judicial office contains a reference to the administration of justice according to the swearing judge's conscience. The literature indicates, therefore, that the judge's conscience is a professional conscience, shaped by the constitutional system of values and subordinate to it[27]. However, in this instance, it is impossible to completely isolate the judge's conviction *ad casum* as to what morality is, and whether a fully public hearing in a given case would threaten it. It is extremely difficult to unequivocally identify such cases[28]. The situation is similar regarding a threat to state security or public order.

The restriction of the publicity of a hearing before an administrative court is motivated, *inter alia*, by the need to protect private life or another important private interest[29]. The acceptance of these premises implies the impossibility of the participation in the hearing of the public, the press, or representatives of other mass media. Article 14 of the Constitution of the Republic of Poland establishes the principle of the freedom of the press and other means of social communication (*e.g.*, radio, television, internet)[30]; simultaneously, Article 47 states that everyone has the right to legal protection of their private and family life, dignity and reputation and the right to make decisions concerning their personal life. To secure the protection of freedoms, the mere prohibition of state interference in a specific sphere of human life is sometimes sufficient; however, the state is often obliged to undertake active measures to create the conditions necessary for the realisation of a given human freedom[31]. Privacy protection is also viewed from the perspective of the benefits it yields for society,

[26] Cf. the considerations of *B. Williams*, Moralność, Wprowadzenie do etyki (transl. *M. Hernik*), Warszawa 2000, pp. 105 *et seq.*

[27] Cf. *M. Kobak*, Sędzia sądu administracyjnego jako przedstawiciel Narodu, ZNSA 2024, No. 2(113), p. 35. The author argues that a judge's conscience must abstract from their individual, personal moral markers, but should instead sensitise them to legal values decoded from the Constitution and statutes, insofar as the latter do not violate the former.

[28] As an example, the literature points to the court's examination of a case considered "exceptionally controversial due to the moral attitudes displayed by the parties and participants" – cf. *A. Jendrzejewska*, [in:] Metodyka pracy w sądach administracyjnych (eds. *R. Hauser*, *J. Drachal*), Warszawa 2015, p. 506.

[29] Here, too, one must agree with the conviction regarding the difficulty in attempting to obtain an unambiguous designator for such concepts. *M. Safjan* convincingly states that attempts to enumerate the elements of privacy exhaustively yet precisely cannot succeed, and that all definitions constructed in this field are of a general and directional nature – *M. Safjan*, Prawo do ochrony życia prywatnego, [in:] Podstawowe prawa jednostki i ich sądowa ochrona (ed. *L. Wiśniewski*), Warszawa 1997, p. 128.

[30] The inclusion of this provision in Chapter I "The Republic" of the Constitution is decoded as treating freedom of the press as one of the fundamental principles of the state's political system, one of the guiding ideas upon which the legal-systemic construction of the state and its apparatus is based – *J. Sobczak*, Prawo prasowe. Podręcznik akademicki, Warszawa 2000, p. 161.

[31] Therefore, the development of the concept of the right to privacy leads to the search for ever more effective instruments of protection – cf. *K. Degórska*, Prawo do ochrony życia prywatnego i rodzinnego, [in:] Prawa i wolności I i II generacji (eds. *A. Florczak*, *B. Bolechów*), Toruń 2006, p. 159.

despite the fact that it is often perceived as a right protecting only the interests of the individual, frequently at the expense of the general public. In this context, the role of privacy is emphasised: on the one hand, it enables the individual to freely develop and shape their views, and on the other, it allows for the conduct of public debate based on the equal and free participation of all citizens[32]. Legal literature argues that freedom of the press is not absolute, but is subject to limitations and must remain within the boundaries prescribed by law – a point accentuated in the case-law of the ECtHR. Moreover, the press is also obliged to protect personal rights, including the sphere of the private life of persons active in the public sphere[33].

§ 7. Concluding remarks

The principle of the publicity of the judicial process defined in the ECHR, and the premises for its subjective limitation (Article 6(1), second sentence), find reflection in the Constitution of the Republic of Poland, as well as in the regulations concerning the administrative court process. The provisions of the PPSA in this regard constitute, in essence, almost a repetition of the constitutionally defined premises for excluding the publicity of a hearing, supplementing this catalogue with the situation where the public examination of a case could lead to the disclosure of circumstances constituting classified information – a case not explicitly accounted for by the Convention itself. Admittedly, the premises for restricting publicity contained in Article 96(1) and (2) PPSA are somewhat different from those found in Article 6(1), second sentence, of the ECHR; however, the thesis that the Polish administrative court process fundamentally respects the norms of the Convention in the analysed scope is legitimate. One of the reasons for an administrative court to order a public session to be held in camera is regard for a threat to morals; in Convention terms, the adequate premise for the exclusion of the press and public from the hearing is defined as interests of morals. The premise of a threat to state security or public order in Article 96(1) PPSA is not conceptually distant from the case of the exclusion of the press and public due to public order or national security in a democratic society, which is included in the Convention. The absence in the provisions of the PPSA of a premise for holding a public session in camera on the grounds that the interests of juveniles so require – which is included in Article 6(1), second sentence, ECHR – may be explained by the specific nature of administrative court cases.

[32] Cf. the in-depth discussion of *K. Łakomiec*, Konstytucyjna ochrona prywatności. Dane dotyczące zdrowia, Warszawa 2020, pp. 35–39.

[33] *J. Sieńczyło-Chlabicz*, Prawo do ochrony sfery życia prywatnego osób publicznych w świetle polskiej doktryny i orzecznictwa, PUG 2005, No. 2, p. 6. As an example of a case justifying examination in a session held in private, the investigation of an occupational disease requiring the disclosure of details regarding an employee's health condition is cited – cf. *A. Jendrzejewska*, [in:] Metodyka pracy, pp. 506 *et seq.*

Instances of holding a session in camera by a Polish administrative court are sporadic and are not recorded in official reports on the activities of the Supreme Administrative Court of Poland and regional administrative courts. This does not change the fact that a derogation from the principle of the publicity of the judicial process is rightly provided for in the ECHR itself, as well as in the provisions of the Constitution and the PPSA. The States Parties to the Convention realise that the publicity of the judicial process is not an absolute value; *ad casum*, the state court must be empowered to order a hearing with restricted publicity, since threats may arise to values before which the publicity of the trial must recede. It will, in turn, depend on the experience of the adjudicating panel whether to order a session in camera *ex officio* or to grant a party's motion in this regard. A hasty resolution of the dilemma between the designated values may bring about difficult, or relatively impossible to rectify, consequences. Thus, the utilisation by judges of administrative courts of the constructions contained in Article 96(1) and (2) PPSA should be characterised by the utmost prudence. Once again, one may be confirmed in the belief that *Ius est ars boni et aequi*.

Abstract

The subject of the article is the issue of the examination of cases by Polish administrative courts in the so-called "closed-door session". These considerations were made in the context of the obligation of public examination of a case by the court, stemming from Article 6(1) ECHR. The author recapitulates the rules for holding an in camera hearing, the prerequisites and consequences of such a hearing, highlighting the need for a restrictive interpretation of the holding of such hearings in order to respect the right to a fair (just) trial.

Andrzej Skoczylas*

The Impact of ECtHR Case-Law on the Decisions of Administrative Courts in Cases Concerning the Excessive Length of Proceedings

An analysis of the case-law included in CBOSA[1] suggests that administrative courts generally consider themselves bound by the case-law of the European Court of Human Rights on the basis of the so-called "intellectual" binding force[2]. Legal scholarship emphasizes that "ECtHR judgments do not have the status of *de jure* precedents. Nevertheless, there are rational grounds to assume that ECtHR judgments often function as *de facto* precedents (...)"[3]. This means that, in practice, administrative courts generally accept and refer to the legal views of the ECtHR on the basis of the court's authority and the persuasive force of the arguments presented in its reasoning[4]. Theses based on ECtHR judgments are used as authoritative grounds in the reasoning of administrative court judgments. In such cases, an administrative court's judgment is first justified by a legal provision and subsequently by an ECtHR judgment[5].

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., Adam Mickiewicz University, Poznań; ORCID: 0000-0001-7951-7341.

[1] Central Database of Administrative Court Judgments available at: http://orzeczenia.nsa.gov.pl.

[2] *L.L. Guerra*, Znaczenie ujednolicenia interpretacji prawa w państwie prawnym, Jurysta 2000, No. 11–12, p. 17; cf. also *S. Gołąb*, Organizacja sądów powszechnych, Kraków 1938, pp. 14–15.

[3] *M. Balcerzak*, *S. Sykuna*, Charakter prawny orzeczeń ETPC a system źródeł prawa polskiego, [in:] Orzecznictwo w systemie prawa. II Konferencja Naukowa Wydziału Prawa i Administracji Uniwersytetu Gdańskiego oraz Wolters Kluwer Polska. Gdańsk, 17–18.9.2007 r. (eds. *T. Bąkowski*, *K. Grajewski*, *J.K. Warylewski*), Warszawa 2008, p. 44.

[4] In cases other than those concerning complaints about the excessive length of proceedings, ECtHR judgments sometimes also have a so-called "deterring effect", meaning that regional administrative courts may apply the interpretation contained in these judgments out of concern for the fate of their own judgments when they are reviewed following the filing of a legal remedy – cf. *L.L. Guerra*, Znaczenie ujednolicenia, p. 17.

[5] In other words, they function as a kind of precedent – see *A. Orłowska*, Moc wiążąca precedensu, PS 2000, No. 7–8, pp. 4–5 and the literature cited therein.

An excellent example of this type of practice is the reasoning of the Supreme Administrative Court of Poland (NSA) decision of 25 August 2020[6], in which, while analysing the institution of a complaint concerning the excessive length of court proceedings, the court directly pointed to the necessity of taking into account the ECtHR case-law related to the application of Article 6(1) ECHR. At the same time, reference was made to specific judgments of the Court[7]. Attention was also drawn to the fact that the need for the efficient conduct of court proceedings arises from both domestic and international law[8]. In the discussed judgments, it is recalled that, according to Article 45 of the Constitution of the Republic of Poland[9] "everyone has the right to a fair and public hearing of a case without undue delay by a competent, independent and impartial court"[10], and Article 6(1) ECHR provides that "everyone is entitled to a hearing of his or her case within a reasonable time by an independent and impartial tribunal"[11]. It is emphasised that the obligation contained in these provisions to examine a case without undue delay is implemented in Article 7 APAC, which establishes the principle of speed in administrative court proceedings, according to which the administrative court should take actions aimed at the rapid handling of the case and strive to resolve it at the first hearing[12].

The above-mentioned practice of referring to the Court's views is undoubtedly commendable, as (as I pointed out 20 years ago[13]) it is in the ECtHR case-law that the main reason for undertaking legislative work[14], should be sought. The aim of this work was to introduce in Poland specific instruments designed to ensure the implementation of an individual's right to have their case heard within a reasonable time. This legislative work culminated in the adoption of the Act of 17 June 2004 on the

[6] NSA decision of 25 August 2020, II GPP 5/20, CBOSA.

[7] ECtHR judgments of: 27 June 2000, *Frydlender v. France*, application no. 30979/96, HUDOC; 27 April 2004, *Krzewicki v. Poland*, application no. 37770/97, HUDOC.

[8] NSA judgment of 11 January 2011, II GSK 1095/09, CBOSA. Similarly, judgment of the NSA of 24 May 2011, II GSK 584/10 and judgment of the NSA of 11 May 2023, I GSK 1182/19 – CBOSA. See also judgment of the NSA of 10 September 2009 I FSK 123/09, CBOSA.

[9] Constitution of the Republic of Poland of 2.4.1997 (Polish Journal of Laws No. 78, item 483 as corrected, Polish Journal of Laws of 2001, No. 28, item 319).

[10] According to the aforementioned constitutional provisions, the right to a court consists of three inseparably connected elements – the right of access to a court, the right to a properly structured court procedure, and the right to a judicial decision – *M. Wyrzykowski*, [in:] Zasady podstawowe polskiej konstytucji (ed. *W. Sokolewicz*), Warszawa 1998, p. 82.

[11] Judgment of the NSA of 11 January 2011, II GSK 1095/09, CBOSA.

[12] NSA decisions of 17 July 2024, II OSK 1406/23, LEX and NSA judgment of 11 January 2011, II GSK 1095/09 and NSA judgment of 9 January 2024, II OSK 863/23 – CBOSA.

[13] This article utilises the research findings published in: *A. Skoczylas*, Ocena przewlekłości postępowania sądowoadministracyjnego w świetle orzecznictwa ETPC i NSA (zagadnienia wybrane), ZNSA 2005, No. 2–3, pp. 52–61.

[14] The reasoning of the draft bill on the complaint concerning the violation of a party's right to have a case heard in court without undue delay, Sejm print No. 2256, fourth term of the Polish Sejm.

complaint concerning the violation of a party's right to have a case heard in court without undue delay (the Act)[15].

A key milestone in this regard was the judgment of 26 October 2000 in the case of *Kudła v. Poland*[16]. It is emphasised that by introducing, in the Act of 17 June 2004, a special institution allowing for a challenge to the excessive length of court proceedings (the complaint concerning the excessive length of proceedings)[17], the recommendation to introduce into the domestic legal order a specific "remedy" within the meaning of Article 13 of the Convention was implemented. This remedy is intended to counteract excessive length of court proceedings during their course, which means that, under the penalty of the dismissal of a complaint against Poland submitted to the ECtHR, there arises an obligation to first make use of this remedy at the domestic level[18].

Referring to the period of time considered by the NSA when assessing the admissibility of the complaint concerning the excessive length of court proceedings, it is emphasised that neither the Act of 17 June 2004 nor ECtHR case-law specify rigid time limits for court proceedings, the exceeding of which would automatically constitute a violation of the right to a court by allowing proceedings to become excessively long[19].

In numerous judgments of the NSA, however, it is indicated that "a certain guidance results from Article 14 of the Act, which provides that the complainant may file a new complaint in the same case after 12 months"[20]. However, the mere fact

[15] Act of 17 June 2004 on the Complaint Concerning the Violation of a Party's Right to Have a Case Heard in Preparatory Proceedings Conducted or Supervised by a Prosecutor and in Court Proceedings Without Undue Delay (consolidated text, Polish Journal of Laws of 2023, item 1725), hereinafter referred to as the Act.

[16] ECtHR judgment of 26 October 2000, *Kudła v. Poland*, application no. 30210/96, HUDOC.

[17] In the reasoning of the draft bill, it was emphasised that, given the realities of the Polish justice system, it was justified to adopt solutions based – in their basic assumptions – on the Italian law (the so-called Pinto Act), taking into account the conditions in which Polish courts currently operate – cf. Reasoning of the draft bill on the complaint concerning the violation of a party's right to have a case heard in court without undue delay, Sejm print no. 2256, fourth term of the Polish Sejm.

[18] See *K. Gonera*, Przewlekłość postępowania w sprawach cywilnych, PS 2005, No. 11–12, pp. 9–11.

[19] *K. Gonera*, Przewlekłość postępowania w sprawach cywilnych, material for the conference of judges of the Labour, Social Security and Public Affairs Chamber of the Supreme Court, 16–18.5.2005, duplicated manuscript, pp. 13–14; *E. Rak*, gloss on the NSA decision of 26 Mach 2008, I OPP 11/08, ZNSA 2008, No. 6, pp. 151–155; and NSA decision of 29 March 2016, II OPP 7/16, CBOSA.

[20] As rightly noted by *K. Celińska-Grzegorczyk*, "the period of one year may be treated as an auxiliary guideline for determining the excessive length of proceedings, but it should not constitute a definitive and automatic criterion excluding and thus justifying the refusal to recognise the proceedings as violating the party's right to have the case heard without undue delay" – *K. Celińska-Grzegorczyk*, Odpowiedzialność odszkodowawcza za naruszenie prawa strony do rozpatrzenia sprawy bez nieuzasadnionej zwłoki w postępowaniu sądowoadministracyjnym po nowelizacji z 30 listopada 2016, ZNSA 2018, No. 2, p. 61.

that proceedings last longer than 12 months does not automatically imply that the proceedings are excessively long within the meaning of the Act[21].

In legal scholarship, it has been emphasised that observation of the jurisprudential practice of the administrative courts initially indicated that, when assessing the excessive length of proceedings, the administrative proceedings preceding the filing of the complaint as well as any administrative proceedings that would take place after the final judgment in the administrative court case, were not taken into account[22]. From some judgments of the NSA[23], it appeared that in assessing the excessive length of administrative court proceedings, only the course of the proceedings in the case from its initiation (i.e., the filing of a complaint or motion) to the moment of its final conclusion at a given judicial stage should be considered[24]. It was further noted, for example, that the complaint in question does not concern the excessive length of "administrative office proceedings"[25]. The courts therefore analysed only the course of the administrative court proceedings, or only a specific stage of those proceedings[26]. However, the concept appearing in the NSA case-law regarding the stages of proceedings composing the duration of administrative court proceedings differed significantly from the concept developed in ECtHR case-law[27].

In the light of the position taken by the ECtHR in *Erkner and Hofauer v. Austria*, "the reasonable time of proceedings under Article 6(1) of the Convention usually begins from the moment proceedings are initiated before a 'court'; however, in certain circumstances, it is permissible for the time to start earlier"[28]. An analysis of ECtHR judgments[29] concerning the excessive length of administrative court proceedings indicates that, quite often, when assessing the duration of proceedings, the Court takes

[21] Cf. decisions of the NSA: of 24 April 2008, I OPP 16/08; of 4 June 2008, I OPP 20/08; of 24 July 2008, II OPP 20/08; of 25 March 2021, II GPP 1/21; of 7 March 2014, II OPP 14/14; of 19 August 2011, II OPP 27/11; of 29 March 2016 II OPP 7/16 – available in CBOSA.

[22] *B. Banaszak*, *K. Wygoda*, Funkcjonowanie sądownictwa administracyjnego w Polsce w zderzeniu z problemami współczesności – wybrane zagadnienia, SIL 2014, No. 22, p. 175. This practice received critical assessment in legal scholarship, see *e.g. A. Skoczylas*, Ocena przewlekłości , ZNSA 2005, No. 2–3, p. 59 and *W. Ryms*, Skarga na przewlekłość postępowania przed sądami administracyjnymi, ZNSA 2010, No. 5–6, p. 382.

[23] Cf. *e.g.* NSA decisions: of 2 November 2004, OPP 54/04; of 28 October 2004, OPP 5/04 22; of 23 November 2004, OPP 52/04 – available in CBOSA.

[24] Cf. reasoning of the NSA decision of 17 April 2024, II OSK 483/24, CBOSA.

[25] NSA decision of 13 March 2023, I OPP 2/23, CBOSA.

[26] NSA decision of 12 November 2009, I FPP 4/09, LEX No. 586046.

[27] See *e.g.* ECtHR judgment of 9 December 1994, *Schouten and Meldrum v. the Netherlands*, applications nos. 19005/91, 19006/91, HUDOC.

[28] ECtHR judgment of 23 April 1987, *Erkner and Hofauer v. Austria*, application no. 9616/81, HUDOC.

[29] *E.g.* ECtHR judgments: of 15 June 2004, *Piekara v. Poland*, application no. 77741/01; of 11 February 2003, *Fuchs v. Poland*, application no. 33870/96; of 1 June 2004, *Urbańczyk v. Poland*, application no. 33777/96 – available in HUDOC.

into account not only the proceedings before the court but also the preceding administrative proceedings. This applies, for example, to situations where:

a) an authority, despite being obliged by the administrative court to issue an act or perform an action within a specified time, remained inactive, and the act or action subsequently issued by the authority was challenged before the court[30];
b) the administrative court annulled the contested decision or ruling of the administrative authority, as a result of which the authority issued a new decision, which was again challenged before the court[31];
c) a significant number of decisions taken in the same case (and subsequently challenged before the court) demonstrates, in the Court's view, a lack of diligence on the part of the authorities[32].

This means that when assessing whether the reasonable time of proceedings under Article 6(1) of the Convention has been exceeded, the Court takes into account not only the circumstances of the administrative court case but also the "total length of the proceedings"[33]. Particular importance is attached to the views expressed by the ECtHR in the judgments of 20 December 2001 (*Janssen v. Germany*)[34] and 19 April 2007, 63235/00 (*Vilho Eskelinen and Others v. Finland*)[35]. In the light of these decisions, it should be acknowledged that the relevant period referred to in Article 6 § 1 of the Convention may begin on the day the administrative decision issued at first instance is challenged and end on the day of the NSA decision (concluding the administrative court proceedings). Viewed from the perspective of the citizen (party), one should therefore consider not only the proceedings before the court but also the preceding proceedings before the administrative authorities. This is particularly significant given that, in principle, an administrative case, after passing through two instances in the administrative procedure, may subsequently go through two judicial instances[36]. It is

[30] ECtHR judgment of 15 June 2004, *Piekara v. Poland*.

[31] "Numerous remittals of the case for reconsideration caused further delays" – ECtHR judgment of 1 June 2004, *Urbańczyk v. Poland*.

[32] Cf. ECtHR judgment of 11 February 2003, *Fuchs v. Poland*.

[33] ECtHR judgment of 11 February 2003, *Fuchs v. Poland*.

[34] ECtHR judgment of 20 December 2001, *Janssen v. Germany*, application no. 23959/94, HUDOC. Similarly, ECtHR judgment of 26 March 2009, *VAAS v. Germany*, application no. 20271/05, HUDOC.

[35] ECtHR [GC] judgment of 19 April 2007, *Vilho Eskelinen and Others v. Finland*, application no. 63235/00, HUDOC.

[36] For a broader discussion on this topic, see *A. Skoczylas*, Ile instancji w sądownictwie administracyjnym?, PiP 2025, No. 1, pp. 109–130 and *W. Piątek*, *A. Skoczylas*, Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli administracji, PiP 2019, No. 1, pp. 24–38. See also on the concept of an effective court: *Z. Kmieciak*, Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie, Warszawa 2010, p. 110 and the literature cited therein.

therefore necessary to prevent the so-called "yo-yo effect"[37], *i.e.* the repeated consideration of the same case alternately by administrative authorities and administrative courts (of different instances) without its final substantive resolution. From the standpoint of the expectations of the participants in the proceedings towards the justice system, including administrative justice, the most important factor is its final outcome. It is precisely the decision rendered and its implications, both legal and factual, that have the greatest impact on the overall assessment of the administration of justice[38].

An analysis of the NSA judgments contained in CBOSA indicates, however, that the above-mentioned ECtHR judgments in *Janssen v. Germany* and *Vilho Eskelinen and Others v. Finland* have not so far been cited by Polish administrative courts in the context of assessing the length of proceedings, and therefore it is difficult to consider them as having a direct impact on case-law in this area[39].

It is therefore aptly emphasized in legal scholarship that the Court's body of case-law "cannot be disregarded when interpreting statutory instruments designed to accelerate ineffective proceedings before public administration authorities"[40]. Indeed, it should be underlined that, in analysing the causes of excessive length of proceedings, the Court usually notes whether the administrative court (examining complaints against the inactivity of an authority or complaints against decisions issued in administrative proceedings) paid attention to the excessive length of the administrative proceedings[41].

In some judgments, the NSA applied precisely this concept of excessive length of proceedings – for example, in the decision of 7 November 2014,[42] when citing the circumstances supporting the award of a monetary sum, the adjudicating panel "also took into account the duration of the administrative proceedings that preceded the initiation of the administrative court proceedings in the case"[43].

[37] *Z. Kmieciak*, Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie, Warszawa 2010, p. 109 and *S. Jansen*, [in:] Judicial Lawmaking and Administrative Law (eds. *F. Stroink*, *E. van der Linden*), Antwerpen-Oxford 2005, pp. 41–54.

[38] *S. Szuster*, Koncepcja merytorycznych kompetencji orzeczniczych sądów administracyjnych, unpublished doctoral dissertation, Faculty of Law and Administration, Jagiellonian University, Kraków 2009, p. 351.

[39] As of 15 July 2025. It should be noted, however, that the ECtHR judgment of 19 April 2007, *Vilho Eskelinen and Others v. Finland,* application no. 63235/00, is cited by administrative courts regarding the criteria for the applicability of Article 6(1) in disputes concerning employment of officials – cf., *e.g.*, NSA decision of 7 December 2017, I OSK 858/17, CBOSA.

[40] See *P. Kornacki*, Glosa do wyroku WSA z 20.9.2011, II SAB/Kr 67/11 [Gloss on the Regional Administrative Court judgment of 20 September 2011, II SAB/Kr 67/11], ZNSA 2012, No. 3, p. 175.

[41] Cf. ECtHR judgment of 11 February 2003, *Fuchs v. Poland*.

[42] NSA decision of 7 November 2014, I OPP 118/14, CBOSA.

[43] This is emphasized by *K. Celińska-Grzegorczyk*, Odpowiedzialność odszkodowawcza, p. 58.

Similarly, in the judgment of 6 May 2024[44], the court held that a general allegation of excessive length of proceedings, in the context of the overall duration of the case (from the moment it was initiated in the administrative proceedings), is justified "from the perspective of the case-law of the European Court of Human Rights"[45].

As I have already indicated above, the case-law of the NSA in the cases under discussion is not uniform. From the perspective of the Court's case-law, a fundamental concern arises regarding the view that proceedings on a complaint of excessive length of proceedings are intended to accelerate the case at hand and, therefore, should focus solely on the current stage of the court proceedings. This leads to allegations concerning a previous (closed) stage being considered untimely, as from this point of view they do not allow the achievement of the objective intended by the legislator[46].

This view does not fully correspond to the requirements set out by the ECtHR in the judgment of 7 July 2015, *Rutkowski v. Poland*[47]. In the reasoning of that judgment, the Court noted that "The Court's position was to examine the entire length of the proceedings, taking into account all stages"[48]. It should also be remembered that, under the influence of the Court, Article 2(2) of the Act of 17 June 2004 was amended, which now expressly states that, in order to determine whether a case involves excessive length of proceedings, one must in particular assess the timeliness and correctness of the actions taken by the court to issue a decision concluding the proceedings. In making this assessment, however, the total elapsed time of the proceedings from its initiation to the consideration of the complaint must be taken into account, regardless of the stage at which the complaint was filed[49].

Moving on to the description of the criteria indicating that excessive length occurred in judicial proceedings, it should be noted that in the case-law of the NSA it has been emphasized that, for a finding of excessive length of proceedings, it is necessary to establish that "a delay occurred in the judicial proceedings (excessive length of proceedings) and that the delay in the proceedings is unjustified". In this regard,

[44] NSA judgment of 6 May 2024, II OSK 276/24, CBOSA.

[45] Reference was made here to §§ 49 and 50 of the ECtHR judgment of 1 December 2009, *Trzaskalska v. Poland*, application no. 34469/05, and § 46 of the judgment of 25 November 2003, *Wierciszewska v. Poland*, application no. 41431/98 – available in HUDOC.

[46] NSA decisions: of 17 October 2019, I GPP 22/19; of 19 July 2022, II GPP 4/22; of 30 November 2022, II GPP 15/22 – available in CBOSA.

[47] ECtHR judgment of 7 July 2015, *Rutkowski and Others v. Poland*, application no. 72287/10, HUDOC.

[48] Reasoning of the ECtHR judgment of 7 July 2015, *Rutkowski and others v. Poland*.

[49] See, regarding the need to move away from the fragmentation of proceedings and to award monetary compensation in accordance with Convention standards – *K. Celińska-Grzegorczyk*, Odpowiedzialność odszkodowawcza, p. 60; *P. Domagała*, *M. Kiełbik*, Nowelizacja ustawy o skardze na przewlekłość postępowania, PS 2017, No. 3, pp. 94–95; and *M. Muzyka*, Skarga na przewlekłość postępowania cywilnego, Warszawa 2023, pp. 99 *et seq.*

particular attention should be paid to assessing the timeliness and correctness of actions undertaken by the court to issue a decision on the merits or other procedural actions, taking into account the nature of the case, the degree of factual and legal complexity, the significance for the party who lodged the complaint, the issues resolved in the case, and the conduct of the parties, especially the party alleging the excessive length of proceedings[50]. According to the NSA, "a delay can be considered unjustified when the proceedings in the case last longer than necessary"[51]. In this context, "reference should be made to knowledge derived from practice, case-law, or the average duration of proceedings in similar cases"[52]. Similar criteria have also been highlighted in the judgments of the European Court of Human Rights[53].

In this scope of control, aspects of the efficiency of judicial proceedings will also be examined, such as the timeliness and correctness of judicial actions[54] (*e.g.*, irregularities in the designation of the adjudicating panel[55], timeliness in assembling the files necessary for the case, the timing of placing the case on the docket and scheduling closed or public hearings, unjustified adjournments of hearings[56], timeliness of

[50] In numerous situations, the abuse of procedural rights by a party leads to a significant prolongation of the proceedings (*P.F. Piesiewicz*, Korzystanie z uprawnień procesowych przez stronę a przewlekłość postępowania sądowego, [in:] Przewlekłość postępowania sądowego (eds. *O.M. Piaskowska*, *P.F. Piesiewicz*), Warszawa 2018, pp. 45 *et seq.*). In this regard, it is necessary to examine, first of all, whether the party demonstrated appropriate diligence in taking procedural steps concerning them, refrained from using delaying tactics, and whether they took advantage of the legal possibilities to expedite the proceedings (cf. ECtHR judgment of 7 July 1989, *Union Alimentaria Siers S.A. v. Spain*, application no. 11681/85, HUDOC, and NSA decision of 28 October 2004, OPP 4/04, CBOSA; NSA decision of 23 November 2004, OPP 54/04; NSA decision of 23 November 2004, OPP 54/04, CBOSA). In the proceedings in question, the NSA "examines whether the right to have a case heard without undue delay has been violated separately with respect to each complainant and each participant with the rights of a party, assessing all the circumstances of the case individually" – cf. decision of 22 August 2014, II OPP 33/14, CBOSA.

[51] NSA decision of 28 October 2004, OPP 4/04; NSA decision of 23 November 2004, OPP 54/04, CBOSA.

[52] NSA decision of 20 May 2025 III OPP 21/25 and *P. Górecki*, *S. Stachowiak*, *P. Wiliński*, Skarga na przewlekłość postępowania przygotowawczego i sądowego. Komentarz, Warszawa 2010, p. 31.

[53] See ECtHR judgments: of 30 January2003, *Kubiszyn v. Poland* application no. 37437/97, of 26 October 2000, *Sobczyk v. Poland*, application no. 25693/94; of 4 April 2000, *Dewicka v. Poland*, application no. 38670/97, and of 30 April 2002, *Jagiełło v. Poland*, application no. 61437/0 – available in HUDOC.

[54] Cf. NSA decisions: of 28 October 2004, OPP 4/04; of 23 November 2004, OPP 54/04 – available in CBOSA. See also *W. Piątek*, Rozpoznanie sprawy przez sąd administracyjny bez nieuzasadnionej zwłoki, RPEiS 2017, No. 2, pp. 50 *et seq.*

[55] NSA decisions: of 8 November 2013, II OPP 48/13 and of 7 March 2014, I OPP 18/14 – available in CBOSA.

[56] Cf. NSA decision of 25 August 2020, II GPP 5/20, CBOSA.

the preparation of reasonings[57], the duration of inter-instance proceedings[58] and intervals between hearings, the necessity to submit a legal question to other courts or tribunals, and the justification for conducting supplementary evidence proceedings). The NSA additionally examines, for instance, whether the party or their legal representative submitted a motion to expedite the consideration of the case or to have it heard out of turn, or whether they waived a hearing under Article 182 § 2 APAC, which would have allowed for an earlier hearing of the case[59].

In this context, however, the ECtHR emphasizes that a party to the proceedings should not bear the consequences of improper organisation of the judiciary, which makes it impossible to hear the case within a reasonable time[60].

In summary, it should be noted that the influence of the ECtHR case-law on the judgments of the NSA is clearly visible, although there can be significant differences between the assessment of the duration of proceedings made by the NSA and that made by the ECtHR.

It was aptly emphasized in the reasoning of the NSA resolution of 7 March 2022[61], that, despite the introduction in statutory terms of separate possibilities to challenge the excessive length of proceedings before an administrative body (see Article 149 APAC)[62], and to challenge unjustified delays before an administrative court – Polish statutory regulations did not explicitly cover "the obligation of the court to take into account the total duration of administrative and judicial-administrative proceedings for the overall assessment of procedural delay"[63], nor did they create "a framework

[57] *J.P. Tarno*, [in:] System Prawa Administracyjnego (eds. *R. Hauser*, *Z. Niewiadomski*, *A. Wróbel*), Vol. 10, Judicial control of public administration, Warszawa 2016, p. 216.

[58] NSA decision of 25 August 2020, II GPP 5/20, CBOSA.

[59] NSA decisions: of 10 October 2023, II OPP 12/23 and of 21 January 2025, II OPP 14/24 – available in CBOSA.

[60] See ECtHR decision of 15 June 2000, *A.K. and T.K. v. Poland*, application no. 28863/95, HUDOC. See also *L. Bernardini*, Fair trial rights violations and effective remedies in criminal proceedings – The ECHR perspective, [in:] Effective Justice. International and Comparative Approaches. Vol. 2 (ed. *B. Janusz-Pohl*), Berlin 2025, pp. 323 *et seq.*

[61] See the reasoning of the NSA resolution of 7 March 2022, II OPS 1/21, ONSAiWSA 2022, No. 3, item 34.

[62] Complaints in this regard, even as intended by the legislator, served only to create an additional means of challenge enabling the administrative court to oblige the authority to resolve the case – see the reasoning of the NSA resolution of 7 March 2022, II OPS 1/21; cf. also *Z. Kmieciak*, Przewlekłość postępowania administracyjnego, PiP 2011, No. 6, p. 34; *P. Daniel*, Skarga na przewlekłe prowadzenie postępowania administracyjnego, Ius.Novum 2012, No. 3, pp. 116–128; *M. Grzymisławska-Cybulska*, Bezczynność organu i przewlekłość postępowania administracyjnego w świetle nowelizacji z 3 grudnia 2010 r., ZNSA 2012, No. 5, pp. 52–53.

[63] This issue was also emphasized in the case-law of the ECtHR – reference is made to ECtHR judgment of 9 June 2009, *Kamecki and others v. Poland*, application no. 62506/00, § 52, HUDOC. In Poland, the problem is not limited to administrative and judicial-administrative proceedings – cf. *S. Pawelec*, The right to an effective remedy in the light of the length of the proceedings in the Polish

for assessing the delay of administrative proceedings after their conclusion"[64]. The NSA also pointed out that this latter requirement, however, was not indicated by the ECtHR either in cases against Poland[65] or in other case-law concerning the sluggish conduct of proceedings by public administrative bodies[66].

In the aforementioned rulings of the NSA, the influence of the Court's jurisprudence is clearly visible, which supports the view that, despite the lack of "legal" binding effect of the Court's judgments, "the courts should appreciate them and take them into account in their jurisprudential practice"[67].

For this reason, the availability of ECtHR judgments in professional Polish translations is of utmost importance[68] and it is recommended to intensify efforts to ensure the provision of such translations.

Abstract

This article concerns selected problems of the application of the ECtHR case-law by courts in cases concerning the protraction of administrative court proceedings. In our legal system, statutory regulations do not take into account the total duration of administrative and court-administrative proceedings for the overall assessment of the undue delay of the proceeding. The comments presented in the article indicate that the case-law of the NSA in the discussed cases is largely inconsistent, which means that the dismissal by the NSA of a complaint about the protraction of administrative court proceedings will not always be tantamount to the lack of violation of Article 6 paragraph 1 of the Convention within the meaning adopted in the case-law of the ECtHR.

criminal process according to the jurisprudence of the ECtHR, [in:] Effective Justice. International and Comparative Approaches. Vol. 2 (ed. *B. Janusz-Pohl*), Berlin 2025, pp. 300 *et seq.*

[64] See the reasoning of the NSA resolution of 7.3.2022, II OPS 1/21, ONSAiWSA of 2022 No. 3, item 34.

[65] Reference is made to ECtHR judgment of 16 December 2008, *Zakrzewska v. Poland*, application no. 49927/09, §§ 65–67 and *Kudła v. Poland*, and ECtHR judgment of 6 October 2000, application no. 30210/96, § 15 – available in HUDOC.

[66] ECtHR judgments: of 11 January 2002, *H.T. v. Germany*, application no. 38073/97, § 31–32; of 29 June 2006, *Božič v. Croatia*, application no. 22457/02, §§ 38–39 – available in HUDOC.

[67] *M. Balcerzak*, *S. Sykuna*, Charakter prawny orzeczeń, p. 44.

[68] See also *ibid.*, pp. 44–45.

Przemysław Szustakiewicz*

The Impact of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Strasbourg Case-Law on the Development of the Polish Right to Public Information

The suffering caused by totalitarianism, nationalism, and militarism in the first half of the 20th century prompted a reaction after World War II, resulting in the development of human rights. For it was obvious that the imposition of authoritarian ideologies destroys human dignity, reducing individuals to passive instruments for pursuing goals set by uncontrollable authorities, which also possess the ability to manipulate public opinion, transforming individuals into compliant and obedient "masses". It therefore seemed that a supranational system to protect fundamental human rights could effectively prevent the resurgence of trends that undermine human dignity and freedom. Its first component is the UN Universal Declaration of Human Rights of 1948[1], adopted just three years after the end of the Second World War, followed by the ECHR. It has been noted that "the outstanding significance of the European Convention on Human Rights (ECHR) for the advancement of international human rights protection lies in the establishment of effective mechanisms for enforcing human rights through judicial proceedings at a global level for the first time. The case-law of the convention bodies (which were established to apply the Convention) has developed individual guarantees through an interpretation of the Convention that could be described as 'cautiously dynamic'. This has given

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., Lazarski University, Warsaw; ORCID: 0000-0001-9102-9308.

[1] https://libr.sejm.gov.pl/tek01/txt/onz/1948.html.

the Convention the status of a pan-European standard for fundamental rights"[2]. Therefore the ECHR serves as a component of international law that enables, firstly, through an established international court to hold party states to the Convention accountable for complying with its provisions. Secondly, through jurisprudence, to extend human rights, adapting them to changing socio-economic realities. It should be emphasized that the case-law of the ECtHR is not the only element contributing to the development of the human rights listed in the Convention. The Council of Europe has a different kind of capabilities that have also influenced human rights standards in both member and non-member countries. The case-law of the ECtHR and the legal instruments produced by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe together serve as mechanism for promoting human rights and adapting them to address contemporary challenges. This also applies to the right to information.

According to Article 10 ECHR, "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (§ 1). The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (§ 2). The Convention does not establish the right to information as construed in Article 61(1) of the Polish Constitution, *i.e.* as an individual right to receive data from public entities. In contrast, the ECHR defines the right to freedom to hold opinions, which is shaped by two positive entitlements enjoyed by individuals: the right to receive opinions or ideas and the right to impart information. In this respect, the state's obligations are shaped in a negative way. For the state is to refrain from interfering with the freedom to hold opinions. However, the right to freedom to hold opinion through receiving and imparting information is not absolute. Paragraph (2) provides for two prerequisites allowing restrictions: a formal one – the restriction should be prescribed by law; and a substantive one – the restriction should be necessary in a democratic state and therefore justified in a society of free people and serving the protection of the values enumerated in Article 10(2) ECHR, such as: national security, territorial integrity or public safety but only for the necessity to prevent disorder or crime, to protect the health and morals, to protect the reputation

[2] *M. Herdegen*, „Prawo europejskie", Warszawa 2004, p. 12.

and rights of others and to prevent the disclosure of confidential information or to maintain the authority and impartiality of the judiciary.

The construction of Article 10(1) of the Convention, in contrast to Article 19 of the 1948 UN Universal Declaration of Human Rights[3], according to which "[e]veryone has the right to freedom of opinion and expression; this right includes freedom [...] to seek, receive and impart information [...] through any media and regardless of frontiers" – the inspiration for post-war international law on the freedom to receive information – does not explicitly provide for the right to "seek" information". Furthermore, this provision defines the state's obligations in a negative way, *i.e.* to refrain from acts that interfere with the freedom to disseminate information. Hence, perhaps in its early days, the ECtHR emphasized that "the protection of Article 10 of the Convention extends to all forms of expression, including opinions, ideas, and information, regardless of their content or the way they are communicated. This is especially true for expressions related to political matters and issues of public concern". It also encompasses artistic expressions, commercial information, and even entertainment music and advertisements that are broadcast through a cable network[4], thus primarily giving it a power linked to the publication of information and the freedom of the press. The Court has interpreted the freedom referred to in Article 10 of the Convention in a rather conservative manner, similar to how the right to freedom of expression was perceived in the period before World War II. The shift in case-law did not occur until the 1990s, and appears to have been influenced by *soft law* acts issued by Council of Europe bodies, which explicitly began to perceive the right to information in a manner that accommodated the individual's right to receive information.

The first act that defined the principle of the right of access to information concerning an individual was the Resolution of the Committee of Ministers No. (73) 22 and (74) 29 on the protection of the privacy of individuals with regard to electronic data banks in the private and public sectors respectively, which explicitly provided for the right of an individual to be informed about the data held by the entities mentioned in the data recommendation. Another important step in extending the right to information was Recommendation 854 (1979) of 1 December 1979 of the Parliamentary Assembly of the Council of Europe on access by the public to government records and freedom of information[5], calling on Member States to implement provisions in their legal systems to allow broad access to the data they hold. A kind of elaboration of Recommendation 854 (1979) is found in the Recommendation of the

[3] https://libr.sejm.gov.pl/tek01/txt/onz/1948.html.

[4] *M.A. Nowicki*, [in:] Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, Warszawa 2021, Article 10 ECHR.

[5] https://pace.coe.int/en/files/14888/html.

Committee of Ministers of the Council of Europe of 25 November 1981 (R 81/19)[6] stating eight principles that later influenced the development of national legislation on access to public information. The Recommendation pointed out that access to information is part of the functioning of good administration. Therefore, every person, regardless of their nationality, should be guaranteed access to information held by the public authorities other than legislative bodies and judicial authorities (Point I); effective legal means shall be provided to ensure access to information (Point II); it was prohibited to require a person requesting access to information to demonstrate a legal interest (Point 3); discrimination in access to information has been prohibited (Section IV); restrictions on access to information are only possible for reasons necessary in a democratic society (Section V); any request for information shall be decided upon within a reasonable time (Section VI); the reasons why the information cannot be disclosed must be given (Section VII); an applicant must be able to challenge a decision refusing access to information (Section VIII). The principles set out in the Recommendation of the Council of Ministers of 25 November 1981 (R 81/19) were, in turn, further developed in subsequent legal acts of the Council of Europe, in particular in the Recommendation No. (2002) 2 of the Council of Ministers of 21 February 2002 on access to official documents in the Member States[7], in which, *inter alia*, the obligation to provide access to information was extended also to entities that are not part of public administration but perform public functions and in the Convention of the Council of Europe of 18 June 2009 on Access to Official Documents (not signed by Poland) (Tromsø Convention)[8]. The Tromsø Convention clearly states that access to information may be refused if its disclosure would or would be likely to harm any of the protected interests, unless there is an overriding public interest in disclosure. It also introduces in Article 3(2) a very interesting mechanism for limiting access to public documents by applying two tests: "harm test" and the "balancing of interests". Where there are grounds for refusing access to information, the authority performing the public task should firstly perform a "harm test". This test evaluates the extent to which disclosing the information would violate any of the values specified in the law. Secondly, to assess, according to a "balancing of interests" test – determining whether, despite there are grounds to withhold the information after applying the harm test, it should still be disclosed if the public interest in disclosure outweighs the protected interests assumed in the harm test.

[6] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f7a6e.

[7] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c6fcc.

[8] https://rm.coe.int/1680084826.

The content of the Recommendation of 25 November 1981 (R 81/19), together with certain views expressed in ECtHR judgments, were referred to[9] during the drafting of the law of 6 September 2001 on access to public information[10], but, notably, no reference was made to it in the explanatory memorandum to the draft law[11]. This may explain why, during the work of the Committee set up to examine the bill, there was a greater emphasis on national experience and the existing case-law of the Supreme Administrative Court and the Supreme Court in this area. Such a situation was perhaps due to the fact that, as noted until 2009, "the case-law on Article 10(1) ECHR has, in fact, predominantly involved violations of the rights of the press and journalists – who, in their activities, face various restrictions on their freedom to receive and impart information and ideas without interference from public authorities. In this regard, the ECtHR has emphasised the „freedom to" receive and impart information without interference from public authorities"[12]. The ECtHR primarily viewed Article 10 as a guarantee of freedom of the press and public discussion, rather than a tool for individuals to obtain information.

The first sign of change in the case-law of the Court was the judgment of 14 April 2009 in the case *Társaság a Szabadságjogokért v. Hungary*[13], in which it was pointed out that "the denial of access by an NGO to an MP's motion for the constitutional scrutiny of the legislation on data protection grounds violates Article 10 of the Convention. The purpose of viewing the motion by the TASZ organisation was to hold a public debate in the public interest, which did not threaten any specific individual interest of the applicant MP. The role of the NGO is press-like role in this connection, since its work allow the public to discover, and form an opinion about the legislation and policy of the government (here: drug policy)". The ECtHR therefore considered that that the scope of freedom to receive information also includes the right to access information held by social organisation included in

[9] Cf. the statement by dr hab. *Teresa Górzyńska* during the work on the law on access to public information – Biuletyn Kancelarii Sejmu Nr 3614/III kad. Komisja Nadzwyczajna do rozpatrzenia projektów ustaw dotyczących prawa obywateli do uzyskiwania informacji o działalności organów władzy publicznej oraz osób pełniących funkcje publiczne a także dotyczących jawności procedur decyzyjnych i grup interesów /No. 3/, pp. 4–6 and statement by MP *H. Wujec* – Biuletyn Kancelarii Sejmu nr 3818/III kad. Komisja Nadzwyczajna do rozpatrzenia projektów ustaw dotyczących prawa obywateli do uzyskiwania informacji o działalności organów władzy publicznej oraz osób pełniących funkcje publiczne a także dotyczących jawności procedur decyzyjnych i grup interesów, No. 6, p. 4.

[10] Polish Journal of Laws of 2022, item. 902.

[11] Draft Access to Public Information Act Parliamentary Paper No. 2094, 3rd Sejm.

[12] *Sz. Ossowski*, *B. Wilk*, Od wolności otrzymywania i przekazywania informacji do prawa do informacji (publicznej). Ewolucja orzecznictwa Europejskiego Trybunału Praw Człowieka w zakresie art. 10 Konwencji o ochronie praw człowieka i podstawowych wolności, PPK 2017, No. 2, p. 149.

[13] ECtHR judgment of 14 April 2009, *Társaság a Szabadságjogokért v. Hungary*, application no. 37374/05; http://www.prawaczlowieka.uw.edu.pl/index.php?orzeczenie=81d51c78e6380c53c0310e296eabbeef5ffaae5f-b0 (date of access: 1.8.2025).

the group of entities that enable the public to assess the activities of the authorities. This new way of interpreting Article 10 ECHR was developed in the judgment in case *Youth Initiative For Human Rights v. Serbia*[14], which emphasises in § 20 that the notion of "freedom to receive information" embraces a right of access to information [...] when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press". Subsequently, in the judgment *Sdružení Jihočeské Matky v. Czech Republic*[15], the Court pointed out, firstly, that according to the principle of transparency, access to public information should be as broad as possible and, secondly, that in a democratic society it is not necessary to make access to information conditional on the need to demonstrate the legitimacy of the request, and that national legislation requiring demonstration of such an interest is contrary to Article 10 of the Convention.

An important, and according to some, crucial ruling on expanding the right to public information was the Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary*[16]. The ECtHR in this case formulated two principles. Firstly, the right to public information cannot be seen merely as an obligation on public authorities to take positive action to disclose certain data of their own motion or by court decision. To this extent, it applies to non-public entities in situations where access to information is essential for the exercise of an individual's rights under Article 10(1) of the Convention. Secondly, when disclosure of data has been refused, its merits must be assessed on a case-by-case basis taking into account four criteria: 1) the purpose of the request for information; 2) the nature information requested; 3) the role of the applicant; 4) whether the information is ready and available.

In subsequent rulings issued in the context of the application of Article 10 ECHR, the ECtHR has "even pointed out the obligation of public finance entities to make public information proactively available"[17], although at the same time it is pointed out in the literature that "if Article 10 [ECHR] is to encompass the full right to

[14] ECtHR judgment of 25 June 2013, *Youth Initiative For Human Rights v. Serbia, Application*, application no. 48135/06, HUDOC.

[15] ECtHR decision of 10 July 2006, *Sdružení Jihočeské Matky v. Czech Republic*, application no. 19101/03, HUDOC.

[16] ECtHR judgment of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, application no. 18030/11; https://siecobywatelska.pl/wp-content/uploads/2025/03/CASE-OF-MAGYAR-HELSINKI-BIZOTTSAG-v.-HUNGARY-Polish-Translation-summary-by-the-Polish-Ministry-of-Foreign-Affairs-1.pdf (date of access: 1.8.2025).

[17] *K. Izdebski*, Międzynarodowe standardy jawności. Wybrane polskie propozycje zmian na tle międzynarodowych rozwiązań, https://informacjapubliczna.org/wp-content/uploads/M-narodowe-standardy.pdf p. 6 and ECtHR case-law cited therein.

information, then this right must be accessible to every citizen and not only to journalists or public interest organisations"[18].

It should be noted that, to date, the rulings of Polish administrative courts in cases concerning public information have rarely referred to both the acquis of the Council of Europe and the case-law of the ECtHR, which may have been due to the fact that until recently the Court itself perceived Article 10 of the Convention primarily as an element safeguarding the freedom of public debate, rather than an individual right to data held by public entities. Hence, it is not uncommon for Article 10 of the Convention to be omitted from the reasons for judgments, despite being referred to in the allegations of the complaint[19].

Moreover, as pointed out in the judgment of the Supreme Administrative Court of Poland of 24 January 2018 (I OSK 306/16), the manner in which the allegation in cassation appeal is formulated often hampers an effective review of the contested judgment against the provisions of the Convention, since "the violations of substantive law claimed by the appellant, namely the misapplication of Article 61(1) and (2) of the Constitution in conjunction with article 10 European Convention Rights Human Rights by failing to take account of the importance of the of the right to public information, resulted in the conclusion that ignorance of the provisions relating to that right resulting in a several months delay in the processing of the request, did not constitute a gross violation of the law. The reasons why the authority's actions in this case could not be considered a gross violation of the law have already been explained above. The provisions cited are so general that it is difficult to derive from them the specific scope of information that must be disclosed"[20]. The applicants treat Article 10 of the Convention, as well as the provisions of the Constitution, as a kind of embellishment, which, however, is not followed by specific allegations allowing the court of cassation to refer to them in its reasoning.

On the other hand, it is noted that Article 10 ECHR does not state that the right to public information is not limited, as "under Article 10(1) of the Convention, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. According to Article 10(2) of the Convention, the exercise of these freedoms, since it

[18] *M. Mrowicki*, Dostęp do informacji publicznej. Glosa do wyroku ETPC z dnia 17 lutego 2015 r. 6987/07, LEX/el. 2016.

[19] Cf. judgments of the WSA in Warsaw of: 29 September 2002, II SAB/Wa 859/19; 19 September 2018, II SAB/Wa 128/18; 16 November 2017, II SAB/Wa 269/17; of 6 November 2014, II SA/Wa 807/14; WSA in Kraków of 17 December 2024, II SAB/Kr 182/24 – available in CBOSA.

[20] NSA judgment of 10 November 2023 r., III OSK 2685/21, CBOSA.

carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The Convention itself therefore provides for the possibility of introducing restrictions on the exercise of the above-mentioned rights, indicating that such restrictions should be prescribed by law"[21]. Article 10 of the Convention does not imply that the national legislator cannot impose barriers to access to public information. National law can impose restrictions in this respect under two conditions: the values accepted in a democratic society are protected and the restriction is prescribed by law.

However, references to the Article 10 ECHR in judgments are usually ornamental in nature, although the judgment of the Supreme Administrative Court of Poland of 5 March 2015 (I OSK 1948/14, Legalis) stands out in this respect, where both the reasons and the dissenting opinion extensively refer to the body of law of the Council of Europe and the Convention. The case concerned the disclosure of the Prosecutor General's requests addressed to the President of the Republic of Poland in proceedings for the application of the right of pardon. The Supreme Administrative Court overturned a judgment of the regional administrative court holding that the requested documents constitute public information and that the provisions of the Law on access to public information apply to their disclosure. However, in the opinion of the Supreme Administrative Court, it should be recognised that a pardon proceedings are limited in terms of their publicity, where certain documents are not accessible to the parties and to the public, within the meaning of Article 1(1) of the Law on access to public information, and therefore the procedural documents produced in the course of such proceedings do not qualify as public information. In justifying its position, the Supreme Administrative Court emphasised that the right of access to such documents could not be derived from Article 10 of the Convention due to its general nature, let alone from Recommendation No. (2002) 2 of 21 February 2002, which contains solutions allowing Member States to define a margin of discretion in assessing which documents should qualify as public documents. In turn, in the dissenting opinion to this judgment it was argued that several documents, along with decisions made by bodies of the Council of Europe and certain ECtHR rulings admit the possibility of access to documents that are not public, although they have been produced by state entities, and that the principle should be to make data on the activities of public institutions as widely accessible as possible. However, the above

[21] Judgment of the NSA of 10 November 2023, III OSK 2685/21, CBOSA.

NSA judgment seems to be somewhat of an exception in the case-law to date. In cases related to public information, courts have generally hesitated to reference the Convention and the ECtHR case-law. Perhaps this situation will be altered by a recent judgment in a case to which Poland was a party and which directly concerns access to public information in Poland.

The ECtHR, on 21 March 2024, handed down its judgment in the case of *Sieć Obywatelska Watchdog Polska v. Poland*[22], where it held that Poland had violated Article 10 of the Convention in respect of the refusal to grant the applicant NGO access to list of the meetings of the President and Vice-President of the Constitutional Court between 1 January 2017 and the date of the application, because it had not shown that the refusal to provide this information pursued any legitimate aim or was "necessary in a democratic society".

The judgment was reviewed as a result of a complaint lodged by the Association, whose cassation appeal against the judgment of the Regional Administrative Court in Warsaw dismissing the complaint against the Constitutional Tribunal's inaction regarding public information – was dismissed. The NSA found that the position of the court of first instance was correct, as "information regarding the records of entries and exits of visitors to the Constitutional Tribunal building does not qualify as public information. This is because it does not pertain to the public tasks performed by the authority and instead contains personal details of individuals from outside the public administration. This record is maintained solely for organisational purposes and to ensure security within the building. It serves as an internal technical information medium for building management, supporting the reception desk's work and assisting the organisational department in maintaining order and security within the Court building. It is also important to note that the production and possession of the requested information is not required by the laws governing the performance of the public tasks imposed on the authority. In conclusion, the requested information pertains to the internal workings of the Court. It does not relate to activities of the Court aimed at fulfilling specific public tasks or pursuing public interests and objectives. Consequently, this information cannot be considered as produced "for a public purpose"[23]. The NSA position therefore referred to the notion developed by doctrine and case-law of an "internal document", which, as it does not contain public data, is not considered public information. The cassation court referred to the position of the Constitutional Court, which in its judgment of 13 November 2013 (P 25/12) held that "while many types of information are considered public, certain contents of internal documents are excluded from this broad definition. This

[22] ECtHR judgment of 21 March 2024, *Sieć Obywatelska Watchdog Polska v. Poland*, application no. 10103/20, HUDOC.

[23] NSA judgment of 18 June 2019, I OSK 2893/18, Legalis.

exclusion applies to information that is of a working nature, including notes and memos documented in either traditional or electronic formats. Such documents represent a particular thought process, deliberation, or the stages involved in developing a final concept or position by an individual employee or a team. Here we can refer to a specific stage in the process of producing public information. It is important to distinguish between "official documents", as defined by Article 6(2) of the law on access to public information, and "internal documents" that, while facilitating the execution of a public task, do not affect the decision-making process of an authority. Such documents serve the purpose of exchanging information, gathering necessary material, and agreeing views and positions. However, they do not express the position of the authority and therefore do not constitute public information"[24]. An internal document, although formally it may have the characteristics of an authentic document, as defined in Article 6(2) – it does not, however, contain a "substantive element" because, due to its content, it does not concern a public matter within the meaning of Article 1(1) of the law on access to public information. The purpose of adopting the concept of an internal document is to ensure the proper functioning of public bodies, as "public bodies must be granted a certain degree of freedom and discretion during the decision-making process. This allows them to gather information, consider various and often differing solutions, draft documents, or informally record the discussions and proceedings related to selecting the best option. Holding that absolutely all documents and actions of this kind are subject to disclosure would only result in even greater attempts than before to conceal and classify materials that are in fact necessary for making the right decision"[25]. An internal document as a certain conceptual or mere data of no significance to the society does not constitute public information, which should concern matters related to broadly understood public affairs affecting society.

It should be noted that, contrary to come opinions appearing in the public sphere, the Court did not find that the concept of an "internal document" was contrary to Article 10 ECHR, considering, firstly, that the refusal was justified under domestic law (§ 74) and, secondly, that the case-law of the administrative courts in this respect is consistent (§ 73). However, according to the ECtHR, the administrative courts failed to consider both the subjective and objective contexts of the case. Indeed, the Association, as a kind of guardian of the public debate, was entitled to request public information (§ 60), and the national courts failed to recognise and consider the circumstances, vital for ensuring a quality public debate, which led to the request for access to the a list of meetings of the President and Vice-President of the Constitutional

[24] OTK-A 2013, No. 8, item 122.

[25] *A. Piskorz-Ryń*, *J. Wyporska-Frankiewicz*, [in:] Ustawa o dostępie do informacji publicznej. Komentarz (eds. *A. Piskorz-Ryń*, *M. Sakowska-Baryła*), Warszawa 2023, pp. 41–42.

Court despite speculation in the national media regarding the nature of these meetings. Meanwhile, both the Constitutional Court and, later, the administrative courts denied the Association access to information that the Court deemed to be in the public interest, particularly considering the political context of the case. This denial occurred without a thorough individual assessment of the interests at stake. Thus, the ECtHR found that, in essence, both the Regional Administrative Court in Warsaw and the Supreme Administrative Court of Poland acted with a kind of "judicial automatism", without referring to the principle of proportionality, and as a result failed to demonstrate that the refusal to disclose the public information requested by the non-governmental organisation was justified by legitimate objective that could be pursued in a democratic state governed by the rule of law (§ 76).

The ruling therefore establishes two important interpretative guidelines which should be taken into account by administrative courts in cases concerning access to public information. Firstly, it can be assumed out of hand, that not every internal document contains public information. Indeed, Internal documents may contain public information, and the basis for assessment in this regard should, it seems, be their content and the significance of their disclosure for public control over public authorities. Secondly, "a refusal to grant access to public information cannot be based solely on formal arguments"[26], therefore, when justifying a refusal to grant access to public information on the grounds that it concerns an internal document, the authority and subsequently the administrative court cannot be content merely to point out that the applicant wants this type of document. In this regard, it is necessary to indicate the reason for considering the requested document as "internal" and to demonstrate that it does not contain public data, also in view of the context that led to the request for access.

So far, it seems that both the Convention itself and the acts of the Council of Europe bodies and also the judgments of the ECtHR referring to its provisions have not had a significant impact on the case-law of administrative courts in cases concerning access to public information. Perhaps, however, such an unequivocal position as was expressed in the judgment of 21 March 2024 in the case of *Sieć Obywatelska Watchdog Polska v. Poland*, application no. 10103/20 will change such practice. Indeed, the ECtHR has set out very interesting rules for interpreting the provisions on access to public information in the context of Article 10 of the Convention.

[26] *A. Chmielarz-Grochal*, Judgment of the ECHR of 21 March 2024 in the case of Sieć Obywatelska Watchdog Polska v. Poland (application no. 10103/20), ZNSA 2024, No. 5, p. 73.

Abstract

The article analyzes the evolution of the understanding of the right of access to public information under Article 10 of the European Convention on Human Rights and the case-law of the European Court of Human Rights. Initially, Article 10 ECHR was interpreted narrowly, as a guarantee of press freedom and public debate, without granting individuals the right to actively seek information. The change came in the 1990s, with the Council of Europe's soft law instruments and subsequent recommendations that emphasized access to information as a foundation of good administration, to which every person should be entitled to without the need to demonstrate a legal interest. Groundbreaking ECtHR judgments expanded the protection of Article 10 to include the right of social organisations to access information if it serves public and societal interest. It was also indicated that restrictions on this right are permissible, but must be proportionate and prescribed by law. Polish administrative courts rarely refer to the ECtHR's achievements in cases concerning public information, and national law itself leaves a considerable margin for restricting access to data. Recent rulings, including the case of the *Civic Network Watchdog Poland v. Poland* in 2024, underscore the obligation to individually analyze the requested documents and the necessity to avoid automatic refusals to disclose public information.

Joanna Wegner*, Tomasz Kolanowski**

Paths to the Profession of Administrative Judge in the Light of the Standards of the Convention for the Protection of Human Rights and Fundamental Freedoms

§ 1. The European standard for recruitment to the judicial service

Independence of the courts and independence of the judges are values important to the peoples of Europe and central to the democratic functioning of the States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms. This issue has been repeatedly addressed by the European Court of Human Rights in examining complaints alleging violations of Article 6(1) ECHR. Among the most frequently cited judgments is the ECtHR judgment of 1 December 2020 in *Guðmundur Andri Ástráðsson v. Iceland*[1].

Recognising that no system for recruitment to the judicial service is entirely free of political elements, the European Commission for Democracy Through Law (the so-called Venice Commission)[2] has systematically sought to develop an European model for judicial councils. It points out that judicial councils should be constitutionally empowered, with at least half of their compositions being judges. While it is true that these judges should be elected by other judges, it is also stressed that "overwhelming

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Lodz; ORCID: 0000-0003-2773-6651.

** Judge of the Supreme Administrative Court of Poland; ORCID: 0000-0002-0439-4241.

[1] ECtHR judgment of 1 December 2020 in *Guðmundur Andri Ástráðsson v. Iceland*, application no. 26374/18, HUDOC.

[2] Venice Commission Report No. CDL-AD(2007)028, adopted at its 70th Plenary Session in Venice, 16–17 March 2007, https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2007)028&lang=EN, p. 7.

supremacy of the judicial component in the judicial council may rise risks of «corporatist management»"[3]. A broader discussion of these issues is beyond the scope of this article; however, for its purposes, it is worth pointing out that the objective nature of recruitment to the judicial service appears, in the light of fundamental principles of law, to be crucial.

The aforementioned opinion raises what we consider to be an extremely important point, namely that, irrespective of the path to become a judge adopted in the national system, judicial councils should introduce, make public and enforce objective criteria to ensure that the selection and promotion of judges is based on merit, having regard to qualifications, integrity, ability and efficiency. Once this is done, the body responsible for judicial appointments is obliged to act accordingly, so as to make it possible to scrutinise the content of the criteria adopted and their practical effect[4].

This position corresponds to that expressed by the Committee of Ministers of the Council of Europe in its Recommendation CM/Rec(2010)12 to the Member States on judges: independence, efficiency and responsibilities of 17 November 2010. This document indicates that decisions concerning the selection and promotion of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions must be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity[5].

It stresses, too, that there should be no discrimination in the appointment process on the ground of sex, race, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. It points out that requiring nationality of a particular state does not constitute unlawful discrimination.

The relevance of this issue is demonstrated by the fact that the ECtHR allows – due to the categorisation of the judiciary as a typical public service – the protection of the rights of the judge under Article 6(1) of the Convention. It has pointed out that this provision should be applied to "all types of disputes concerning judges, including those relating to recruitment/appointment (see *Juričić v. Croatia*, application no. 58222/09, 26 July 2011), career/promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), application no. 12628/09, 9 October 2012; *Tsanova-Gecheva v. Bulgaria*, application no. 43800/12, 15 September 2015, §§ 85–87), transfer (see *Tosti v. Italy* (dec.). application no. 27791/06, 12 May 2009 and *Bilgen*, cited above, § 79, suspension (see *Paluda v. Slovakia*, application no. 33392/12, §§ 33–34, 23

[3] *Ibid.*, p. 8.

[4] *Ibid.*, pp. 8–9.

[5] www.icj.org/wp-content/uploads/2014/06/CMRec201012E.pdf, p.5, www.coe.int/fr/web/portal/home (date of access: 23.7.2025).

May 2017; *Camelia Bogdan v. Romania*, application no. 36889/18, § 70, 20 October 2020), disciplinary proceedings (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], applications nos. 55391/13 and 2 others, § 120, 6 November 2018; *Di Giovanni v. Italy*, application no. 51160/06, §§ 36–37, 9 July 2013; and *Eminağaoğlu v. Turkey*, application no. 76521/12, § 80, 9 March 2021), as well as to the dismissal of judges (see *Oleksandr Volkov v. Ukraine*, application no. 21722/11, §§ 91 and 96, ECtHR 2013; *Kulykov and Others v. Ukraine*, applications nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; *Sturua v. Georgia*, application no. 45729/05, § 27, 28 March 2017; *Kamenos v. Cyprus*, application no. 147/07, §§ 82–88, 31 October 2017; *Olujić v. Croatia*, application no. 22330/05, §§ 31–43, 5 February 2009), to the reduction in salary and conviction for a serious disciplinary offence (see *Harabin v. Slovakia*, application no. 58688/11, §§ 118–123, 20 November 2012), removal from a post (for example, president of the Supreme Court or president of the Court of Appeal or vice-presidents of the Regional Court) while remaining a judge (see *Baka*, cited above, §§ 34 and 107–111; *Denisov v. Ukraine* [GC], applications no. 76639/11, § 54, 25 September 2018, and *Broda and Bojara v. Poland*, applications nos. 26691/18 and 27367/18, §§ 104–124, 29 June 2021)"[6].

These issues were also the subject of deliberations of the Polish Constitutional Tribunal which, in its judgments of 29 November 2007 in SK 43/06[7] and of 27 May 2008 in SK 57/06[8] drew attention to the need to ensure, in the light of Article 60 of the Constitution, actual access to public service on equal terms. In the latter of these judgments, the Constitutional Tribunal emphasised that this provision "on the one hand, requires the lawmakers to establish substantive legal regulations specifying transparent criteria for the selection of candidates and the filling of particular posts in the public service, and, on the other hand, prescribes the creation of appropriate procedural guarantees ensuring that decisions on recruitment to the service may be verified". Demands in this regard were also made by the Commissioner for Human Rights who came into office at a later time[9].

§ 2. Controversy over the judicial appointment process in 2018–2023

The systemic transformation of the judiciary that has been carried out since 2017 has been criticised by the judiciary and academia. It concerned several issues, namely

[6] ECtHR judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, applications nos. 49868/19 and 57511/19, § 227, HUDOC.

[7] OTK-A 2007/10/130.

[8] OTK-A 2008/4/63.

[9] *A. Bodnar*, Dostęp do zawodu sędziego na tle wyroku SN z 10.06.2009 r., III KRS 9/08, MOP 2010, No. 3, addendum, pp. 26–29.

the structure and principles for the appointment of the members of the National Council of the Judiciary, the conduct of the appointment procedure, including the legal nature of judicial appointments and the possible grounds and the procedure for reviewing the legality of the appointments. With respect to the Supreme Court, statements made by members of the academia and the judiciary mainly referred to the newly introduced system and organisation, and the procedure for the appointment of its judges. The year 2018 saw a systemic transformation within the National Council of the Judiciary, which is a constitutional body. Pursuant to Article 1(1)–(13) of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts[10], the provisions of the Act of 12 May 2011 on the National Council of the Judiciary were amended. Articles 9a and 11a–11e incorporated into this law were alleged to be incompatible with the provisions of the Polish Constitution and the principles of EU law relating to the independence of the courts and independence of the judges. This issue was dealt with by the ECtHR in, *i.a.*, judgments of 22 July 2021, 43447/19, or 23 November 2023, 50849/21. This case-law has been encapsulated in many administrative court rulings issued in adjudicating cassation appeals, requests for the exclusion of judges and requests for so-called judicial independence tests, related – to say it in the most general terms – to the way administrative judges have been appointed since 2018.

In its deliberations, the Supreme Administrative Court of Poland has invoked the aforementioned ECtHR case-law (see judgment of 11 October 2021 in II GOK 9/18, judgment of 4 November 2021 in III FSK 3626/21, judgment of 7 June 2024 in III FSK 1389/22, resolution of a panel of seven judges of 3 April 2023 in I FPS 3/22, or judgment of 17 December 2024 in II FSK 355/22, with dissenting opinion). Incidentally, the Supreme Administrative Court of Poland– referring to the views of the ECHR – would decide to suspend court proceedings (as in, *e.g.*, the decision of 23 January 2025 in II FSK 1041/24)[11].

Numerous statements made by representatives of the academia and the judiciary focusing on the constitutional position and the composition of the National Council of the Judiciary did not address – in our view – something much more important, namely the question of the criteria for recruitment to the judicial service and promotions within it. It is worth recalling that accusations of lack of objectivity were levelled against the National Council of the Judiciary even before the December 2017 reform. Statements by persons considered to be authority figures in legal discourse included claims that there was need to increase the transparency of promotion

[10] Polish Journal of Laws of 2018, item 3.

[11] All rulings of the Supreme Administrative Court of Poland referred to are available in CBOSA.

proceedings, and to raise the standards of integrity of the assessments formulated by the Council[12].

Without denying the need for a discussion on how a constitutional body should be constructed, it seems, however, that the key issue for the judiciary is not which body, in what manner, provides the recruitment to the service, but what criteria should guide it and to what extent these criteria should bind the body in the proceedings. Indeed, we would like to propose that what is an important safeguard for independence of the courts and independence of the judges is the judges' knowledge and working skills, as well as their professional achievements prior to their acceptance of a judicial position. It is much more difficult to accuse a judicial decision derived from extensive knowledge of being not substantive, and this also eliminates potential doubts regarding a judge's preservation its attributes of autonomy and independence. The respect for the judge's knowledge, stemming from their previous professional standing, can only reinforce the preservation of juridical independence.

§ 3. Access to judicial service in Poland – the law *versus* practice

The rule in the currently applicable law is that the first judicial post in common courts is taken up after a person serves their term as assistant judge. Pursuant to Article 106xa(1) CCO Law, an assistant judge, before 36 months pass of them performing the duties of a judge, may submit to the president of the competent district court a request for appointment to a judicial post. The term of service as an assistant judge is a time-limited judicial service that precedes application for a judicial post. The position of an assistant judge is not obtained as a result of any competition, but is a natural, and almost automatic consequence of passing the exam for a judge or public prosecutor after completing the judicial internship which is provided by the National School of the Judiciary and Public Prosecution (Article 106h(1)–(3) CCO Law). Pursuant to Article 33a(5) the Act[13], a judicial intern taking the exam may choose one of the vacant assistant judge posts, with first choice going to those who got the best results from the judicial exam. In turn, recruitment for judicial internship is, pursuant to Article 20(1) of that Act, conducted by a competition board appointed by the Minister of Justice at the request of the Director of the National School.

Presentation to the President of the Republic of Poland of a request for the appointment of a candidate to a judicial office takes place on the basis of a resolution of the National Council of the Judiciary, whereas – pursuant to Article 37a(1) the NCJ Act – a resolution refusing to do so may be adopted only after the assistant judge's

[12] See, *e.g.* https://www.prawo.pl/prawnicy-sady/prof-rzeplinski-tez-probowal-reformowac-krs,184274.html.

[13] The Act of 23 January 2009 on the National School of the Judiciary and Public Prosecution (consolidated text, Polish Journal of Laws of 2022, item 217).

comments on the assessment of their qualifications are considered and their work is vetted by three visiting judges. In practice, non-submission of a request for the appointment to a judicial office occurs in exceptional cases. What we may notice then is that almost every assistant judge becomes a judge of a common court. Contrary to *opinio communis*, it is not the NCJ, but the authorities of the National School of Judiciary and Public Prosecution that have a non-trivial influence on the shape of the judiciary in the common courts.

The intentions behind the indicated method of access to the judicial service correspond to the career model described in science, known to civil law systems[14]. Its weakness is the almost automatic transition from one stage to the next. Although the different phases are rendered separate by demanding examinations which involve the testing of a certain amount of knowledge, practical skills, notwithstanding the no less important personal qualities of the judge, such as the ability to make decisions, make working arrangements, learn quickly, work under stress, work in a time as well as communicativeness, decisiveness, *etc.*, a person who becomes an assistant judge, and then a judge, is still someone with little life and family experience, who usually has not undertaken any other employment, and in particular not in any legal profession.

The multifacetedness of the contemporary legal system, the level of complexity of economic relations, their international aspects, the diversity of social life, the creativity of individuals in trade, requires not only theoretical knowledge, but experience-based perspicacity in analyses performed, insight in observing human behaviour, including the shortcomings of human nature, considerable psychological knowledge, as well as the ability to read emotions and the real intentions behind someone's behaviour, and to make judgments about a person's veracity. Even a considerable amount of theoretical knowledge does not compensate for deficiencies in the sphere of life experience.

Literature emphasises that structuring judicial staff this way resembles a bureaucratic clerical service, organised hierarchically with gradual promotions. Transition between the different levels of the judiciary therefore depends on an adequate term of service in a lower hierarchical position[15].

This concept may be balanced by the elements of the recognition model provided for in Article 61(2)(2)–(5) CCO Law which assumes that the profession of a judge is the culmination of the work of a legal practitioner, since judges are recruited from

[14] See: *N. Georgakoppoulos*, Discretion in the Career and Recognition Judiciary, The University of Chicago Law School Roundtable 2000, Vol. 7, Issue 1, pp. 205–225.

[15] *C. Guarnieri*, Appointment and Career of Judges in Continental Europe: the Rise of Judicial Self-government, Legal Studies, Vol. 24, No. 1–2/2006, pp. 169 *et seq.*

among experienced practitioners or scholars, less frequently from among the judges themselves[16].

These provisions allow scholars as well as persons with experience in other legal professions to apply for the office of a common court judge. *Prima facie*, there is no preferential treatment for either those who decide to pursue the career model through judicial internship and term of service as assistant judge or those who seek to enter the profession on the basis of the aforementioned provisions. However, in practice, the overwhelming number of judicial positions is filled through promotions within the judicial community (47% between 2018 and 2023), whereas new positions in district courts are virtually fully filled by those who have served as assistant judges (43% over the same period), with appointments to assistant judge offices accounting for 19% of all appointments during this period[17].

In the administrative judiciary system and within the much wider extent of Articles 6, 6a and 7 CAO Law[18], the position of an assistant judge is taken up quite differently from that in common courts. The method of appointing assistant judges is much more similar to the competition procedure for the office of judge, and the differences in terms of the conditions to be met by the candidate are minor and relate only to the length of legal practice required in both categories of these procedures. There is no training institution, the attendance of which (culminating in an internship exam) would precede the service as assistant judge in the administrative judiciary. While a term of service as an assistant judge is a fixed-term legal relationship, it is established on the basis of a competitive procedure with a person who has a certain age, as well as educational and professional background. And it is the assistant judges who, in the recent years, have been filling the adjudicatory staff of the administrative courts for the most part (34%)[19].

§ 4. Problematic criterion of qualifications for a candidate for administrative court judge

The differentiation in access to the profession of administrative court judge, resulting from the provisions of the law, was hindered by the case-law of the Supreme Court developed in recognising the appeals against resolutions of the NCJ.

[16] See: *N. Gergakopoulos*, Discretion in the Career, p. 210.

[17] See: Powołania sędziów w latach 2018–2023 na wniosek tzw. „nowej" Krajowej Rady Sądownictwa, Analiza statystyczna, Report by the Helsinki Foundation for Human Rights, https://hfhr.pl/upload/2023/10/raport_powolania_sedziow_przez_nowa_krs.pdf, pp. 4–15 (date of access: 25.7.2025).

[18] For more on this topic, see *E. Plesnarowicz-Durska*, Prawo o ustroju sądów administracyjnych. Komentarz, Warszawa 2013, pp. 71 *et seq.*; *M. Romańska*, [in:] Postępowanie sądowoadministracyjne (ed. *T. Woś*), Warszawa 2015, p. 46; *T. Kuczyński*, [in:] *M. Masternak-Kubiak*, *T. Kuczyński*, Prawo o ustroju sądów administracyjnych. Komentarz, Warszawa 2009, pp. 99 *et seq.*

[19] Powołania sędziów, p. 14.

Indeed, the Supreme Court has presented the view that, in the case of candidates for the position of administrative judge of a common court, the prerequisite of having exceptional knowledge of administrative law is in principle always fulfilled. The court even stated that "[i]f it were to be assumed that every judge of a common court hitherto adjudicating in the civil divisions does not display the characteristic feature arising from the provision in question, it would be equally legitimate to assume that every civil servant employed for a legally required time at a public institution in a position related to the application or creation of administrative law fulfils this prerequisite, which is untenable"[20]. The preferential treatment of judges in competitions for judicial offices in administrative courts, being a result of this position, even if the said judges have not touched upon administrative law in any aspect of their professional or academic life, raises serious questions. In particular, what should be regarded as controversial is the juxtaposition of the view in question with the statutory prerequisite of a substantive nature, and described in Article 6 § 1(6) CAO Law, requiring a candidate for a judge to have extensive knowledge in the field of public administration and administrative law as well as other areas of law related to the operation of public administration authorities. Until recently, during judicial or public prosecutor's internship, these issues were on the margins of training, let alone practice in this area. Although the current curriculum at the National School of the Judiciary and Public Prosecution provides classes in this area, it is still not reflected in the performance of duties as an assistant judge and then judge or public prosecutor. Interestingly, the Supreme Court has taken a different, much stricter position on this issue in relation to the representatives of other professions, *e.g.*, in relation to whether a notary is suitable for the profession of administrative judge, emphasising the need to examine the candidate's experience in matters related to the application of administrative law[21].

Notably, the aforementioned substantive condition applies only to the appointment of judges and assistant judges of administrative courts. This is because the provisions of the CCO Law do not contain substantive grounds for assessing a candidate in a promotion procedure. Since the lawmakers have decided to introduce such a requirement into statute, it means that they consider it important for candidates for administrative judges to be specialists in administrative law. This condition applies to all candidates for administrative judges, including those hailing from other legal professions, including judges of common courts. It also covers postdoctoral scholars exempted under Article 6 § 2 of the CAO Law only from having to prove the relevant term of service. Instead, one gets the impression that the condition is sometimes

[20] See: judgment of the Supreme Court of 15 May 2013, III KRS 196/13, OSNP 2014, No. 4, item 64.

[21] See: judgment of the Supreme Court of 10 December 2014, III KRS 69/14, Legalis.

treated automatically, without sufficient analysis of the scope of the scientific specialisation in the context of the range of cases that an administrative court judge deals with. As a general rule, the lack of sufficient practical experience or working skills can hardly be compensated for by a degree or even a scientific title[22]. Scientific activity involves, after all, something completely different from the practice of application of the law. Knowledge of the theory of law, and even mastery of the legal doctrine or administrative procedure is no substitute for the ability to apply the rules, to analyse them in the reality of the case at hand. A person without sufficient practical experience and working skills should not exercise the role of a judge in society if they do not supplement these qualifications. Further, these comments perhaps in particular apply to candidates for offices in the Supreme Administrative Court of Poland. Many years ago, the lawmakers have decided that judges could be recruited from a variety of legal and academic backgrounds. However, questions referred to in the positions of the Venice Commission and the recommendations of the Committee of Ministers of the Council of Europe presented hereinabove have still not been elaborated on.

§ 5. Conclusions

We believe that the establishment of clear, precise rules could consist, for example, in the development of a scoring system for the candidates' individual achievements, both professional (professional experience) and scientific (further scientific degrees or titles), as well as for other skills, such as teamwork, ability to seek compromise solutions in adjudicating benches, the knowledge of foreign languages, and additional non-legal education. In the case of promotion procedures, an assessment of the judge's performance, drawn up after the period of their secondment to a court of higher instance should be considered a desirable criterion.

In our view, the margin left to the NCJ for its own assessment of a candidate should be small, thus minimising accusations of using extrinsic considerations. The development of such a scoring system would be in line with the demands of the Venice Commission and the Committee of Ministers of the Council of Europe presented hereinabove. They should have statutory value, providing not only the response expected by the public to the allegations raised against the results of individual competitions, but also a guarantee for the participants. The biggest advantage of this solution, in our view, would be the reduction, if not the elimination, of potential extrinsic factors in competition procedures, including, in particular, those of a political nature and, not least, of cronyism and corporatism. The dispute over how the relevant authority should be created would play far less of a role under these conditions,

[22] See: *W. Piątek*, Ustrój sądów administracyjnych – stan obecny oraz potencjał do zmian, [in:] Ius est ars boni et aeqi. Studia ofiarowane Profesorowi Romanowi Hauserowi Sędziemu Naczelnego Sądu Administracyjnego, ZNSA 2021, special publication, p. 394.

and the independence of the selected candidates would meet the level required by the constitutional and conventional standard. In our opinion, it is precisely the competence, knowledge, professional experience and acquired skills that allow a judge to maintain the feature of autonomy and independence in adjudication. A judge who has these qualities has a strong sense of worth anchored in an inner conviction that they have the sufficient resources and arguments to defend their view.

Abstract

This article discusses the issue of judicial independence and impartiality in the context of appointing judges as well as administrative judges. This issue has been repeatedly considered by the ECtHR in connection with allegations of violations of Article 6(1) ECHR. It appears, that the systemic changes proposed by both the ECtHR and the Polish Constitutional Tribunal, involving the introduction of objective, substantive criteria for judicial recruitment, have not yet been implemented. This topic is also not present in statements by representatives of the judicial community.

Roman Wiatrowski*

Protection of Taxpayer Rights in Administrative Court Proceedings in Light of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union

§ 1. Introductory remarks

Modern tax law is strongly connected with human rights protection standards, as it directly impacts individual freedoms. The purpose of this article is to examine the extent to which the ECHR can be applied in tax matters, in comparison with the Charter of Fundamental Rights of the European Union. The starting point is Article 6 TEU, which identifies three sources of rights protection in EU law: ECHR, CFR and general principles of law. The analysis focuses on the case-law of the ECtHR and the CJEU, as well as the practice of administrative courts. Due to space limitations, the study addresses selected areas: the right to a fair trial, protection of property, and the right to privacy.

§ 2. Application of the European Convention on Human Rights to tax matters

The absence of an explicit indication in the ECHR of specific rights subject to protection in particular areas of law – such as tax law – does not preclude the examination of these issues by the ECtHR, provided that in cases brought before the Court an alleged violation of rights guaranteed by the ECHR has been raised[1].

* Judge of the Supreme Administrative Court of Poland, President of the I Division of the Financial Chamber, dr; ORCID: 0000-0003-0051-6712.

[1] *M. Piłaszewicz*, Ochrona prawna przed Europejskim Trybunałem Praw Człowieka w sprawach podatkowych, Gl. 2011, No. 3, p. 112.

The issue against which a comparison of case-law referring to the ECHR and the CFR in tax matters can be made is the right to a fair trial (Article 6 ECHR).

As noted in the literature, the ECtHR jurisprudence expresses the view that disputes related to the fulfilment of tax obligations – with certain exceptions (*e.g.*, the right to a refund of unduly collected tax) – are not considered civil matters within the meaning of Article 6 ECHR[2].

Although Article 6 ECHR formally covers only civil and criminal matters, this does not exclude tax cases. The ECtHR adopts an autonomous interpretation of the right to a court, independent of the national classification of a given case[3]. According to the ECtHR, the autonomous concepts contained in the Convention must be interpreted with regard to the conditions prevailing in democratic societies, which does not allow the Court to interpret Article 6(1) as if the adjective "civil" were absent from its text[4]. The European Court of Human Rights refers to the "nature" of financial obligations towards the state – they must be treated as belonging exclusively to the sphere of public law, and therefore not covered by the notion of "civil rights and obligations". Consequently, the Court has in particular held that tax disputes, arising from a public-law relationship between citizens and the state, do not fall within the scope of civil rights under Article 6(1) ECHR[5]. Obligations arising from public systems, such as contributions or taxes, constitute elements of public order and do not fall within the civil scope of application of Article 6(1) ECHR[6]. The mere fact that a case concerns money does not determine its civil character, as tax obligations remain within the sphere of public law[7].

Although tax disputes have a financial nature, this fact alone is not sufficient to apply Article 6(1) ECHR due to the civil character requirement. Before determining whether a given right can be considered "civil", it is necessary to assess the features characteristic of public and private law. The ECtHR's reference to the "nature" of financial obligations toward the state leads to the conclusion that they should be treated as belonging exclusively to the realm of public law and, consequently, as not falling within the concept of "civil rights and obligations"[8]. As a result, although

[2] *M. Wiącek*, Sądownictwo administracyjne w Polsce z perspektywy art. 6 EKPC, EPS 2022, No. 10, p. 25, after *A. Mudrecki*, Ochrona praw podatników w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka w Strasburgu, Krytyka Prawa 2020, No. 1, pp. 132 *et seq.*

[3] ECtHR judgment of 24 September 2002, *Posti and Rahko v. Finland*, application no. 27824/95, HUDOC.

[4] *M.A. Nowicki*, Ferrazzini przeciwko Włochom – wyrok ETPC z dnia 12 lipca 2001, skarga nr 44759/98, [in:] Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004, Kraków 2005, p. 563.

[5] ECtHR judgment of 12 July 2001, *Ferrazzini v. Italy*, application no. 44759/98, HUDOC.

[6] ECtHR decision of 24 January 2002, *Rieg v. Austria*, application no. 63207/00, HUDOC.

[7] ECtHR judgment of 23 November 2006, *Jussila v. Finland*, application no. 73053/01, HUDOC.

[8] *M. Piłaszewicz*, Ochrona prawna, p. 113.

certain criminal fines and cases where the obligation arises from tax law are excluded from the scope of Article 6 ECHR, the imposition of a penalty for violating these provisions may trigger its application, because in such instances a criminal charge under Article 6 ECHR is being considered[9]. The Court held that in cases concerning additional tax charges, Article 6 ECHR applies due to their punitive nature. These charges, provided for in the general tax code and applicable to all taxpayers, do not serve to compensate for damage but have a punitive and preventive function, and in the case at hand were also of a very high amount[10]. In this judgment, the Court stated that access to documents can be an element of the right to a fair trial, but the request must be properly justified. The applicant requested all documentation without indicating how its absence would hinder the defence and, moreover, already had access to it in the criminal proceedings. As a result, the Court found that Article 6(1) ECHR was not violated[11].

The fact that an individual must be guaranteed the right to a fair trial also in tax matters was confirmed by the ECtHR in the *Hentrich* judgment[12]. In that judgment, the ECtHR held that domestic law did not provide sufficient or adequate legal remedies that would allow for judicial review of the tax authority's decision to exercise its pre-emption right over real estate, and therefore the applicant had been deprived of the right to bring her case before a court in France.

Another issue through which it is possible to compare the case-law referring to the ECHR and the CFR in tax matters is the right to the protection of property (Article 1 of Protocol No. 1 to the ECHR). In the literature, it is emphasised that since Article 1 of Protocol No. 1 to the ECHR provides protection of the "right to property", the concept of "property" within the meaning of the ECHR has a broader scope than that adopted in Polish property law. It is considered to be closer to the notion of "possessions" in civil law, encompassing both ownership and other proprietary rights[13]. The Court pointed out that the concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning and is not limited solely to ownership of physical things; other rights and interests constituting possessions may be recognised as "property rights" and thus as "possessions" within the meaning of this provision[14].

[9] *Ibid.*, p. 114.

[10] ECtHR judgment of 24 February 1994, *Bendenoun v. France*, application no. 12547/86, HUDOC.

[11] ECtHR judgment of 24 February 1994, *Bendenoun v. France*.

[12] ECtHR judgment of 22 September 1994, *Hentrich v. France*, application no. 13616/88, HUDOC.

[13] *M. Piłaszewicz*, Ochrona prawna, p. 114.

[14] ECtHR judgment of 23 February 1995, *Gasus Dosier-und Fördertechnik GmbH v. Netherlands*, application no. 15375/89, HUDOC.

From Article 1 of Protocol No. 1 to the ECHR arise three principles of the protection of property: the respect for the right to the peaceful enjoyment of possessions, the permissibility of deprivation of property, and the control of the use of property in the public interest, including for securing tax revenues. In the ECtHR case-law, it is emphasised that these principles are interconnected, which means that any interference by the state with the right to property is assessed primarily in light of the principle of the peaceful enjoyment of possessions[15].

However, during the first decades of the Convention's application, there was no ECtHR case-law in this regard[16] – the first judgment concerning the protection of possessions in tax matters appeared only in the 1970s[17]. In the subsequent period, the ECtHR increasingly upheld taxpayers' complaints, recognising their right to the protection of possessions, because even in such cases it acknowledged the need to balance the public interest with the guarantees of individual rights[18].

The Court found a violation of Article 1 of Protocol No. 1 to the ECHR in particular in relation to delays in VAT refunds[19], sudden changes in the interpretation of provisions governing such refunds[20], and the interpretation of tax law in the manner least favourable to the taxpayer – especially where those provisions were subject to significant doubt[21]. The ECtHR emphasises that restrictions on the right to property under Article 1 of Protocol No. 1, including those arising from tax obligations, must maintain a "fair balance" between the public interest and the protection of the individual. The key factor is the proportionality of the measure in relation to its aim. Although states enjoy a wide margin of appreciation in fiscal policy, the ultimate assessment of proportionality rests with the Court[22]. Before administrative courts in Poland, disputes concerning the extension of deadlines for VAT refunds are particularly common. Therefore, the position taken by the ECtHR regarding delayed VAT refunds is of particular relevance. In one case, the Court held that a violation

[15] ECtHR judgment of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, applications nos. 7151/75 and 7152/75, HUDOC.

[16] *A. Cieśliński*, Dopuszczalność opodatkowania odszkodowania uzyskanego od Skarbu Państwa w świetle standardów ochronnych Europejskiej Konwencji Praw Człowieka, AUWr PPiA 2018, No. 115, DOI: 10.19195/0137-1134.115.2, p. 21.

[17] ECtHR judgment of 7 December 1976, *Handyside v. United Kingdom*, application no. 5493/72, HUDOC.

[18] *A. Ciesliński*, Dopuszczalność opodatkowania [Admissibility of taxation], p. 21.

[19] ECtHR judgment of 9 January 2007, *Intersplay v. Ukraine*, application no. 803/02, HUDOC.

[20] ECtHR judgment of 10 March 2011, *Serkov v. Ukraine*, application no. 39766/05, HUDOC.

[21] ECtHR judgment of 14 October 2010, *Shchokin v. Ukraine*, applications nos. 23759/03 and 37943/06, HUDOC.

[22] ECtHR judgment of 23 October 1997, *National & Provincial Building Society, The Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*, application no. 21319/93, HUDOC.

of the "fair balance" between the public interest and the rights of the individual may arise from uncertainty regarding the execution of a VAT refund[23]. The complaint concerned a right to a VAT refund and compensation arising under domestic law. Despite the applicant's fulfilment of statutory conditions and the absence of any dispute as to the amount of the claim, the authorities refused to acknowledge it, resulting in delays and chronic legal uncertainty. The Court considered this to be a disproportionate interference with the right to property, stressing that combating VAT fraud cannot justify restrictions imposed on entities not involved in any wrongdoing[24].

The above leads to the conclusion that the ECtHR intervenes in matters of tax refunds or their amount only exceptionally. The Court's intervention is justified only when the limits of rationality – understood in an autonomous manner – are exceeded, in relation to the level of taxation, the method of its application, the context of taxation, or in cases where the individual is deprived of procedural guarantees or of acquired rights[25].

The Court also found a violation of Article 1 of Protocol No. 1 in the context of Article 14 ECHR. According to the ECtHR, in the circumstances of the case, it could not be concluded that the state exceeded its wide margin of appreciation, and the difference of treatment for the purposes of the grant of inheritance-tax exemptions was reasonably and objectively justified for the purposes of Article 14 ECHR[26]. The case concerned two sisters who claimed that the absence of tax reliefs available to spouses violated their right to equal treatment in respect of the protection of property. The ECtHR found the application admissible but held that the sisters' situation was not comparable to that of a married couple or a civil partnership, as they lacked the legal obligations and mutual responsibilities characteristic of such relationships. The Grand Chamber emphasized the distinct nature of family ties between siblings and the special status of marriage protected under Article 12 ECHR. Referring to the *Shackell*[27]. case, the Court noted that the situation of heterosexual married couples and heterosexual cohabiting couples is not analogous regarding survivor benefits. Consequently, the Grand Chamber concluded that the applicants – as sisters living together – could not be compared, for the purposes of Article 14 ECHR, with a married couple or a couple in a registered partnership. As a result, the Court held that

[23] ECtHR judgment of 9 January 2007, *Intersplay v. Ukraine*.

[24] *Ibid*.

[25] *A. Ciesliński*, Dopuszczalność opodatkowania, pp. 21–22.

[26] ECtHR judgment of 12 December 2006, *Burden v. United Kingdom*, application no. 13378/05, HUDOC.

[27] ECtHR judgment of 27 April 2000, *Shackell v. United Kingdom*, application no. 45851/99, HUDOC.

no discrimination occurred and, therefore, Article 14 in conjunction with Article 1 of Protocol No. 1 ECHR was not violated[28].

§ 3. Application of the Charter of Fundamental Rights to tax matters

Under Article 51(1) CFR, its provisions bind the Member States only when they are implementing or applying Union law. In the field of taxation, this primarily concerns VAT as the most harmonized tax. The application of the CFR requires the existence of a relevant connection between the case and Union law. In the absence of such a connection, the CJEU has no jurisdiction, and the CFR cannot serve as an independent legal basis[29].

According to the Court's established case-law, fundamental rights protected within the EU legal order apply in all situations governed by Union law. The application of Union law therefore entails the simultaneous application of the fundamental rights guaranteed by the Charter of Fundamental Rights[30].

In accordance with Article 52(3) CFR, which is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law, the CJEU should therefore take into account, when interpreting the rights guaranteed in the Charter, the corresponding rights in the ECHR, as interpreted by the ECtHR, as the minimum threshold of protection[31]. The CJEU indicated that the CFR may also apply when national legislation, although not directly based on EU law, serves to ensure the effectiveness of that law. This includes, *inter alia*, monetary sanctions for refusal to provide information under tax cooperation pursuant to Directive 2011/16/EU. The Court held that these measures fall within the scope of "information gathering" and "necessary measures" under the Directive – and therefore fall within the scope of EU law application, regardless of the national legislative basis[32]. In particular, in tax matters the CFR protects the right to a court. This is regulated in Article 47 CFR. According to this provision, everyone whose rights and freedoms guaranteed by EU law have been violated has the right to an effective remedy before a court – under the conditions laid down in this Article. This right also includes judicial protection

[28] ECtHR judgment of 12 December 2006, *Burden v. United Kingdom.*

[29] CJEU judgments of 27 March 2014, C-265/13, *Emiliano Torralbo Marcos*, EU:C:2014:187, § 30; of 6.3.2014, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, EU:C:2014:126, § 24.

[30] CJEU judgments of 26 February 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105, §§ 19–21; and of 26 September 2013, C-418/11, *Texdata Software*, EU:C:2013:588, §§ 72, 73.

[31] CJEU judgment of 8 December 2022, C-694/20, *Orde van Vlaamse Balies and others*, EU:C:2022:963, § 26.

[32] CJEU judgment of 16 May 2017, C-682/15, *Berlioz*, EU:C:2017:373, §§ 39–40.

of claims arising from EU law – allowing a case to be brought before a court within any judicial procedure provided by national law, provided it meets the requirements of effectiveness and equivalence[33]. In the case-law of the CJEU, fundamental rights guaranteed in the Charter should ensure that the court hearing an action against a tax authority decision giving rise to an adjustment of VAT be empowered to ascertain that the evidence originating in a related administrative procedure has been obtained in accordance with the rights guaranteed by EU law and that the findings based on that evidence do not breach those rights. A VAT adjustment made by tax authorities – even following the detection of fraud – constitutes implementation of EU law for the purposes of Article 51(1) CFR[34], which justifies judicial review of the methods used by tax authorities to collect evidence in such cases.

In its case-law, the CJEU has noted that the principle of respect for the right of defence is not absolute and may be subject to limitations – including within the framework of tax control procedures. These limitations, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality, business secrecy, the private life of third parties (especially regarding personal data), as well as the effectiveness of the criminal action, which access to certain information and certain documents is liable to harm[35]. According to the CJEU, compliance with the requirements arising from the right to a fair trial should guarantee the parties the opportunity to know and adversarially debate both on the matters of fact and of law which will determine the outcome of the proceedings[36]. In particular, the CJEU held that the provisions of the VAT Directive, the principle of respect for the right of defence, and Article 47 CFR do not, in principle, preclude the practice whereby the tax authority, when verifying the right to VAT deduction, relies on findings made with respect to the taxpayer's suppliers in separate proceedings concluded by a decision of tax fraud. However, the compliance of such a practice with EU law depends on ensuring that the taxpayer is granted full procedural safeguards: access to relevant evidence, the possibility to effectively challenge it, the right to defend against findings adopted regarding third parties, and judicial review of the legality of the collected materials[37].

[33] Cf. *N. Półtorak*, Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych, Warszawa 2010, p. 165.

[34] CJEU judgment of 16 October 2019, C-189/18, *Glencore*, EU:C:2019:861, § 59; similarly, CJEU judgment of 26 February 2013, C-617/10, *Åkerberg Fransson*, §§ 19, 27; and of 17 December 2015, C-419/14, *WebMindLicenses*, EU:C:2015:832, § 67.

[35] CJEU judgment of 16 October 2019, C-189/18, *Glencore*, § 55.

[36] *Ibid.*, § 62, similarly CJEU judgment of 2 December 2009, C-89/08 P, *Commission v. Ireland and Others*, EU:C:2009:742, § 56.

[37] CJEU judgment of 16 October 2019, C-189/18, *Glencore.*

The CJEU responded positively to the question referred by the national court as to whether Article 47 CFR should be interpreted to mean that the addressee of a decision, on whom a pecuniary penalty has been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations – pursuant to Directive 2011/16/EU – is entitled to challenge the legality of that decision[38]. According to the CJEU, the national court hearing an action against the pecuniary administrative penalty imposed on the addressee of a decision for failure to comply with a mandatory decision must be able to examine the legality of that decision if it is to satisfy the requirements of Article 47 CFR[39]. The CJEU also examined whether the national legislation of a Member State, which excludes the possibility of bringing a remedy against a request to provide tax information, leads to a violation of Article 47 CFR. The Court held that the right to an effective remedy, as defined in Article 47 CFR, must include the possibility for the addressee of such a decision to have recourse to a judicial procedure when the administrative authority issues a decision requiring the provision of tax information. According to the Court, Article 52(1) CFR precludes the existence of such national provisions. Furthermore, the CJEU indicated that in connection with the issuance of such tax decisions, the taxpayer enjoys: first – the right to respect for private life, guaranteed in Article 7 CFR, and second – the right to the protection of personal data, under Article 8(1) CFR, which, in relation to natural persons, is closely linked to the right to respect for private life[40].

The Court of Justice addressed a potential violation of Article 47 CFR in the context of the absence of participation in a tax procedure by a third party who could have been involved in proceedings regarding joint and several liability[41]. In its question for a preliminary ruling, the national court argued that binding the tax authorities to a final decision issued against the company could prevent the third party from challenging any possible erroneous findings, raising concerns under the rule of law (Article 2 TEU), the protection of property (Article 17 CFR), the right to defence, the principle of proportionality, as well as the right to good administration and effective judicial protection (Articles 41 and 47 CFR). However, the CJEU rejected this argument, holding that Article 47 CFR and the right to an effective remedy do not apply in the case due to the administrative nature of both the tax procedure and the proceedings concerning joint and several liability[42].

[38] CJEU judgment of 16 May 2017, C-682/15, *Berlioz***,** § 59.

[39] *Ibid.*, § 56.

[40] CJEU judgment of 6 October 2020 in Joined Cases: C-245/19, *État luxembourgeois v. B* and C-246/19, *État luxembourgeois v. B, C, D, F.C., with the participation of: A*, EU:C:2020:795.

[41] CJEU judgment of 27 February 2025, C-277/24, *Adjak*, EU:C:2025:130.

[42] *Ibid.*, § 42.

Also significant in tax matters is the CJEU case-law concerning the guarantee of the fundamental right provided for in Article 7 CFR. This provision, which grants everyone the right to respect for their private and family life, home and communications, corresponds to Article 8(1) ECHR[43]. In this regard, the CJEU ruled that Article 7 CFR must be interpreted as meaning that legal consultations with a lawyer in the field of company law are covered by the enhanced protection of communications between lawyer and client guaranteed by that article. Consequently, a decision requiring a lawyer to provide all documents and information concerning their relationship with the client to the administration of the cooperating Member State for the purposes of information exchange under Directive 2011/16/EU[44] constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article[45]. The CJEU justified its jurisdiction to rule on a factual situation related to the application of Directive 2011/16/EU by pointing out that the application of EU law also encompasses the adoption by a Member State of rules governing the procedure for information exchange on request established by Directive 2011/16/EU, which in particular provide for the possibility for the competent authority to issue a decision requiring the person holding the information to transmit it to that authority[46].

With regard to the right to the protection of property provided for in Article 17 CFR, the CJEU has repeatedly pointed out that protection against arbitrary or disproportionate interference by public authorities in the private activities of an individual – whether natural or legal – constitutes a general principle of Union law[47].

§ 4. Application of the ECHR and the CFR by Polish administrative courts

It appears that in Polish tax cases, taxpayers are entitled to rely on the ECHR, in particular in matters concerning value-added tax. As indicated above, imposing a penalty for a breach of tax provisions may trigger the application of Article 6 ECHR, as in such a case the matter is treated as a criminal charge within the meaning of that provision. A specific form of penalty for violating tax law provisions are the sanctions

[43] CJEU judgment of 8 December 2022. C-694/20, *Orde van Vlaamse Balies and Others*, EU:C:2022:963, § 25.

[44] The Directive introduces a system of cooperation between the tax authorities of the Member States and lays down the principles and procedures applicable to the exchange of information for tax purposes between Member States.

[45] CJEU judgment of 26 September 2023, C-432/23, *F SCS*, ECLI:EU:C:2024:791, § 52.

[46] *Ibid.*, § 44 and case-law cited therein.

[47] CJEU judgments of 21 September 1989, 46/87 and 227/88, *Hoechst v. Commission*, EU:C:1989:337, § 19; of 22.10.2002, C-94/00, *Roquette Frères*, EU:C:2002:603, § 27; and decision of 17 November 2005, C-121/04 P, *Minoan Lines v. Commission*, EU:C:2005:695, § 30.

referred to in Articles 112b–112c ATGS. Moreover, reliance on the ECHR could also apply in cases of repeated issuance by tax authorities of decisions extending the deadline for VAT refunds. As noted above, the ECtHR has already held that a delay in VAT refund may constitute an interference with property rights, as it leads to chronic uncertainty and forces the taxpayer to initiate repeated court proceedings[48].

An analysis of the case-law of administrative courts shows that these courts exceptionally rarely refer to the ECHR in tax matters. The few instances of administrative courts relying on the ECHR result from the necessity for the NSA to address allegations of ECHR violations raised in cassation complaints. In particular, allegations of violations of Article 6(1) ECHR are linked to deficiencies in the reasoning of administrative court judgments[49]. Violations of Article 1 of Protocol No. 1 to the ECHR are particularly associated with breaches of provisions concerning the liability of third parties, including members of management boards, under Articles 116 § 1 point 1(b) and 116 § 2 TO[50]. The NSA, when addressing allegations of ECHR violations raised in cassation complaints, consistently refers to the case-law of the ECtHR. In one case, in which a violation of Article 6(1) ECHR was alleged in connection with the hearing being held in chambers, the NSA of Poland stated that such a hearing does not breach the standard of a fair trial, provided that only legal issues, and not factual findings, are subject to review. The Court emphasized the importance of the principle of procedural speed[51], which obliges administrative courts to examine cases efficiently, and also noted that both the Constitution of the Republic of Poland and statutory provisions allow, in exceptional circumstances, for a case to be heard in chambers[52].

Although the NSA applies standards arising from the European Convention on Human Rights, in particular Article 6, in the context of the right to a fair trial – including in tax matters – there are, however, no judgments in which the Convention is explicitly applied to typically tax-related issues, such as additional tax liabilities, extension of the tax refund period, the tax rate, or the tax base. This is therefore an area in which case-law directly referring to the European Convention on Human Rights is still lacking. Administrative courts also relatively rarely refer to the CFR. Most often, they do so in the context of preliminary rulings referred to the CJEU. An example may be a judgment in which the Regional Administrative Court in Wrocław relied on Article 17 CFR, formulating preliminary questions concerning the tax liability of third parties for tax obligations[53]. In the case of a court of cassation, such as the NSA,

[48] ECtHR judgment of 9 January 2007, *Intersplay v. Ukraine*.
[49] NSA judgment of 13 March 2025, I FSK 2146/21, Legalis.
[50] NSA judgment of 27 August 2024, III FSK 257/24, Legalis.
[51] The principle provided for in Article 7 APAC.
[52] NSA judgment of 25 April 2024, II FSK 968/21, Legalis.
[53] WSA in Wrocław decision of 31 January 2024, I SA/Wr 966/22, Legalis.

the lack of references to the ECHR or the CFR in the content of judgments often results from the absence of relevant claims in the cassation complaint.

§ 5. Concluding remarks

The analysis conducted in this article leads to the conclusion that the ECHR constitutes an important, albeit substantively limited, instrument for the protection of taxpayers' rights, serving a subsidiary function in relation to the CFR in situations where there is no direct connection between the case and Union law. The Convention applies only to civil and criminal matters, whereas the CFR guarantees a broader spectrum of fundamental rights. For this reason, the protection of taxpayers' rights should not be based on the principle of exclusivity, but rather on the complementary application of both mechanisms. In administrative court practice, references to the ECHR and the CFR are, however, marginal, which indicates the need for a deeper integration of tax law with European human rights standards, particularly in the context of the case-law of the European Court of Human Rights concerning delays in the refund of VAT – an issue of significant relevance to Polish judicial practice.

Abstract

The article presents the extent to which the European Convention on Human Rights contributes to ensuring standards of protection for taxpayers in court proceedings. To this end, based on the rulings of the European Court of Human Rights and the Court of Justice of the European Union, an attempt was made to answer the question of when the provisions of the Convention and when those of the Charter of Fundamental Rights may apply to tax matters. It also indicates how the fundamental rights arising from the Convention and the Charter are used in tax cases in the case-law of administrative courts.

Mirosław Wincenciak*

Imposition of Fines and the Right to a Fair Trial According to the European Court of Human Rights

§ 1. Introductory remarks

For many years there has been a noticeable increase in the regulation of violations subject to administrative fines under Polish law[1]. Legal solutions governing legal liability for violating the law subject to administrative fines has also noticeably evolved. Initially, the laws on violations of the law, subject to such penalties, provided for constructions of liability referred to as absolute or objective. The constructions of legal liability have begun to change influenced by the views of the doctrine, case-law of the Constitutional Tribunal, and judgments of national and European courts. A key change was supplementing the Code of Administrative Procedure with the provisions of Section IVa "Administrative monetary penalties", which stipulate a number of legal solutions to individualise legal liability and impose the administrative monetary penalty. In terms of the systemic and procedural aspect of the application of administrative monetary penalties, since 2004 when the provisions introducing two-instance administrative jurisdiction took effect[2], the procedural model has basically remained

* Judge of the Supreme Administrative Court of Poland, dr. hab. prof. UwB, University of Bialystok; ORCID: 0000-0003-3099-1012.

[1] The concept of an administrative monetary penalty is defined in Article 189b CAP – an administrative monetary penalty is a pecuniary sanction defined by law, imposed in a decision of a public administration body, following a violation of law consisting in a failure to comply with an obligation or a violation of a prohibition imposed on a natural person, a legal person, or an organisational unit without legal personality. It should also be noted that the legislator uses the terms monetary penalty – for instance, Article 66(1) of the Rail Transportation Act, and administrative monetary penalty – for instance, Article 88(1) of the Nature Conservation Act.

[2] Act of 30 August 2002 – Provisions introducing the Law on the Organisation of Administrative Courts and the Act on Proceedings before Administrative Courts (Polish Journal of Laws of 2002, No. 153, item 1271).

unchanged – administrative monetary penalties are imposed within the framework of two-instance administrative procedures which end with acts of applying the law by public administration bodies, which are controlled by administrative courts in two-instance administrative judicial proceedings. The exceptions are fines imposed by regulatory bodies, whose decisions may be appealed to ordinary courts.

Recognising the monetary penalty imposed for a criminal offence within the meaning of Article 6 ECHR implies, according to ECtHR case-law, the application of procedural guarantees specific to a criminal offence to the punished entity. The objective of this article is to present the criteria for distinguishing a criminal offence according to the ECtHR and the standard[3] of procedure resulting from the case-law of the ECtHR in criminal offences, and then to compare these criteria and the standard with the Polish regulation on the application of administrative monetary penalties.

§ 2. The right to a fair trial in cases of monetary penalties imposed by entities exercising public administration according to the case-law of the ECtHR

The right to a fair trial stipulated in Article 6(1) ECHR applies to the determination of civic rights and obligations of a civil nature and to criminal offences. The European Court of Human Rights first decides whether the proceedings relate to civil rights or obligations, or criminal charges. According to the Polish legal order, as a general rule, administrative monetary penalties are not classified as part of civil or criminal offences. However, the classification of the national legislator assigning the offence to a particular branch of law does not prejudge the assessment of the ECtHR[4]. The ECtHR case-law takes the view that the concept of a criminal offence cannot refer to the systematics adopted by national legislation, as under such an assumption the protection of the right under Article 6(1) ECHR would be illusory[5]. The systematisation of sanctions in the legislation of Member States cannot be decisive in assessing the nature of an offence under Article 6 ECHR. Otherwise, the application of the ECHR would be at the discretion of State Parties which provide for potential liability, but would characterise the sanctions established as administrative[6]. Thus, recognising a particular sanction as administrative or disciplinary under

[3] The standard is understood as the criteria to which legal solutions should conform, determining the scope of the legal solutions that create the standard.

[4] *M. Rogalski*, Odpowiedzialność karna a odpowiedzialność administracyjna Ius Novum 2014, Vol. 8, p. 75.

[5] ECtHR judgments: of 21 February 1984, *Öztürk v. Germany*, application no. 8544/79; of 8 June 1976, *Engel and Others v. the Netherlands*, applications nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 – available in HUDOC.

[6] ECtHR judgments of 8 June 1976, *Engel and Others v. the Netherlands*, § 50.

national legislation does not prevent the sanction from being considered a criminal offence under Article 6 ECHR.

The European Court of Human Rights has commented on several occasions on the nature of the sanction and the proceedings involved. The starting point for the legal assessment of the sanction is the above qualification of the sanction under national legislation. This criterion is of auxiliary importance, since, as already mentioned, the classification of sanctions under national law is non-binding in terms of determining whether an offence is criminal within the meaning of Article 6 ECHR. However, if national legislation indicates that the offence is criminal in nature, in principle, it relieves the Court of the obligation to make further findings[7].

The second criterion is the criminal nature of the act. Two elements are distinguished in relation thereto. The first is to identify the addressee of the prohibition or prohibition subject to a sanction. It has been expressed that the criminal nature of a sanction may be determined by the addressing the order or prohibition to all addressees, rather than to a group of actors distinguished by certain characteristics or status[8]. In the case of *Öztürk v. Germany*[9], it was indicated that legal liability for traffic violations applies to all road users. It was the view of the ECtHR that the repressive nature of the sanction and the widespread nature of the violation of the law, relating to all road users, justified the assumption that legal liability for this violation was of a penal nature. Thus, addressing a norm to a group of actors with specific characteristics, *e.g.* entrepreneurs, does not justify the qualification of a sanction as a criminal offence[10]. Another element is the purpose of the standard. It is assumed that a sanction of a repressive and preventive nature is, in principle, a criminal sanction[11]. If the purpose of the sanction was to compensate for losses, then this type of sanction is not criminal in nature[12]. In the case of *Bendenoun v. France*[13], the Court indicated that the purpose of the sanction of a surcharge for a tax offence, added to

[7] ECtHR judgment of 9 March 2006, *Menesheva v. Russia*, application no. 59261/00, HUDOC.

[8] *Ł. Prus*, Zasada *ne bis in idem*. Na pograniczu prawa administracyjnego i karnego w najnowszym orzecznictwie sądów europejskich, PiP 2021, No. 10, p. 76.

[9] ECtHR judgment of 21 February 1984, *Öztürk v. Germany.*

[10] *E. Śliwiński*, Odpowiedzialność karna w orzecznictwie Europejskiego Trybunału Praw Człowieka i Trybunału Konstytucyjnego, Warszawa 2023, p. 46–47. According to *P. Iżycki*, liability for traffic violations is narrowed from a subjective angle, as the driving of motor vehicles is controlled by the state. Thus, the ECtHR's view in *Öztürk v. Germany* on a universal violation of law can be considered controversial – *P. Iżycki*, Administracyjny a sądowy model nakładania sankcji prawnych, typescript, Warszawa 2023, pp. 200–201. Equally critically: *P. Hofmański*, *A Wróbel*, [in:] Convention for the Protection of Human Rights and Fundamental Freedoms (ed. *L. Gralicki*), Vol. I, Warszawa 2010, pp. 282–282.

[11] *M. Jackowski*, Zasada *ne bis in idem* w orzecznictwie Europejskiego Trybunału Praw Człowieka, PiP 2012, No. 9, p. 22.

[12] *Ł. Prus*, Zasada *ne bis in idem*, p. 76.

[13] ECtHR judgment of 24 February 2004, *Bendenoun v. France*, application no. 12547/86, HUDOC.

the amount of tax, did not constitute a compensation, but primarily repression and prevention. In the Court's view, this type of sanction, the widespread nature of the violation, and the severity of the penalty justified the position that this was a criminal offence[14]. The Court assumed that the measure of deducting points for traffic violations is preventive but also punitive and deterring. It is therefore similar to additional penalties imposed in criminal cases. Adopting a solution which applies it in a different mode from other judicial penalties does not change the nature of this measure. It was therefore a penalty within the meaning of Article 6(1) ECHR[15]. The subject of the analysis is also to assess whether the good protected by law is also protected by criminal law[16].

The third criterion is the type and severity of the sanction. The assessment concerns the severity of the penalty imposed as a monetary penalty[17], and the possibility of converting the monetary penalty into a sentence of restricted liberty[18] disclosed in the criminal record. The assessment of the severity of the penalty refers to the maximum amount stipulated in the statute, and not to the amount specified in the act of applying the law. It is assumed that the criterion deciding whether the case is in nature is the threat of a sentence of restricted liberty. In a democratic state governed by the rule of law, it is possible to assume that an act punishable by imprisonment is of a criminal nature. It can only be overturned as a matter of exception if the nature, duration, or manner of executing the sentence is not significantly inconvenient for the sentenced person[19].

[14] *Ibid*.

[15] ECtHR judgment of 23 September 1998, *Malige v. France*, application no. 27812/95, HUDOC, in which the Court considered that the sanction of losing a driving licence was repressive, but that France had not violated Article 6 ECHR as it had provided in the judicial proceedings the guarantees of due process required in criminal cases.

[16] *Ł. Prus*, Zasada *ne bis in idem*, p. 76.

[17] ECtHR judgments: of 24 September 1997, *Garyfallou Aebe v. Greece*, application no. 18996/91; of 22 May 1990, *Weber v. Switzerland*, application no. 11034/84 – available in HUDOC.

[18] In the case of *Schmautzer v. Austria* which concerned punishing the complainant for driving a vehicle without a seatbelt on, where that complainant invoked a violation of the right to a fair trial with regard to being punished by a police officer with a fine convertible into custody. This case was adjudicated by the Constitutional Court which rejected the complaint. The complainant argued that imprisonment was imposed by an authority which lacked independence and impartiality. The Court indicated that in the case of sanctions imposed by administrative bodies the accused has to be entitled to appeal to a court with full jurisdiction, including as to the facts and the law. The Austrian administrative tribunal was not considered to meet the above requirements as it did not have full factual jurisdiction – ECtHR judgment of 23 October 1995, *Schmautzer v. Austria*, application no. 15523/89, §§ 34–36, HUDOC.

[19] ECtHR [GC] judgment of 10 February 2009, *Zolotukhin v. Russia*, application no. 14939/03, HUDOC.

If one of the conditions is met, it may be sufficient to assume that the sanction is of a penal nature. If there is a doubt, it may be justified to base the assessment on the perspective of both of the above conditions[20].

Case-law review leads one to conclude that the assessment of the criminal nature of the sanction is made taking into account three criteria. The first is the legal classification of the violation under national law, the second is the nature of the violation, and the third is the nature and severity of the sanction that may be imposed. The second and third criteria are vague in nature. The lack of clear distinctive features of a given form of legal liability means that the repressive nature of the sanction and the criminal nature of the offense are each time determined by the ECtHR in its *a casu ad casum*[21] proceedings.

The Court bases its assessment on Article 6 ECHR. It encompasses the entire procedure of the Member State, including the stages of the administrative procedure[22]. Recognising a sanction as repressive does not mean that such sanction cannot be imposed by a non-judicial body. The provisions of the Convention require Member States to provide an individual with a right to a fair trial in cases classified as repressive law. The right to a fair trial is presumed to be ensured if national legislation guarantees the right of appeal to a court against a decision imposing a legal sanction. In turn, the elements of the right to a fair trial consist of components such as hearing a case within a reasonable time by an independent and impartial tribunal established by law. Classifying a sanction as a *criminal offence* does not attribute it to criminal law under national law, but only to an obligation to ensure effective judicial review of the imposition of that sanction. If a dispute was heard by different authorities, the structure of the proceedings has to include either a judicial body with full jurisdiction on the facts and law, providing the guarantee of a fair hearing under Article 6(1) ECHR, or the adjudicating authority has to meet the requirements of Article 6(1) ECHR[23]. At the same time, the Court's case-law stipulated that, for instance, the requirements of Article 6 ECHR might not extend to a full assessment of the facts[24] in such a specialised area of law as spatial planning.

[20] ECtHR judgments: of 24 February 2004, *Bendenoun v. France*; of 24 September 1997, *Garyfallou Aebe v. Greece*; of 23 November 2006, *Jussila v. Finland*, application no. 73053/01; HUDOC; *M. Jackowski*, Zasada *ne bis in idem*, p. 23.

[21] *M. Bogusz*, Delikt administracyjny i kara administracyjna z perspektywy konstytucyjnej, [in:] Administratywizacja prawa karnego czy kryminalizacja prawa karnego (eds. *M. Bogusz*, *W. Zalewski*), Gdańsk 2021, pp. 28–29.

[22] ECtHR judgment of 11 June 2009, *Dubus S.A. v. France*, application no. 5242/04, HUDOC.

[23] ECtHR judgment of 10 February 1983, *Albert and Le Compte v. Belgium*, applications nos. 7299/75; 7496/76, HUDOC, § 29, cited in: *M.A. Nowicki*, Wokół Konwencji Europejskiej, Kraków 2002, p. 165.

[24] ECtHR judgment of 18 January 2001, *Chapman v. the United Kingdom*, application no. 27238/95, HUDOC, point 124.

Classifying a case as criminal implies increased procedural guarantees for the person who may be punished. Pursuant to Article 6(3) ECHR, everyone charged with a criminal offence has, among others, the right "to have adequate time and facilities for the preparation of his defence" (point b) "to defend himself in person or legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" (point c), and "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (point d).

Access to court regarding criminal offences is defined as guaranteeing everyone charged with such offence the right to have their case heard by an independent and impartial tribunal with basic procedural guarantees[25]. Furthermore, an oral and public hearing is one of the fundamental principles under Article 6(1) ECHR. It is of particular relevance in the case of a criminal offence before a court which fully complies with the requirements of Article 6 ECHR, and the complainant has the right to have his case "heard" and to submit evidence in his defence, to have the evidence against him heard, and to hear the testimony of witnesses[26]. However, the obligation to hold a hearing is not absolute. Where there are no issues of credibility or disputed facts that require a hearing, courts can fairly and reasonably decide the case on the basis of the parties' submissions and other written material[27].

§ 3. Procedures for imposing administrative monetary penalties under Polish law

A. Administrative procedures

The doctrine of administrative law uses the concept of "procedural guarantees", meaning provisions or groups of provisions designed to protect the interests of the parties to the proceedings, and to ensure that the rule of law is observed[28]. The process of applying the law by public administration bodies consists of legal institutions, and technical and procedural solutions that guarantee the correct standard of the

[25] *P. Hofmański*, Prawo do sądu w prawach karnych jako gwarancja ochrony praw człowieka, [in:] Podstawowe prawa jednostki i ich sądowa ochrona (ed. *L. Wiśniewski*), Warszawa 1997, p. 203.

[26] ECtHR judgment of 25 February 1997, *Findlay v. the United Kingdom*, application no. 22107/93, § 79.

[27] ECtHR judgments: of 21 February 1990, *Håkansson and Sturesson v. Sweden*, application no. 11855/85, § 66; of 12 November 2002, *Döry v. Sweden*, 28394/95, § 37; of 12 November 2002, *Lundevall v. Sweden*, application no. 38629/97, § 39 – available in HUDOC.

[28] *W. Chróścielewski*, *Z. Kmieciak*, *J.P. Tarno*, Czy nowy kodeks postępowania administracyjnego?, PiP 1993, No. 5, s. 64 *et seq.*

decision taken. These guarantees and principles include: allowing the citizen to participate in the resolution of their case; openness of the proceedings; impartiality of the determining authority; fairness of the proceedings; obligation to give reasons for decisions; possibility of appealing against a decision made; ensuring judicial review of the legality of decisions[29].

Taking into account the perspective of the subject matter of the proceedings – the imposition of an administrative monetary penalty – it should be noted that the proceedings are conducted in a cabinet manner, as the laws of the administrative proceedings do not provide for the obligatory settlement of the case at a hearing (Article 89 CAP). The administrative procedure regarding imposition of administrative monetary penalties is a two-instance procedure. An exception to the two-instance principle is stipulated for the proceedings before so-called regulatory authorities, which are single-instance proceedings. These are proceedings conducted by: the President of the Office of Competition and Consumer Protection[30], the President of the Energy Regulatory Office[31], the President of the Office of Electronic Communications[32], the President of the Office of Rail Transport[33]. There is also an exception for proceedings before the President of the Personal Data Protection Office[34].

B. Administrative judicial proceedings

The verification of fact finding of an administrative body is a follow-up verification, as it is not possible to conduct evidentiary proceedings before an administrative court which bases its control of legality on the evidence gathered in the proceedings before the administrative body issuing the contested decision (Article 133 § 1 APAC). Adjudicating on the basis of a case means that the administrative court considers the circumstances stemming from the administrative file. This implies a prohibition to go beyond the evidence gathered during the administrative proceedings. The only exception is the provision in Article 106 § 3 APAC which allows to take supplementary documentary evidence and make new findings of fact in these proceedings if two conditions are jointly met: it is necessary to clarify material doubts and it will not unduly extend the proceedings in the case. In the course of supplementary evidentiary proceedings, the administrative court may only make findings

[29] *Z. Kmieciak*, Postępowanie administracyjne w świetle standardów europejskich, Warszawa 1997, pp. 53–55; also see: *idem*, Ogólne zasady prawa i postępowania administracyjnego, Warszawa 2000, pp. 147–157.

[30] Article 81(1) of the Competition and Consumer Protection Act.

[31] Art. 30(2) of the Energy Law.

[32] Article 129(2) of the Postal Law.

[33] Article 13b(2) of the Rail Transport Act.

[34] Article 7(2) of the Protection of Personal Data Act.

intended to allow for the assessment of legality of the act or action. They cannot lead to a finding of fact in substitution for the authority or constitute a certain continuation of the evidentiary procedure conducted by the public administration[35]. The administrative court does not have sufficient tools to verify whether the penalty applied is fair. The decision rendered by the administrative court does not follow the hearing of the case in the sense accepted in the ordinary courts. The hearing of a case by an administrative court is an assessment of the legality of the action of a public administration body.

C. Judicial proceedings

Judicial proceedings in appeals against decisions of the regulatory authorities are governed by the provisions of the Code of Civil Procedure[36]. The authority's decision to impose an administrative monetary penalty may be appealed against to the Regional Court in Warsaw – Court of Competition and Consumer Protection. An appeal against a decision of the regulatory authority is lodged through that authority with the Court of Competition and Consumer Protection within 14 days from the date of rendering the decision. The Court of Competition and Consumer Protection rejects an appeal filed after the deadline, inadmissible for other reasons, and if the defects of the appeal have not been remedied within the prescribed deadline. The regulatory authority is obliged to immediately refer the appeal with the case file to the court. If the regulatory authority upholds the appeal in its entirety, it may, without referring the file to the court, issue a new decision revoking or amending its decision, of which it will immediately notify the party by sending it the new decision against which the party is appealing. If an appeal is lodged against a decision of the regulatory authority, the Court of Competition and Consumer Protection may, at the request of the party that lodged the appeal, suspend the enforcement of the decision pending the outcome of the case. The Court of Competition and Consumer Protection dismisses the appeal against the decision of the regulatory authority if there are no grounds to uphold it. If the appeal is upheld, the Court of Competition and Consumer Protection revokes or amends the contested decision in whole or in part, and rules on the merits of the case. It is accepted in the case-law of the Supreme Court that severe monetary penalties imposed on entrepreneurs by the regulatory authorities have the nature of criminal sanctions within the meaning of the ECHR. Consequently, to the extent that a monetary penalty is imposed on the entrepreneur, the

[35] *B. Dauter*, [in:] *B. Dauter*, *A. Kabat*, *M. Niezgódka-Medek*, Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Warszawa 2016, p. 774.

[36] Article 479^{28}–479^{88} CCP.

rules for verifying the correctness of the regulatory authority's decision should correspond to the requirements analogous to those in force in a criminal case[37].

A merit-based judgment rendered by the court may be appealed against to the court of second instance in accordance with the provisions of Section V of the Code of Civil Procedure.

§ 4. Assessment of the regulation on administrative monetary penalties in the case-law of the Constitutional Tribunal

In its case-law, the Constitutional Tribunal indicates that the determination of the nature of a particular legal institution is not served by its very name, but by the content that the legislator attaches to it[38]. In repressive proceedings, it is not so much the "name" of the proceedings in question that is crucial, but whether, due to the nature of the legal norms governing the proceedings, there is a need to apply the constitutional guarantees on criminal liability to them[39]. In its judgments, the Constitutional Tribunal has expressed the view that Chapter II of the Constitution of the Republic of Poland applies not only in criminal proceedings *sensu stricto*[40]. These guarantees should apply to all repressive proceedings, *i.e.*, proceedings which aim to subject a citizen to some form of punishment or sanction[41]. This means that the provisions of Article 42(1) of the Constitution may apply not only to criminal liability *sensu stricto*, but also to other penalties of a repressive nature imposed on individuals[42].

On the issue of jurisdiction, the Constitutional Tribunal noted that the provisions of the Constitution of the Republic of Poland dictate that the jurisdiction of individual courts should be shaped in such a way that the type of cases heard by them is adequate to the procedure applied[43].

In its case-law on monetary penalties imposed by public administration bodies, the Constitutional Tribunal refers to the concept of "repressive nature" without defining it. According to the Constitutional Tribunal, it is not the repressive nature of the fine *per se*, but the excessively or drastically repressive nature of the monetary fine

[37] Supreme Court judgment of 14 April 2010, III SK 1/10, Legalis; see also *M. Bernatt*, Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPC – glosa do wyroku SN z 14.4.2010 r., EPS 2011, No. 6, *passim*.

[38] TK judgment of 10 December 2002, P 6/02, OTK-A 2002, No. 7, item 91.

[39] TK judgment of 3 November 2004, K 18/03, Legalis.

[40] TK judgments: of 8 December 1998, K 41/97; of 27 February 2001, K 22/00; of 19 March 2007, K 47/05 – available in Legalis.

[41] TK judgments: of 8 December 1998, K 41/97; of 19 March 2007, K 47/05; of 28 November 2007, K 39/07; of 17 February 2009, SK 10/07, and of 12 May 2009, P 66/07 – available in Legalis.

[42] TK judgments: of 26 November 2003, SK 22/02, OTK-A 2003, No. 9, item 97; of 3 November 2004, K 18/03.

[43] TK judgment of 10 June 2008, SK 17/07, OTK-A 2008, No. 5, item 78.

that may justify it being considered a criminal sanction in nature[44]. It has been noted in the doctrine that this criterion does not actually clarify anything, since recognising that an administrative penalty has a repressive nature does not mean that it is included among the criminal sanctions[45]. The Court uses the term excessive or drastic repressiveness of the monetary penalty. The case-law of the Constitutional Tribunal defines repressiveness as excessive punishment[46].

§ 5. Concluding remarks

The doctrine indicates that the measure for assessing the extent to which the standard of the right to a fair trial is ensured is the efficiency of the administration of justice, defined as the final determination of the legal position of the parties to a dispute[47]. Violations of the law subject to a criminal sanction should be examined by a court with full jurisdiction. This condition is not met by the Polish administrative courts. Pursuant to Article 184 of the Constitution, these courts are established to examine the legality of the action of the public administration. Following the current legislation, the administration of justice by administrative courts is an external and independent control of the activities of the public administration and not the adjudication of an administrative case on its merits. The predominant view in the doctrine is that administrative courts are not called upon to engage in the activity of administrative concretisation of the law, and therefore cannot rule on the merits in the place of public administration bodies. Assigning an administrative court with the competence to concretise legal provisions, in extra-jurisdictional form, falls into contradiction with the concept of judicial review of public administration[48]. The concept of review referred to in the provision of Article 184 of the Constitution is defined as a secondary action of the administrative judiciary, which is to assess the action of the administration by means provided for by law, and not to replace it in the performance of its tasks. The administrative court's control of the imposition of administrative monetary penalties does not meet the standard of the right to a fair trial in criminal matters within the meaning of Article 6 ECHR. This does not mean that the Polish model of imposing administrative monetary penalties by administrative authorities through administrative decisions and control by administrative courts requires adaptation changes to the Convention standard. As already discussed determining that

[44] TK judgment of 29 April 1998, K 17/97, OTK ZU 1998, No. 3, item 30.

[45] *A. Wróbel*, Odpowiedzialność administracyjna w orzecznictwie Trybunału Konstytucyjnego (na przykładzie administracyjnych kar pieniężnych), EPS 2014, No. 9, 35.

[46] Judgment of the Constitutional Tribunal of 12 April 2011, P 90/08, Legalis.

[47] *A. Skoczylas*, Modele uprawnień orzeczniczych sądów administracyjnych w Europie, PiP 2012, No. 10, p. 2.

[48] *M. Kamiński*, O istocie pojęcia sprawy sądowoadministracyjnej, PPP 2009, No. 10, pp. 6–27.

a case is criminal in nature is decided by the criteria formulated in *Engel v. Netherlands*, *i.e.*, the severity of the penalty and the nature of the violation.

The criminal nature of a monetary penalty imposed by a public administration body may be evidenced by its considerable severity according to the upper limits of the threat provided for by law. It appears that an indicator of the criminal nature of the monetary penalty imposed by the authority may be the comparable or even higher threat of a monetary penalty, as defined in the law establishing the administrative monetary penalty, from the maximum amount of the penalty imposed under the provisions of the Criminal Code. Following the current legislation, pursuant to Article 33 CC, a maximum fine of PLN 1,080,000 may be imposed. In the legal system, examples can be found of regulations according to which the threat of the upper limit of the fine is defined in amounts close to the maximum fine[49], as well as constructions of the fine which make its amount dependent on a percentage of the entrepreneur's annual revenue generated in the previous financial year[50], which means that the imposed fine may be higher than the maximum amount defined in Article 33 CC. An example would be a fine imposed by administrative decision by the President of the Personal Data Protection Office[51]. The decision of the President of the Personal Data Protection Office may be appealed against to an administrative court. Thus, doubt may arise as to whether the case is being heard by a court within the meaning of Article 6 ECHR, since the administrative court's review of that authority's findings of fact is a follow-up verification. An analogy would have to be made with regard to decisions on fines imposed by the KNF Board[52]. Attention would have to be paid to the constitutional position of the two adjudicating bodies, which cannot be considered a court in the functional sense. According to ECtHR case-law, an independent and impartial court is an entity that is independent, in particular from the executive, appointed for a sufficiently long term of office, and immune to political pressure[53]. Undertaking other administrative activities in addition to adjudicatory activities does not prevent an authority from being considered a court for

[49] For example, Article 315f(2) of the Environmental Protection Law stipulates: If the entity or body referred to in Article 118(3) does not provide the Chief Inspector of Environmental Protection with the strategic noise map, updated identification data referred to in Article 117a(8) and data from the strategic noise maps referred to in Article 118a(2) within the time limit referred to in Article 118(4), it shall be subject to a financial penalty of PLN 500 000.

[50] For example, Article 66(2) of the Rail Transport Act.

[51] In the case decided by the judgment. NSA of 9 February 2023, III OSK 3945/21, Legalis, the administrative monetary penalty imposed by the President of the Personal Data Protection Office amounted to PLN 2,800,000.

[52] See NSA judgment of 13 June 2025, II GSK 103/24, Legalis – the subject of the complaint was a monetary penalty imposed by the KNF Board in the amount of PLN 20,000,000.

[53] ECtHR judgment of 1 October 1982, *Piersack v. Belgium*, applications no. 8692/79, HUDOC, § 27.

the purposes of Article 6 ECHR[54]. In *Findlay v. the United Kingdom*, in addressing the requirement of the independence of the court, the Court took into account the following criteria: the manner in which its members were appointed; the duration of their term of office; the existence of safeguards against external pressure; and the perception in the public mind of whether such a body gives the impression of independence[55]. In my opinion, the current legal regulation does not allow to adopt the position that the President of the Personal Data Protection Office is, in a functional sense, a court that corresponds to the requirements of Article 6 ECHR. According to Act on the Protection of Personal Data, the term of office of the President of the Personal Data Protection Office is four years. The same person may not be President of the Office for more than two terms (Article 34(6) and (7)). The President's term of office is therefore relatively short, moreover, the mechanism of re-election (appointment for another term of office) raises significant doubt about the President's independence. A person running for another term of office may be susceptible to various influences and pressures from the political class that decides on re-election, as the President of Personal Data Protection Office is appointed by the Sejm with the consent of the Senate (Article 34(3)). Neither can the KNF Board be considered a court in the functional sense, as its members include the competent ministers or their representatives (Article 5(2) of the Act on Financial Market Supervision). Undoubtedly, a board formed this way does not meet the conditions of independence set out in *Findlay v. United Kingdom*, *i.e.*, the manner in which members are appointed and the existence of safeguards against external pressure.

As already mentioned, the criminal nature of the case may also be evidenced by the nature of the violation subject to penalty. For many years, a conversion phenomenon has been observed in Polish law consisting in legislative changes through which, by decision of the legislator, legal liability is changed from criminal to administrative legal liability, subject to administrative monetary penalty[56]. This may be relevant to the classification of a case as criminal within the meaning of Article 6 ECHR. Since the national legislation originally considered a specific violation of the law to be a criminal act (a criminal offence), and no rational arguments were put forward in the conversion process to change the construction of legal liability, this circumstance may support the recognition of such a "converted" regulation as a criminal case, within the meaning of Article 6 ECHR.

[54] ECtHR judgment of 28 June 1984, *Cambell i Fell v. the United Kingdom*, application nos. 7819/77, 7878/77, §§ 33 and 81, HUDOC.

[55] ECtHR judgment of 25 February 1997, *Findlay v. the United Kingdom*, § 73.

[56] See also: *D. Danecka*, Konwersja odpowiedzialności karnej w administracyjną w prawie polskim, Warszawa 2018, *passim*.

Abstract

Recognition of the imposed financial penalty as a criminal case within the meaning of Article 6 ECHR implies, according to the case-law of the ECHR, the application of procedural guarantees towards the punished entity, which is appropriate for a criminal case. The aim of the article is to present the criteria for distinguishing a criminal case according to the ECHR and the procedural standard resulting from the case-law of this Court in criminal cases, and then to compare these criteria and the standard with the Polish regulation on the application of administrative financial penalties.

Krzysztof Winiarski*

The Institution of Third-Party Tax Liability in View of the Right to the Defence and Protection of an Individual's Property Rights from the Perspective of the European Convention on Human Rights

§ 1. Introductory remarks

The provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantee the implementation of key rights of individuals, including such fundamental ones as the right of the defence, derived from Article 6 ECHR, which concerns the right to a fair trial, as well as Article 5 ECHR, which regulates issues concerning the right to liberty and security of person. Also important are the guarantees relating to the protection of an individual's property rights, which arise from Article 1 of Protocol No. 1 to the ECHR. Although the Convention does not recognise tax-related disputes as "civil matters", and therefore does not directly refer to the state–individual relationship in the field of public levies, it has an indirect influence on tax matters. The mentioned provisions of the Convention, as well as numerous judgments of the European Court of Human Rights, give rise to the obligation for state authorities to observe the principles of fair trial and to respect civil rights.

The existing jurisprudence of Polish administrative courts shows that, in cases concerning the liability of management board members for the tax arrears of companies they manage, the Convention standards relating to the defence of rights and property are not fully respected. It must be acknowledged, however, that the approach taken by administrative courts and tax authorities is affected by the wording of substantive provisions of law, most notably Article 116 TO. Doubts arise

* Judge of the Supreme Administrative Court of Poland, President of the III Division of the Financial Chamber, dr; ORCID: 0000-0002-2213-9973.

regarding the automatic imposition of liability on former management board members for tax arrears that arose by operation of law during the period when they held these positions. Particularly controversial is the fact that the tax situation of persons who knowingly participated in tax fraud is treated equally to the position of former management board members who, several years after leaving their office, are assigned errors in tax settlements resulting from an interpretation of a provision that was subsequently challenged by a tax authority. Imposing on such individuals tax liabilities owed by the company, often amounting to many millions, may raise concerns, especially given that the former management board member did not participate in the tax proceedings conducted against the company, nor in the enforcement proceedings aimed at recovering the tax due from the company. Therefore, they were unable to effectively defend their rights at the stage of the assessment and enforcement proceedings conducted against the company.

A change in the existing practice of administrative courts, and especially of tax authorities, may result not so much from the position expressed in numerous ECtHR judgments, but from the one highlighted in two judgments of the Court of Justice of the European Union (CJEU): of 27 February 2025 in the *Adjak* case and of 30 April 2025 in the *Genzyński*[1] case. However, implementing the directives stemming from these judgments, particularly from *Adjak*, will not be easy and undoubtedly poses a significant challenge for administrative courts and tax authorities, who will have to address this issue already in the upcoming months.

This study is an attempt to outline the legal situation of taxpayers shaped by the emergence of the said CJEU judgments in the legal system, and to answer the question of how these judgments should be applied so as, on the one hand, to ensure the individual's right to defence and to a fair trial, and consequently the protection of property rights, and on the other hand, not to undermine clear legislative statements, including those concerning the fundamental principles of Polish administrative court procedure.

§ 2. The right to defence and to a fair trial, and the protection of property rights, expressed in the Convention

According to the first sentence of Article 6(1) ECHR, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The subsequent parts of Article 6 ECHR concern the right of access to an independent and impartial court in criminal and civil matters, the guarantee of a fair hearing within a reasonable time, the presumption of innocence, and the standards that must characterise criminal proceedings. This provision should be interpreted in conjunction with Article 5(1) ECHR, in particular its first sentence: "Everyone has the right to liberty and security of person".

Article 6 ECHR is very often invoked in ECtHR judgments, together with Article 1 of Protocol No. 1. The latter provision concerns the guarantees of the protection of property rights. It stipulates that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

As already noted, the provisions of the Convention guaranteeing the right of the defence within the framework of a fair trial and the protection of an individual's property rights do not directly translate into ensuring these rights to the taxpayer in administrative court proceedings or in tax proceedings conducted by tax authorities. For instance, in its judgment of 12 July 2001 in *Ferazzini v. Italy*[1], the ECtHR indicated that Article 1 of Protocol No. 1, concerning the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes. The Court additionally expressed the view that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer. Consequently, the principle that the autonomous concepts contained in the Convention must be interpreted in consideration of present-day conditions in democratic societies does not allow the Court to interpret Article 6(1) ECHR as if the adjective "civil" was not present in its text[1].

It is worth noting that the discussed Convention's guarantees of a fair trial and the protection of property rights have been incorporated into the Constitution of the Republic of Poland. Pursuant to Article 45 of the Constitution, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

The right of the defence is also highlighted in EU law and in the jurisprudence of the CJEU[2]. The Court has repeatedly emphasised that this right includes the party's right to actively participate in the proceedings and to present its position not only before a court, but also before public administrative authorities, including tax authorities.

These considerations lead to the conclusion that the regulations on the right to defence and to a fair trial contained in the ECHR, the Constitution of the Republic of Poland, and EU law form a coherent systemic entirety which ensures, in a consistent and non-contradictory manner, the most important rights of the individual, including the taxpayer. The Convention provisions and the ECtHR jurisprudence developed on their basis should constitute an essential guideline for administrative

[1] See: *M.A. Nowicki*, Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004, Kraków 2005, pp. 562–565.

[2] The Convention-based solutions concerning the right to a fair trial and the right of the defence are referenced in Articles 47 and 48 CFR.

courts and tax authorities, defining the limits of their influence on the fundamental rights of the individual guaranteed by the Convention.

§ 3. The essence of management board members' liability for a company's arrears

As a rule, a taxpayer is responsible for the tax arrears that they have allowed to arise. In Chapter 15 of Title III of the Tax Ordinance Act (TO), the legislator introduced the institution of third-party liability for tax arrears of a taxpayer who has failed to fulfil their tax obligation. The provisions contained in that chapter constitute an exception to the general rule that tax liability is borne by the taxpayer, and therefore, they must be applied with great caution and with respect for the legitimate rights of the third party. Importantly, a decision imposing liability on a third party does not extinguish the tax obligation on the part of the taxpayer.

There is generally no controversy regarding the exercise of the party's right to a fair trial and the protection of their property rights where the tax arrears arise from a tax return submitted by that person on behalf of the company, or where that person continuously serves as a management board member both in the period when the tax arrears arose by operation of law and during the proceedings conducted under Article 116 TO. The main problems arise only when proceedings aimed at determining liability for the company's tax arrears are initiated against a former management board member. To date, the practice of tax authorities and administrative courts has not differentiated between the tax situation of "current" and former management board members, which has been criticised by the CJEU in the *Adjak* judgment and, to some extent, in the *Genzyński* judgment. To answer the question of why this has occurred, and why the Court considered that the practical application of Article 116 TO may infringe a taxpayer's right to defend their legitimate interests, it is necessary first to outline the legal considerations that have thus far guided (in most cases) the tax authorities and administrative courts.

The established judicial practice has been based on the assumption that, in light of Article 133(1) TO [3], a former management board member is not a party to the tax proceedings, and therefore is not entitled to request that the authority initiate proceedings to annul the decision determining the company's tax liability[4]. The view that a management board member of a company is not a party to the tax proceedings

[3] Article 133(1) TO sets out the rule stating that "a party to the tax proceedings is a taxpayer, a tax remitter or a tax collector, or their legal successor, as well as the third parties referred to in Articles 110–117c which, due to their legal interest, demand the activity of the tax authority to which the activity of the tax authority refers, or whose legal interest the activity of the tax authority relates to".

[4] See, *e.g.* NSA judgment of 20 October 2021, I FSK 1632/21, CBOSA.

concerning that company should be regarded as well-established in the jurisprudence of administrative courts[5].

Such a position results in the exclusion of the former management board member's right to participate in the tax proceedings conducted against the company with respect to the tax obligation that arose while they held that position, as well as the impossibility to review the evidence gathered by the tax authorities in such proceedings, to submit evidentiary motions, or to present their own arguments regarding the interpretation of the substantive law provisions applicable to the case. That person is also not a party to the enforcement proceedings initiated following the issuance of the tax decision against the company. This naturally raises the question of whether, in such a case, the former management board member had any chance to effectively defend their rights in subsequent proceedings initiated under Article 116 TO. This question is particularly relevant given that many proceedings concerning the assessment of a company's tax liability conclude in administrative courts and end with an unappealable judgment by a regional administrative court or the Supreme Administrative Court of Poland. Meanwhile, according to Article 170 APAC, "an unappealable judgment binds not only the parties and the court that has issued it but also other courts and State authorities, and, in cases provided by law, other persons". In the light of uniform jurisprudence of Polish administrative courts, in proceedings conducted under Article 116 TO, it is impossible to examine the merits of decisions issued against a company in the tax assessment proceedings. It is also unreasonable to conduct further evidentiary proceedings, such as determining whether the company exercised due diligence in business liaisons within the challenged transactions[6]. As a result, within proceedings conducted under Article 116 TO, it is not possible to adopt any findings of fact or legal classifications different from those established in the proceedings determining the company's tax liability, concluded with an unappealable judgment.

Similar doubts arise regarding the definition of the exonerative fact (a fact that excludes a management board member's liability for the company's tax debts), namely, the absence of fault in failing to declare bankruptcy in due time. In the resolution passed by seven judges of the Supreme Administrative Court in Poland on 10 August 2009 (II FPS 3/09), it was stated that failure to pay a tax on time and in the proper (statutorily prescribed) amount "justifies the issuance of a decision by the tax authority pursuant to Article 21(3) TO. However, this does not change the assessment

[5] See NSA judgments: of 03 February 2006, I FSK 504/05; 20 November 2020, I FSK 1750/20; 20 October 2021, I FSK 1632/21; and 12 April 2023, I FSK 1639/18 – available in CBOSA.

[6] See NSA judgments: of 01 July 2021, III FSK 3581/21; and 24 September 2024, III FSK 108/24 – available in CBOSA.

that the liability had already existed before and should have been fulfilled within the deadlines provided for by law".

On the other hand, it should be noted that the fundamental condition for declaring bankruptcy is the existence of "enforceable financial obligations"[7]. In the jurisprudence of the Polish Supreme Court and in the literature, it has been observed that the non-performance of the obligations referred to in Article 11(1) of the Bankruptcy Law should relate to "enforceable" obligations. The assessment of whether a claim is enforceable should be carried out in accordance with the provisions governing the nature of such claims. Enforceability, in turn, means a state where the creditor has the legal possibility to demand satisfaction of a claim owed to them[8]. Applying these observations to tax liabilities, it is beyond doubt that they are financial in nature. What requires clarification, however, is the concept of "enforceable" tax claims. In the literature, a distinction is made between the triggering event (*i.e.*, an occurrence that satisfies the conditions for the tax to be enforceable, which are generally defined as the moment of concluding the taxable transaction) and the actual enforceability of the tax, which arises at the moment when the tax authorities become entitled to demand payment, regardless of any possible deferral of the payment[9]. It is also emphasised that an enforceable tax is one that may be pursued through enforcement proceedings. The consequence of a taxpayer's failure to fulfil a tax obligation, when the tax liability arises by operation of law, is the issuance by the tax authority of a decision determining the amount of the tax liability (Article 21(3) TO). Such a decision, of course, has a declaratory nature. From Article 21(2) TO, read in conjunction with Article 21(3), we can derive the principle of the presumption of accuracy of the tax amount indicated in the submitted tax return, until it is contested in a decision issued under the latter provision. This may lead to the conclusion that, as long as the tax authority has not issued a decision determining the amount of tax liability higher than the amount declared in the tax return, the declared value should be accepted as accurate[10]. It is also worth citing the position expressed in the unappealable judgment of the Regional Administrative Court in Gliwice of 26 October 2004 (I SA/Ka

[7] According to Article 10 of the Bankruptcy Law, bankruptcy shall be declared with respect to a debtor who has become insolvent. In accordance with Article 11(1) of that Law, a debtor shall be deemed insolvent when he fails to perform his enforceable financial obligations.

[8] See: the reasoning in the NSA(7) judgment of 12 February 1991, III CRN 500/90, OSNCP 1992, No. 7–8, item 137; *R. Adamus*, [in:] Prawo upadłościowe i naprawcze. Komentarz (ed. *A.J. Witosz, A. Witosz*), Lex 2014, Article 11.

[9] See: *B. Gryziak*, Powstanie obowiązku podatkowego, wymagalność podatku oraz powstanie zobowiązania podatkowego w VAT w kontekście sprawy C-855/19 (analiza porównawcza), Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych, 2021, Vol. 7, No. 299, DOI: 10.5604/01.3001.0015.0501.

[10] See: *K. Winiarski, K. Stanik,* Odpowiedzialność podatkowa członków zarządów spółek kapitałowych, PPP, 2007, No. 4, p. 20.

2307/03)[11], which states that only such a tax liability should be considered enforceable for which the creditor may demand payment.

Regardless of the views presented above, the prevailing position is that if a decision imposing liability on a management board member concerns arrears in a tax that arises in the manner specified in Article 21(1)(1) TO, the date on which these arrears are determined is irrelevant for exempting the board member from liability for the company's tax debts[12] [13].

§ 4. CJEU judgments in the *Adjak* and *Genzyński* cases and a new opening of the topic

Meanwhile, the practice of administrative courts and tax authorities must now confront a new legal reality arising from the said CJEU judgments. These judgments directly challenge the established case-law in aspects such as the relationship between proceedings conducted under Article 116 TO and earlier tax assessment proceedings concerning a company's tax liability, as well as the way to avoid liability, all from the perspective of ensuring the right of the defence and, consequently, guaranteeing the protection of property rights for management board members of companies. From these judgments, particularly in *Adjak*, it follows that the domestic model for proceedings concerning the liability of a board member does not provide adequate procedural guarantees for board members that would be adequate to defend their rights.

In the judgment of 27 February 2025 (*Adjak*[6]), the Court held that "Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 325(1) TFEU, the rights of the defence and the principle of proportionality, must be interpreted as not precluding national legislation and practice under which a third party who may be held jointly and severally liable for the tax debt of a legal person cannot be a party to the proceedings brought against that legal person to establish the tax debt of that legal person, **without prejudice to the need for that third party, during any joint and several liability proceedings brought against that third party, to be able effectively to call into question the findings of fact and the legal classifications made by the tax authority in the context of the first set of proceedings, and to have access to the file of the tax authority, in accordance with the rights of that person or of**

[11] The cited thesis has been repeated in the NSA judgment of 10 February 2006, II FSK 239/05, CBOSA.

[12] See: NSA judgment of 15 February 2006, I FSK 114/04, CBOSA.

[13] This judgment is the consequence of the following request for a preliminary ruling referred by the WSA in Wrocław by its decision of 25 January 2024 (I SA/Wr 4/23), CBOSA.

other third parties"[14] [15]. The CJEU judgment indicates that a third party jointly and severally responsible for the tax liabilities of a legal person does not have to be a party to the proceedings brought against that legal person. However, such a third party should have the opportunity to call into question the findings and legal classifications from the first proceeding. The goal is to ensure that proceedings against the legal person comply with the principles of legality, while allowing third parties (often former members of a company's management board) to contest the formal grounds for liability and the findings regarding the company's obligations.

In the judgment of 30 April 2025, *Genzyński*, the Court held that "Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2018/1695 of 6 November 2018, read in conjunction with Article 325 TFEU, as well as the right to property and the principles of equal treatment, proportionality and legal certainty, must be interpreted as not precluding a national system under which:

– a member or former member of the board of directors of a company with a value added tax debt is held jointly and severally liable with that company for tax arrears arising during his or her term of office;
– that liability is limited to these tax arrears;
– **exemption from that liability depends, in particular, on proof adduced by the member or former member of the board of directors that an application for a declaration of insolvency in respect of that company has been filed in due time or that the failure to file that application is not due to fault on his or her part, in so far as that member or former member, in order to demonstrate that there was no such fault, may validly claim that he or she exercised all due diligence in the conduct of the affairs of the company concerned, it being specified that, for that purpose, that member or former member cannot merely claim that that company had the public exchequer as its sole creditor when its permanent insolvency was established**"[16].

The *Genzyński* judgment significantly expands the rights of a management board member to use the exonerative fact releasing them from liability, compared to the previously dominant practice of administrative courts and tax authorities. According to the Court, board members, having the right of the defence, must be able to demonstrate that they acted with due diligence and in good faith.

[14] The fragments of the judgment's summary have been marked in bold by the author of this paper.

[15] The judgment was issued following three requests referred by the WSA in Wrocław by its decision of 31 January 2024, I SA/Wr 966/22, CBOSA.

[16] The fragments of the judgment's summary have been marked in bold by the author of this paper.

§ 5. Final remarks

As already noted, the CJEU judgments in *Adjak* and *Genzyński* should lead to a change in the practice of administrative courts and tax authorities. The desired objectives outlined in both judgments are fairly clear. In general, the objective is to ensure effective defence for a management board member, in the broad sense of that term, as understood both in the European Convention on Human Rights and in the discussed regulations of the EU and the Polish Constitution. However, the essential question is how to extract from these judgments specific interpretative directives that, considering the existing national legislative solutions, could be translated into the practical application of law.

It seems that the "implementation" of the *Genzyński* judgment should not cause any significant disruptions in the operation of courts or authorities. Determining the fault of a management board member for failing to file for bankruptcy in due time should be preceded by a careful assessment of when the board member, acting with due diligence and properly managing the company's affairs, could have acquired knowledge of the company's assets and financial situation, justifying the initiation of bankruptcy proceedings. The issues of fault and due diligence have been addressed in numerous rulings of both the CJEU and domestic courts, and therefore it is justified to refer the interpretative concepts developed in this context to the basis for adjudicating on a board member's joint and several liability with the company. It seems that the said guarantees of effective defence should not apply to individuals who consciously commit tax fraud or act in conditions of abuse of law.

Applying the directives arising from the *Adjak* judgment will be far more problematic. The most controversial aspect is the possibility, provided in that judgment, to call into question "the findings of fact and the legal classifications" made previously in a separate proceeding. Assuming that the *Adjak* judgment provides for the possibility to challenge a tax liability determined in a separate proceeding, it should be noted that the current national legal system does not contain a positive regulation allowing for such a possibility. In fact, the entire system of tax and administrative court procedure is subordinated to the rules set out in the previously discussed Article 128 TO and Article 170 APAC, whose binding force has not been contested. This raises the question of what the consequences may be when the findings of fact and the legal classifications from a previously conducted tax assessment proceeding concerning a company's tax liability are challenged: 1) for the management board member who challenges the findings from the assessment made in a separate proceeding conducted under Article 116 TO; 2) for the other board members who did not show such activity; 3) for the company (taxpayer).

Assuming the option that exemption from liability for the company's tax debts (in full or in part) applies only to the board member(s) who successfully challenged the

findings of fact and the legal classifications of the assessment decision would result in multiple different rulings issued in identical cases. It also raises the question of how the right of recourse would operate for a board member who fulfilled the obligation in full and seeks reimbursement from other board members based on their joint and several liability. We could think about whether such a situation will not give rise to a conflict with principles such as justice or the rule of law.

In its judgment of 27 February 2025, the CJEU held that EU regulations do not preclude national legislation and practice under which a third party (who may be held jointly and severally liable for the tax debt of a company) cannot be a party to the proceedings brought against that company; however, the Court did not rule out such a possibility. Ensuring the participation of a former board member as a party in every tax assessment proceeding conducted against a company, given that only a small fraction of such cases generate proceedings concerning their liability for the company's unpaid tax debts, would also be considered impractical. This would undoubtedly extend tax proceedings in time. So how should we understand the right of the defence, defined in the *Adjak* judgment as the ability to "call into question the findings of fact and the legal classifications made in the first set of proceedings"? The answer is provided by one of the recent judgments of the Polish Supreme Administrative Court of 13 August 2025 (III FSK 656/25), which emphasised that the phrase "to be able effectively to call into question the findings of fact and the legal classifications made by the tax authority in the context of the first set of proceedings", as used in the CJEU judgment of 27 February 2025, C-277/24 (ECLI:EU:C:2025:130), means that when challenging the amount of a company's tax debt under the proceedings provided for in Article 116 TO, a former board member – in order to reduce or eliminate their liability for that debt – must demonstrate the existence of evidence or factual circumstances that were previously unknown to the tax authority or overlooked by it in the proceedings conducted against the company; this has led to: 1) an incorrect legal classification or erroneous interpretation of the substantive law provisions forming the basis for the decision determining the company's tax liability; or 2) an incorrect assessment of the existence or non-existence of the conditions listed in Article 116 TO for determining the liability of a third party.

The former board member may also, in exercising their right of the defence, rely on errors made by the authority in legal classification or interpretation of the substantive law provisions applicable in the tax assessment proceedings conducted against the company, taking into account the factual circumstances revealed in those proceedings, unless the decision determining the amount of tax liability, in the scope of the substantive law provisions applied by the tax authority, underwent a substantive review by an administrative court.

Abstract

The provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantee the ability to exercise key individual rights, including fundamental rights such as the right of defence, derived from Article 6 ECHR which concerns the right to a fair trial, as well as Article 5 ECHR which regulates the rights to liberty and security of person. The guarantees concerning the protection of an individual's property rights derived from Article 1 of Protocol No. 1 to the ECHR are also of great importance. Although the Convention does not recognise tax disputes as "civil matters" and therefore does not directly refer to the State-individual relationship in tax law, it does indirectly affect tax matters. The jurisprudence practice of Polish administrative courts to date has shown that in cases concerning the liability of management board members for the tax arrears of the companies they manage, the conventional standards have not been fully respected. Automatically adjudicating on the liability of former management board members for the tax arrears incurred by the operation of law raises doubts. A change in the current practice of administrative courts, and notably all tax authorities, may come not so much from the stance presented in numerous ECHR judgments, but rather from two rulings of the Court of Justice of the European Union: from February 27, 2025, in the case of C-277/24 (*Adjak*) and from 30 April 2025 in the case of C-278/24 (*Genzyński*). However, the implementation of the directives resulting from these judgments, and particularly the one in the *Adjak* case, will not be easy and will certainly pose a huge challenge for administrative courts and tax authorities. This study aims to outline the legal situation of taxpayers following the CJEU judgments referred to above, as well as to answer the question of how to apply those rulings to ensure, on the one hand, the right of individuals to defence and a fair trial, and consequently the protection of property rights, and on the other hand, not to undermine clear legislative statements including those concerning the fundamental principles of Polish administrative court procedure.

Bartosz Wojciechowski*

Between Scylla and Charybdis in the Exercise of the Rights of LGBTQ+ Persons in the Case-Law of the European Court of Human Rights and the Supreme Administrative Court of Poland

§ 1. Introduction

The metaphor of Scylla and Charybdis perfectly captures the situation of the Supreme Administrative Court of Poland, which found itself in the extremely awkward situation of choosing between the excess of the postulated judicial freedom and the insufficiency of the limitation of the judicial right arising from the system of state law in cases concerning the rights of LGBTQ+ persons. In this category of cases, we are still faced with the problem of being in a situation where the court is faced with two equally adverse choices, each of which carries risks and negative consequences.

In the continental system, the basis of the judge's action should be to seek to realise the purpose of the Act, with the purpose and thought of the Act being taken into account in a variety of ways. This means that a judge, even when exercising his or her discretion, must take into account the ideas underlying the legal system in question and, in particular, must take into account the direction of the proceedings and adjudication as outlined by the applicable law. Of course, being oriented towards the teleological aspect of interpretation does not necessarily mean seeking to find the unambiguous purpose of a law. On the contrary, more often than not, it is a matter of current purpose, which derives from a functional interpretation that is, after all, set in a specific historical, social, cultural and economic moment. The purpose of a law is not in itself the subject of interpretation, but is the result of interpretative procedures

* Judge of the Supreme Administrative Court of Poland, prof. dr hab., University of Lodz; ORCID: 0000-0002-4271-7056.

that take into account formal objective elements, whether internal or external to the legal norm, *i.e.* a legal norm that meets the procedural and competence requirements that condition its universally binding character.

The most important objective, which should be reflected in every judicial decision, is to find the legally correct solution for each specific case brought before the judge for decision. It is to take into account at the same time, when judging a particular issue, the purpose of the legal norm in question and the general objectives of the law established by the legislator. A judge has such an obligation both when deciding cases in which he or she has been given a certain amount of discretion and when deciding cases in which he or she has not been given any discretion. In other words, the judge's activity, which expresses itself in the possibility of making a choice from among a range of decision alternatives, should be directed towards realising the objectives of the law in a particular case and keeping in mind the values expressed in the law in question as guidelines for a correct decision. The term "purpose of a legal text" (law, legal norm) is abbreviated. It is important to state that a purpose can only be attributed to a subject equipped with consciousness and will. It is fundamental to identify the entity whose purpose is to be considered as the purpose of the legal text. In some simplification, it can be said that, strictly speaking, what may be at stake here are only the objectives of the legislator or the group whose "will" the law is supposed to express.

The judge's freedom has been constitutionally guaranteed, but at the same time it has been limited by the Constitution and laws, and in particular by the content of the rules derived from them. These dilemmas are faced by the judges of the NSA who rule on the rights of LGBTQ+ persons. In these, *inter alia*, cases they have to resolve the conflict of various goals, values, interests and principles arising from Polish laws, the Constitution of the Republic of Poland, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights.

The judges of the NSA seem to be fully aware that the process of applying the law in so-called difficult cases boils down to a model of balancing various purposeful arguments, principles, goods or values, which is undoubtedly not a straightforward and unquestionable process. The conflict of conflicting principles in the argumentation process outlines the need to understand both the law-making process and its application as a model involving a balancing of relevant principles and objectives. The balancing of principles here involves a reasonable determination of the priority relationship between conflicting principles. Such a clash of principles or objectives is due to the fact that the various principles in a particular case, a consensus, cannot be fulfilled in a complete manner at the same time. The most general rule that applies for balancing principles is: "The higher the degree of non-fulfilment or depletion of

the operation of one principle, the greater must be the importance of another principle in a given case"[1].

§ 2. Jurisprudence on the rights of LGBTQ+ persons in the jurisprudence of the NSA

In this context, the jurisprudence of ECtHR, which has focused on emphasising the right to gender identity and sexual orientation, plays a particular role in this argumentative dispute[2]. These rulings are, for obvious reasons, referred to by the judges of the NSA and the discourse between the two courts in this regard creates some tension.

The Strasbourg Court states that gender identity is a determinant (constitutive element) of personal identity. It also points to the right to self-determination, the right to shape and develop one's own personality or to decide for oneself to live according to one's own will as the rights necessary to create one's own identity[3].

The NSA has dealt with the rights of LGBTQ+ persons primarily in cases concerning citizenship and the transcription of birth certificates of children born and raised by same-sex parents, where at least one of the parents has Polish citizenship but their union entered into abroad has no legal effect in Poland, and thematically related cases on the refusal to enter a same-sex marriage certificate in the register of civil status.

Namely, it was controversial to believe the transcription of a foreign birth certificate of a child with same-sex parents (among others, judgment of 17 December 2014, II OSK 1298/13). Such a position was based on the assumption that the provisions of the Family and Guardianship Code precisely regulate the question of the child's origin, *i.e.* they specify that the mother is the woman who gave birth to the child, while the provisions on paternity, regardless of how it is established, mention the man in every case. Article 18 of the Constitution, which stipulates that only the union between a man and a woman is legally recognised by the state and only such a union enjoys the protection and care of the Republic of Poland, also provided an additional argument here. On these grounds, it was considered that the transcription

[1] *R. Alexy*, Theorie der Grundrechte, Baden-Baden 1985, pp. 77 *et seq.*, 146 *et seq.*

[2] See ECtHR judgments: of 11 July 2002, *Christine Goodwin v. UK*, application no. 28957/95; of 24 June 2010, *Schalk and Kopff v. Austria*, application no. 30141/04; of 3 November 2011, *S.H. and Others v. Austria*, application no. 57813/00; of 21 July 2015, *Oliari and Others v. Italy*, applications nos. 18766/11 and 36030/11; of 14 December 2017, *Orlandi and Others v. Italy*, applications nos. 26431/12, 26742/12, 44057/12 and 60088/12 – available in HUDOC.

[3] See also decision of the European Commission of Human Rights of 19 May 1976, *Brüggemann and Scheuten v. Germany*, application no. 6959/75, § 55; ECtHR judgment of 26 March 2017, *A.-M.V. v. Finland*, application no. 53251/13, § 76 – available in HUDOC.

of the birth certificate in question into Polish civil-status records would be contrary to the legal order in force in the Republic of Poland.

At the same time, the NSA held that the refusal of transcription does not conflict with regulations of international law and European Union law. According to the NSA, the dismissal by the provincial administrative court of the appellant against the decision to refuse to enter the birth certificate of the child of claimant of a civil partnership in the birth register does not in any way violate the right to respect for their private and family life. The NSA stated that the subject matter of the case was neither the applicants' family life nor their private life, but issues concerning the formal conditions required for a particular entry in the birth register. This is because it has been pointed out that there is no legal basis in the Polish legal system for making an entry in accordance with the application. At the same time, the NSA expressed the view that the refusal to enter the child's birth certificate in the birth register was caused by discrimination, in particular on grounds of sex or belief, any other opinion or sexual orientation, or on account of other circumstances listed in Article 21(1) CFR. The sole reason for the refusal to make an entry was that an entry in accordance with the application would be contrary to the law in force in the Republic of Poland. In the case, moreover, it was not legally possible to enter a female person on the birth certificate in addition to the child's mother, instead of (or in place of) the child's father.

This legal issue was considered important enough to be decided by an enlarged composition of the Supreme Administrative Court. Thus, in a resolution of 2 December 2019 (II OPS 1/19), a panel of seven judges of the NSA ruled that: "The provision of Article 104(5) and Article 107(3) of the Act of 28 November 2014 Law on civil status records (Polish Journal of Laws 2014, item 1741, as amended) in connection with Article 7 of the Act of 4 February 2011 Private International Law (Polish Journal of Laws 2015, item 1792) does not allow for the transcription of a foreign birth certificate of a child in which same-sex persons are entered as parents".

The court emphasised that in the case at hand, no doubts arose as to the acquisition of Polish citizenship by the applicant's child or parental rights by the child's mother. The court stated that it is not the mere refusal to transcribe a child's birth certificate that can give rise to State liability for violation of the Convention, but its consequences and the lack of protection against the negative consequences of non-transcription. However, these effects will be assessed in separate individual proceedings, *e.g.* in connection with a possible refusal to issue an identity card. Therefore, the arguments raised by the applicant that the interests of the child have not been taken into account and that the protection of the child's rights under the Convention on the Rights of the Child as well as the provisions of the Constitution have been violated should transcription be refused in these very proceedings. The refusal of a transcription on the grounds of a breach of the principles of the Polish legal order is not

tantamount to a breach of the constitutional and international obligation of the public authorities to take into account the best interests of the child, since a foreign birth certificate, even without its transcription, is exclusive evidence of the events stated therein and the applicant's child may rely on such a certificate in administrative and judicial proceedings concerning his or her rights.

Another example is the judgment of 10 October 2018 (II OSK 2552/16), in which the contested judgment of the court of first instance and the preceding decision of the administrative authority were reversed. In this case, the immediate reason for the Polish administrative authorities' refusal to transcribe the birth certificate drawn up in the United Kingdom was the fact that two women had been entered in both the "mother" and the section of the certificate described as "parent". The NSA, while not denying the legitimacy of the application of the public policy clause in general, pointed out that "the concept of public policy as a justification for deviating from the fundamental action of transcription should be interpreted narrowly, referring in detail to the realities of the case at hand and carefully assessing the real and serious risks to one of society's fundamental interests in a particular case".

The argument that influenced the upholding of the cassation appeal was the amendment and the resulting current regulation of the Civil Status Law (new law of 28 November 2014 Law on civil status records entered into force on 1 January 2015). As noted by the NSA, in the amended Act, "the legislator deliberately and consciously introduced the institution of obligatory transcription in order to prevent situations in which a citizen of the Republic of Poland will not be issued with documents certifying identity", which may "lead to preventing the realisation of rights related to the possession of Polish citizenship acquired, as in the case at hand, by operation of law by a minor (*e.g.* lack of access to the health care system, education, *etc.*)".

On the other hand, the NSA in its judgment of 25 February 2020 (II OSK 1059/18) referred, in the process of argumentation, to the Polish civil status register of a unisex marriage certificate in relation to the law of the European Union, considering unfounded the cassation allegations of misapplication by the WSA in Warsaw of Article 21 in conjunction with Article 20(2)(a) TFEU by its non-application leading to the refusal to grant protection to the applicant's right to transcribe the marriage certificate concerning the marriage concluded abroad and the entry of this marriage certificate in Polish civil registry records, thereby infringing the applicant's right to free movement as a citizen of the European Union by discouraging him from doing so by creating actual obstacles and preventing him from exercising in Poland the rights acquired abroad. In addition, as noted by the NSA, the right to freedom of movement within the European Union undoubtedly derives from Articles 20(2)(a) and 21(1) TFEU, although the exercise of this right is not conditional on the possession of a transcribed marriage certificate, but on the possession of an

identity document that proves citizenship of one of the Member States of the Union (in particular passports or identity cards).

At the same time, the NSA pointed out that Poland, by joining the Union, retained the competence to regulate issues related to the definition of marriages, as Article 90(1) of the Constitution does not allow the transfer of all the competences of the authorities of the Republic of Poland to the bodies of international organisations (including EU bodies), but only certain matters are subject to transfer. The Court noted that matters relating to civil status records or defining marriages were not referred to Union authorities. Union law does not provide for an absolute obligation to transfer to a national civil status register civil status records created in other Union countries. Therefore, according to the NSA, the refusal to transfer a foreign document to the national civil status register may be justified by the application of a national public policy clause.

The position of the NSA expressed in the judgment in the case II OSK 1059/18 on the issue of (refusal of) transcription of a marriage certificate drawn up abroad due to the fact that in the Polish legal order it is not permissible to recognise a same-sex union as a marriage, is confirmed both in its earlier (Supreme Administrative Court judgment of 28 February 2018, II OSK 1112/16), as well as subsequent case-law (NSA judgments: of 22 June 2021, II OSK 2608/19; of 6 July 2022, II OSK 2376/19).

In the judgment of 22 June 2021, II OSK 2608/19, taking into account *mutatis mutandis* the content of resolution II OPS 1/19. In the reasons for this judgment, as if in reference to the allegation of violation of Article 8(1) and (2) ECHR (considered by the panel in conjunction with Articles 12 and 14 ECHR), which was found to be unfounded, the NSA noted that from the ECtHR jurisprudence does not imply an obligation for States to legally recognise a same-sex marriage concluded abroad as a marriage within the meaning of national law. The NSA stated here: "[i]n a case of such important social importance, an administrative court may not interpret the provisions of international law in such a way as to be in conflict with the Polish legal order in a situation where no obligation on the part of the State to provide a legal framework for the functioning of a same-sex union arises from international law. (...) While providing for the possibility to marry only to persons of different sexes, the Polish legislator has provided for further consequences of this in the framework of, *inter alia*, family law (matrimonial property regimes – Section III of the Polish Family and Guardianship Code – Article 146 of the Polish Family and Guardianship Code) and succession (inheritance – Article 931 § 1 of the Civil Code), reserving these institutions only for spouses within the meaning of Article 1 § 1 of the Family and Guardianship Code. The introduction of a transcribed same-sex marriage certificate into the Polish legal order on the basis of an administrative decision could raise questions

about the applicability of the listed civil law institutions to this union. While the so-called law-creating interpretation of the law applied by the courts should be regarded as admissible, when the law-creating interpretation does not find legitimacy in the accepted interpretative directives, it constitutes an impermissible interpretation *contra legem* (...). Indeed, judicial enactments must have their source in the legal system. Judicial activism in an area constituting a constitutional matter (Article 18 of the Constitution), which is precisely regulated by the provisions of the law – Article 1 § 1 of the Civil Code – would constitute a manifestation of an impermissible *contra legem* interpretation. Such an action could violate the constitutional principle of the tripartite division of power (Article 10 of the Constitution) and contradict the scope of jurisdiction of administrative courts expressed in Article 184 of the Constitution".

Similarly, in the reasons for the judgment of 6 July 2022 (II OSK 2376/19), the NSA, referring to Article 1 § 1 of the Family and Guardianship Code in conjunction with Article 18 of the Constitution, acknowledged that the effects of the requested transcription of a marriage certificate concluded between same-sex persons would be irreconcilable with the fundamental principles of the Polish legal order regarding family law. Besides, as in the judgment in the case II OSK 1059/18, the NSA stressed that the Polish legal system does not know a marriage concluded between two men, thus it was inadmissible to transcribe a marriage certificate concluded abroad between two men as a marriage under Polish law. Therefore, entering a same-sex marriage certificate in the Polish civil status register would be incompatible with Article 1 § 1 of the Family and Guardianship Code, the principle according to which marriage is contracted between a man and a woman. Moreover, in the opinion of the NSA, such a legal regulation does not constitute a violation of Article 8(1) and (2) ECHR, taking into account Article 12 ECHR of individual States Parties to the Convention resulting from this provision to regulate the right to marry by national laws.

The second category of cases discussed is even more distinctive as it concerns the certification of the nationality of children whose foreign birth certificates list same-sex parents.[4] In this case, the certification of Polish citizenship on the basis of the American birth certificate was refused, based on the argument that this certificate does not determine who is the parent of the minor *M.S.-H*. Minor M., together with his twin brother *S.*, was born on 26 September 2010 in the United States as a result of a surrogacy agreement and the use of genetic material from O.Z.S. The foreign

[4] NSA judgment of 6 May 2015, II OSK 2372/13 and of 10 October 2018, II OSK 2552/16, as well as the proceedings before the ECtHR on this issue in *S.-H. v. Poland.* In its judgment of 16 November 2021 in *S.-H. v. Poland* (applications nos. 56846/15 and 56849/15, joined for joint consideration), the Court did not share the applicants' arguments. The Court noted that it was true that the decisions of the Polish national authorities had the effect of refusing to confirm Polish nationality, but that this did not mean that the applicants could not exercise their right to freedom of movement within Europe and that there had been any interference with their Article 8 ECHR rights on the part of the Polish state.

(US) birth certificate lists O. as the parents of *M.* and *S.Z.S.* (holding Polish and Israeli citizenship) and *D.H.* (Israeli citizen).

In the opinion of the adjudicating panel, the decision to refuse to recognise the legal effects of the foreign birth certificate and therefore to refuse to certify Polish citizenship was supported by the law in view of the fact that Polish law understands by the term 'parents' only the father and the mother, thus persons of different sexes, and 'surrogate maternity contracts' are not known to the Polish legal order and it is not possible to recognise their effects. Under Polish law, the mother is the woman who gave birth to the child, while the father – or second parent – is presumed to be her husband, provided the child was born during the marriage. The genetic background of the child is not relevant here. The biological (though not genetic) mother of the child in this case is *K.S.C.*, married to *D.T.C.* The recognition of *O.Z.S.* as the father of the child (even if he is genetically so) would lead to the recognition that the other parent – with therefore the mother of the child – is *D.H.*, who is of the male sex, which would be contrary to Polish law.

In doing so, the court referred to the public policy clause as being of vital importance in international trade, as it guarantees "the protection of the national legal order against violations of that order by giving effect (recognition) to a judgment that does not correspond to the fundamental principles of the legal order", and since the applicant's foreign birth certificate indicates two men as the applicant's parents and thus recognises the surrogacy contract, it "contradicts the fundamental principles of the legal order of the Republic of Poland". The above – in the opinion of the adjudicating panel – therefore prevented the applicant's foreign birth certificate from having legal effect in case II OSK 2372/13.

It is worth recalling that a similar issue has already been decided by the ECtHR in the judgments *Mennesson v. France* (application no. 65192/11, in particular § 96 and 99) and *Labasse v. France* (application no. 65941/11); *Foulon v. France* (application no. 9063/14) and *Laborie v. France* (application no. 44024/13) held that the uncertainty of children born to a surrogate mother regarding the recognition of their (in this case, French) nationality was likely to have negative repercussions on their personal identity and thus constituted a violation of their right to respect for their private life. In *Mennesson*, the Court held that the refusal to recognise the legal parent-child bond (which also affected the child's nationality) was incompatible with the principle of the best interests of the child, derived from Article 3(1) of the Convention on the Rights of the Child, also constituted an overstepping of the limits of the so-called margin of appreciation in relation to Article 8 of the Convention by a State party to the Convention. The cited line of case-law of the Court concerned the legal relationship between a child born to a surrogate mother and the biological father. The Court in the referenced case of *Mennesson v. France* found a violation of the right

to protection of private life in the case of these children and emphasised that biological parenthood (in this case paternity) is a component of an individual's identity. As a result of this judgment, paternity was acknowledged and national law was amended, which, however, did not regulate the possibility of entering the data of a child born abroad by a surrogate on the birth certificate insofar as the foreign birth certificate identifies the child's "intending mother" as the legal mother. The only way provided by national law for an "intended mother" to establish a legal mother-child relationship is through the possibility of adopting her spouse's (biological father's) child.

The case-law in this area is not uniform. As such, for example, in its judgment of 16 February 2022 (II OSK 128/19), the NSA reversed the appealed judgment and the decisions of the authorities on the refusal to confirm the possession of Polish citizenship by a minor whose foreign birth certificate lists as parents persons of the same sex, and at the same time obliged the head of the voivodship to issue a decision confirming the possession of Polish citizenship by the minor. In the recitals of the decision, the NSA referred to Article 7, guaranteeing the right to acquire a nationality, and Article 2(1) of the Convention on the Rights of the Child of that Act, according to which any discrimination on the basis of a child's status or the sexual orientation of his or her parents is prohibited. In NSA view, from the principle of non-discrimination arising from Article 2(1) of the Convention on the Rights of the Child derives the requirement that the rights set out in the Convention, including the right to acquire a nationality, be guaranteed to that child without any discrimination, including on the basis of the sexual orientation of the child's parents. In NSA view, the decisions of the authorities and the court of first instance constituted discrimination against the minor on the basis of her parents' sexual orientation, in violation of the aforementioned provision of the Convention. This is because they lead to depriving a minor, who is the daughter of a Polish citizen, of the right to confirmation of Polish citizenship solely on the basis that her birth certificate lists persons of the same sex as her parents.

§ 3. A breakthrough in argumentative discourse – the *Przybyszewska* and *Formela* cases

In the judgment of 12 December 2023 in the case of *Przybyszewska and Others v. Poland*[5] the Strasbourg Court found that the Republic of Poland had overstepped its margin of appreciation and failed to comply with its positive obligation to provide the applicants with a specific legal framework guaranteeing the recognition

[5] ECtHR judgment of 12 December 2023, *Przybyszewska and Others v. Poland*. joined cases applications nos. 11454/17, 11810/17, 15273/17, 16898/17, 24231/17, 24351/17, 25891/17, 25904/17, 30128/18 and 30340/18.

and protection of same-sex relationships. The ECtHR found that the failure to regulate the fundamental aspects of the applicants' lives constituted a violation of their right to respect for private and family life. In its reasoning for this judgment, the ECtHR recalled that Article 8 ECHR applies in terms of both "private life" and "family life" in cases concerning the alleged lack of legal recognition or protection of same-sex couples (§ 39), and that the unavailability of the legal system for the recognition and protection of same-sex couples affects both the personal identity and the social identity of the applicants as same-sex couples wishing to have their relationships as couples legalised and protected by law (§ 39).

The Strasbourg Court further emphasised that Article 8 ECHR imposes an obligation on Member States to ensure the legal recognition and protection of same-sex couples by introducing a "specific legal framework" (§§ 98 and 103). The ECtHR went on to note that the lack of formal recognition of same-sex unions leaves couples in a legal vacuum, as those forming a same-sex union are deprived of legal protection and experience difficulties in their daily lives: no statutory inheritance, no right to leave in case of a partner's illness, no right to seek medical information concerning their partner (§ 108). It pointed out that these are rights concerning material aspects (alimony, taxation or inheritance) or moral aspects (rights and duties of mutual assistance) that are an integral part of a couple's life, and their regulation within the legal framework available to same-sex couples would be of obvious benefit (§ 102).

In the *Przybyszewska and Others* judgment, the Court made it clear once again that the legal recognition of same-sex unions concerns human rights and dignity and has an intrinsic value that goes beyond tax relief or the facilitation of everyday life (§ 109).

Also in *Formela and Others v. Poland*[6], the ECtHR found that by refusing to register the applicants' marriages in any form and by failing to provide them with a specific legal framework providing for the recognition and protection of their relationships, the Polish authorities had left the applicants in a legal vacuum and had failed to meet their basic needs for the recognition and protection of same-sex couples in a stable and committed relationship (§ 26). In the case of *Formela v. Poland*, it was necessary to assess whether Poland had put in place legal instruments giving the possibility to recognise and protect the needs of same-sex couples in committed and stable relationships. The action, brought by two Polish nationals married in the UK before the Court, concerned matters of civil law, tax law and social security law, including the issues of determining the amount of gift tax on a gift from a person with whom the recipient is in a civil partnership and determining the amount

[6] ECtHR judgment of 19 September 2024, *Formela and others v. Poland* joined cases application no. 58828/12 and 4 others; similarly judgment of 27 February 2025, *Szypuła and others v. Poland*, application no. 78030/14.

of income tax on individuals who are in a civil partnership). In this judgment, as in *Przybyszewska and Others*, the Court found that Poland had failed to put forward an interest that would justify its failure to adopt solutions providing institutional support for persons in same-sex relationships, and concluded that "by refusing to register the applicants' marriages in any form and by failing to provide them with a specific legal framework ensuring recognition and protection, the Polish authorities left them in a legal vacuum and failed to provide for the basic needs of recognition and protection of same-sex couples in a stable and committed relationship"[7].

In summary, the Court's reasoning deviates to some extent from the position of the NSA. While, on the one hand, the ECtHR notes that the relationships of non-heteronormative couples deserve legal protection because their relationships are underpinned by the right to private life and the right to family life, on the other hand, the Court – like the NSA – does not point to a violation of the principle of equality. The need for effective legal protection means that the argument cited by the NSA is misplaced referring to the principle of separation of powers. The Court, which is, after all, part of the judicial power, emphasises that the failure to ensure fundamental aspects of their lives, constitutes an interference with their right to respect for their private and family life as it undermines the personal identity of the individual concerned. This therefore requires institutional solutions, which have more than once in history been the result of specific case-law from the administrative courts.

In this sense, the magistrate (court) is understood in the tradition of *John Locke* as a political power, and 'political power is the power to make laws', and as an enforcer acting in an area defined by law – not as a judicial power.

The discourse on these issues is extremely intriguing, touching on vivid, sensitive and important aspects. It was not possible to cover all aspects in this short text. The article is merely an attempt to signal the problems arising from the jurisprudence of both courts, a remarkable contribution to social and legal development as a result of a multifaceted and sophisticated argumentative dispute. The category of cases in question is one of the classic cases whose resolution is not possible without recourse to the law of balancing conflicting principles, objectives, interests or goods. A final decision is not possible without the judge exercising the discretionary power granted to him or her, without his or her courage and wisdom, albeit the outcome is not clear-cut and non-negotiable.

[7] ECtHR judgment, *Przybyszewska v. Poland*, § 25.

Abstract

The article presents the evolution of case-law in matters of LGBTQ+ rights, which aims to build a standard of protection and legal recognition. The aim is to find a standard that will take into account the objectives and requirements of national law, international law and EU law. The analysis of the case-law of both the European Court of Human Rights and the Supreme Administrative Court of Poland leads to the conclusion that this is a legal issue that still raises many difficulties in terms of interpretation, but also in terms of a heated social debate. The courts' conviction that discrimination is not a fundamental aspect of the case, and that it is only about resolving the life issues of members of same-sex couples leaves a certain dissatisfaction. Therefore, the article indicates that the argumentation process in these cases is unfinished and requires the clarification of certain burning issues so that the derived standard is universal in nature and actually solves the existing legal problem.

Marian Wolanin*

Constitutional Protection of Inheritance as a Form of Property Protection – Normative and Jurisprudential Case Studies

§ 1. Introduction

The constitutional declaration of the protection of inheritance was introduced in the Polish Constitution enacted on 2 April 1997, which entered into force on 17 October 1997.

Literally, the concept of inheritance protection is formulated in Article 21(1) of the Constitution, which provides that: "The Republic of Poland shall protect ownership and the right of succession". The juxtaposition of two key elements of constitutional protection in a single drafting unit dictates the recognition of the equivalence and equivalence of this protection and, consequently, the equivalence of the right of ownership and the right of succession. The inseparability of the two is apparent from this juxtaposition, where the protection of the right of succession is inextricably linked to the protection of ownership. Through the protection of succession, the legislator also gives expression to the protection of ownership as a transferable right not only as a result of the will of the subject of ownership, but also as a result of the legal event itself, which is the cessation of the legal existence of the previous subject of ownership. Indeed, the mere cessation of the legal existence of the subject of ownership does not nullify the right of ownership, and the right gains the protection of its existence as a result of its passing to the heir as part of the succession. The right of succession is therefore a legal form of subjective change of ownership docked when the legal existence of the previous subject of ownership ceases.

* Judge of the Supreme Administrative Court of Poland, Director of the Judicial Decisions Bureau.

However, one cannot overlook the fact that the legislator juxtaposed the content of Article 21(1) of the Constitution with paragraph 2 of this provision, which provides that: "Expropriation may be allowed solely for public purposes and for just compensation". In this way, the legislator has set a constitutionally regulated limit to the protection of ownership and the protection of the right of succession, making expropriation a legal institution that constitutes a form of interference (infringement and deprivation) of property and the right of succession. However, the very fact that Article 21 of the Constitution remains among the provisions included in Chapter I "The Republic" makes the protection of the right of succession the foundation of the state system, and expropriation not only the means of interference with property and the right of succession, but also the constitutional principle of permissibility of interference with ownership and the right of succession characterising the scope of their protection.

§ 2. Constitutional limits to the protection of the right of succession

The protection expressed in Article 21(1) of the Constitution may be excluded in the case of the necessity to achieve public purposes for which expropriation is necessary, *i.e.* the withdrawal of ownership or succession rights. At the same time, constitutional expropriation has a protective role vis-à-vis ownership and succession rights in such a way that only expropriation in the manner set out in this provision, *i.e.* for public purposes and with just compensation, can exclude the protection of ownership and succession rights. The legislator has thus made a self-imposed limitation on the granted protection of ownership and the right of succession. Indeed, the scope of the protection of ownership and the right of succession thus derives primarily from the legislator's will. In this respect, the legislator has a far-reaching autonomy, setting the limits of this protection in the Constitution of the Republic of Poland, which constitute a normative guideline for the ordinary legislator in creating statutory regulations affecting ownership and the right of succession in a manner that does not exceed the limits of permissible interference resulting from the Constitution of the Republic of Poland.

In the background of the consideration of the constitutional scope of protection of the right of succession there remains Article 64(1) of the Constitution, which provides: "Everyone shall have the right to ownership, other property rights and the right of succession". In contrast, Article 64(2) of the Constitution provides that: "Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession".

As a consequence of the scope of the regulation of the referred Article 64 of the Constitution, attention should also be drawn to Article 31(3) of the Constitution,

stipulating that: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

The two cited provisions create additional constitutional norms constituting benchmarks for assessing the scope of protection of ownership and succession rights implemented in laws and other legal acts in Poland. However, while according to Article 64(3) of the Constitution, ownership may be restricted only by statute and only to the extent that it does not violate the essence of the right to ownership, a restriction on the exercise of the constitutional right to ownership and to the right of succession may consist in their deprivation when required by the circumstances set out in Article 31(3) of the Constitution. The right to ownership and the right to succession, as a constitutionally defined and at the same time protected value, must therefore yield to such values as set out in Article 31(3) of the Constitution, observing the principle of proportionality expressed in the constitutional formulation "any limitation (...) may be imposed (...) only when necessary in a democratic state (...)".

The provision of Article 21 of the Constitution is among the provisions of the chapter concerning the systemic foundations of the Polish State, and therefore it has a broader normative value than the provision of Article 64 of the Constitution, despite the fact that both provisions are contained in the same piece of legislation. Indeed, it is not without significance that Article 31(3) of the Constitution indicates the admissibility of limiting constitutional freedoms and rights, if this provision is found in the next chapter of the Constitution of the Republic of Poland entitled "The freedoms, rights and obligations of persons and citizens".

The juxtaposition of the content of Article 64 with Article 21 of the Constitution dictates that Article 64 concerns the right to ownership and the right to succession in economic terms. In contrast, Article 21 of the Constitution deals with the broader concept of property and consequently succession rights, not only in economic terms. It should therefore be considered that the concept of ownership and succession rights contained in Article 21 of the Constitution, encompasses a broader meaning of these values, also in economic terms. Ownership and the right of succession in economic terms, which includes the property right *in rem* vested in real property, may therefore be restricted both for the public purposes referred to in Article 21(2) of the Constitution, as well as for the purposes set out in Article 31(3) of the Constitution. The achievement of these goals must of course remain within the constitutional context of the Republic of Poland as the common good of all citizens and the realisation of the principles of social justice (Articles 1 and 2 of the Constitution).

§ 3. Constitutional limits to the protection of the right of succession

While property itself is a right – in principle – granted and protected to the extent recognised by the legislature, the current conception of the rule of law and the mutual relationship between the authority and the citizen assumes that the source of property is not exclusively the will of the legislature (including the legislature), but that this right is one of the powers belonging to the human being, which the legislature (including the legislature) can shape, but cannot absolutely deprive man of. Ownership is therefore not the result of the will of the legislature alone, but is a right belonging to man by virtue of his/her existence, and the legislature (including the legislature) can shape this ownership.

As a consequence of the protection of ownership, there also remains the protection of the right of succession of that property, *i.e.* its empowerment in favour of the heirs of the previous subject of the ownership right.

Recognising that ownership and its protection are not the result of the exclusive will of a society over an individual, states have assumed the obligation to refrain from shaping ownership and its protection in such a way as to nullify the nature of that ownership. Such an obligation results, *inter alia*, from Article 1 of Protocol No. 1 to the ECHR according to which: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Juxtaposing the content of Article 21 of the Constitution with the quoted content of Article 1 of Protocol No. 1 to the ECHR, it should be stated that ownership and, in its shadow, also the right of succession, is a right granted by the legislator only to the extent that it is not necessary to restrict or deprive it for the protection of the interests of society, perceived as a public interest. The actions of the legislator in setting the limits of permissible interference with ownership, which at the same time constitute the limits of the protection granted, are therefore subject to assessment not only from the perspective of constitutional standards, but also from the perspective of the obligations assumed by the state under acts of international law, which are a manifestation of the coexistence of societies organised in systemically and institutionally separate organisations of statehood striving to ensure that the individual has the same legal standards of ownership of the right to ownership.

The cited Article 1 of Protocol No. 1 to the ECHR thus provides a criterion for assessing the relationship of the legislative power of the state to property belonging to man which is also subject to succession. To assess this relationship is to determine whether the autonomy of the legislature in shaping the content of ownership, the cases of interference with such ownership and the limits of its protection nullifies the same as a value belonging to man outside the will of the legislature. The institutional form for making this assessment is, of course, the ECtHR, which is empowered by the ECHR to make binding rulings in this regard.

While there is no literal reference to succession in the wording of Article 1 of Protocol No. 1 to the ECHR, the right of succession is reflected in the term "ownership" used in the provision referred to. This was expressed by the ECtHR in the decision of the Grand Chamber of 19 December 2002 in the case *Broniowski v. Poland*[1], in which, while assessing the Court's temporal jurisdiction to examine the application, the Court at the same time expressed the view that "the concept of *possessions* used in the first paragraph of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law. Certain other rights and interests, *e.g.* receivables, constituting assets can also be regarded as "property rights" and thus as "possessions" for the purposes of this provision. The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1. In the Court's view, the right [to compensation for property left beyond the current borders of Poland – note by *M.W.*] which the applicant has under Polish law was described by the Supreme Court as a "claim to the State Treasury", which "is of a property nature and subject to succession", although it is "transferable only between the persons indicated in Article 212(4) GospNierU" [see Supreme Court of Poland resolution of 27 March 2001, III CZP 3/01]. In conclusion, the Court confirmed that the applicant has a property interest [deriving entitlement from succession – *note by M.W.*] recognised by Polish law and is an interest that is protected under Article 1 of Protocol No. 1".

The views presented were subsequently upheld by the Court in its Grand Chamber judgment of 22 June 2004 in *Broniowski v. Poland*[2].

However, in its judgment of 22 December 2004 in *Merger and Cros v. France*[3], the ECtHR stressed, *inter alia*, that Article 1 of Protocol No. 1 protects everyone's right

[1] ECtHR [GC] decision of 19 December 2002, *Broniowski v. Poland*, application no. 31443/96, HUDOC.

[2] ECtHR [GC] judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, HUDOC.

[3] ECtHR judgment of 22 December 2004, *Merger and Cros v. Franc*e, application no. 68864/01, HUDOC.

to respect for "his" possessions; however, it only applies to existing possessions and does not guarantee the right to acquire possessions either by statutory succession or by voluntary disposition.

Also, in the Grand Chamber judgment of 7 February 2013 in *Fabris v. France*[4], the Grand Chamber of the ECtHR considered the scope of Article 1 of Protocol No. 1, indicating that this provision does not in principle guarantee the right to acquire possessions. However, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legally reasonable prospect" of obtaining the effective exercise of a property right. A legally reasonable prospect must have a sufficient basis in domestic law. Similarly, the concept of "possessions" may extend to a specific advantage of which the persons concerned have been deprived on the basis of a discriminatory condition for entitlement. However, the hope of recognising an old property right that has long since been effectively unenforceable cannot be considered "possessions" within the meaning of Article 1 of Protocol No. 1, nor can a contingent claim that lapses as a result of the failure to fulfil a condition be considered "possessions". The Court emphasised that "restrictions on children's inheritance rights on grounds of their [extramarital] parentage are incompatible with the Convention (...). Prohibition of discrimination on the grounds of a child's "extramarital" parentage (...) [constitutes] a standard of protection in European public policy". The Court thus derived the application of the Convention from Article 14 providing that: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

It should be emphasised that the vast majority of applications examined by the ECtHR in relation to succession take the juxtaposition of Article 1 of Protocol No. 1 with Article 14 ECHR on non-discrimination as the basis for assessing the admissibility of an application and its subsequent examination. Indeed, the problem that arises in the area of violations of the right to succession in the context of Convention protection is usually the question of discrimination in the granting of the right to succession by a State Party to the Convention.

In this regard, in its judgment of 7 February 2013, *Fabris v. France*, already indicated above, the Grand Chamber of the ECtHR pointed out that Article 14 ECHR complements other, substantive provisions of the Convention and its Protocols. It does not exist independently, as it only has effect in relation to the "exercise of rights

[4] ECtHR [GC] judgment of 7 February 2013, *Fabris v. France*, application no. 16574/08, HUDOC.

and freedoms" protected by such legislation. Although the application of Article 14 ECHR does not presuppose a breach of these provisions – and to that extent is autonomous – there is no room for its application if the facts in question do not fall within the scope of one or more such substantive provisions of the Convention. For the purposes of Article 14 ECHR, a difference in treatment is discriminatory if it lacks an objective and reasonable justification, i.e. if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The extent of the margin of appreciation will vary according to the circumstances, the subject matter of the case and its context, but the Court must ultimately determine whether the requirements of the Convention have been met. As the Convention is first and foremost a system for the protection of human rights, the Court must nevertheless take into account the changing circumstances in the Contracting States and respond, for example, to any emerging consensus on the standards to be achieved. In the Court's view, the protection of the "legally reasonable prospect" of the deceased and his or her family must be subject to the requirement of equal treatment of children born out of wedlock and children born within marriage.

The inequality of succession rights on the grounds of birth was already declared incompatible with the Convention by the Court in its judgment of 1 February 2000 in *Mazurek v. France*[5].

Similarly, in its judgment of 19 December 2018 in *Molla Sali v. Greece*[6], the Grand Chamber of the ECtHR indicated, *inter alia*, that freedom of religion does not require the Contracting States to create a specific legal framework in order to grant religious communities a special status linked to specific privileges. Nevertheless, the state that has created such a status must ensure that the criteria established for a group's entitlement to this status are applied in a non-discriminatory manner. Furthermore, it cannot be assumed that a testator of the Muslim faith, by drawing up a will in accordance with the Civil Code, has automatically waived his or her right, or the right of his or her heirs, not to be discriminated against on the grounds of his or her own religion. A person's religious beliefs cannot legitimately be construed as a waiver of certain rights if to do so would be contrary to an important public interest. Nor can the state take on the role of guarantor of the minority identity of a particular population group to the detriment of the right for members of that group to choose not to belong to that group or to follow its practices and rules.

[5] ECtHR judgment of 01 February 2000, *Mazurek v. France*, application no. 34406/97, HUDOC.

[6] ECtHR [GC] judgment of 19 December 2018, *Molla Sali v. Greece*, application no. 20452/14, HUDOC.

In the Court's view, the difference of treatment suffered by the applicant, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification, and there was therefore a violation of Article 14 ECHR, read in conjunction with Article 1 of Protocol No. 1 to the ECHR.

§ 4. National jurisprudence on the constitutional protection of the right of succession

Pursuant to Article 922 § 1 of the Civil Code, the property rights and obligations of the deceased pass upon his or her death to one or more persons in accordance with the provisions of this book. Succession does not encompass the rights and obligations of the deceased closely connected with his or her person, as well as rights which, upon his or her death, pass to designated persons regardless of whether they are heirs (Article 922 § 2 of the Civil Code).

It follows from the juxtaposition of the cited provisions that property rights and obligations of the deceased, not of a personal nature and not covered by specific provisions indicating a personalised legal succession from the deceased, are transferred to the heir.

One of the problems encountered in the practice of applying public acts remains the definition of the powers of heirs and the powers of those acquiring the estate in the absence of an unambiguous normative regulation in this respect.

Indeed, pursuant to Article 1051 of the Civil Code, an heir who has accepted the estate may dispose of the same in whole or in part; the same applies to the disposal of an inherited share. Consequently, pursuant to Article 1053 of the Civil Code, a person acquiring the estate enters into the rights and obligations of the heir, and therefore into the rights and obligations of the estate, with certain reservations arising from Article 1052 of the Civil Code (contractual determination of the scope of the transferred succession rights or share), Article 1055 of the Civil Code (liability for succession debts) and Article 1057 of the Civil Code (contractual determination as to benefits and burdens). The legal status of an heir resulting from the acquisition of an estate or an interest in an estate is therefore determined by the content of the agreement for the acquisition of that estate.

However, in accordance with Article 30 § 4 CAP, in cases involving transferable or heritable rights, in the event of the transfer of a right or death of a party during the course of the proceedings, its legal successors take the place of the previous party. On the other hand, it follows from Article 30 § 5 CAP that, in cases concerning estates that have not been acquired, the persons administering the assets of the estate act as

parties, and in their absence – an attorney appointed by the court at the request of a public administration body. Although the attribute of a party in administrative proceedings cannot be traded, the source of that attribute as defined in Article 28 CAP, *i.e.* certain rights or obligations which are the source of a legal interest, may be traded.

The national legislator formulates the attribute of a party in various ways, referring to the subjectivity of a right or obligation, legal succession, inheritance, succession (the literal use of this term by the legislator restricts inheritance to inheritors), related persons, relatives, *etc.* The most questionable is the normative formulation of a "legal successor", which in compensation and restitution proceedings for deprivation of property is equated with an heir. If the legislator uses the literal term "heir", it is difficult to find a statutory criterion for excluding the acquirer of the estate under Article 1053 of the Civil Code from the meaningful scope of this term, unless, pursuant to Article 1052 § 1 of the Civil Code, the parties to the agreement on the transfer of an estate have agreed otherwise as to the subject matter and scope of this agreement.

If the legislator does not in any way specify the circle of parties entitled to request or participate in administrative proceedings, then the determination of the attribute of a party shall be made on the basis of Article 28 CAP.

In a judgment of 22 February 2023 (I OSK 345/20, Legalis), the Supreme Administrative Court, considering the problem of whether an acquirer of an estate, after a former owner who, on the basis of Article 2(1)(e) of the decree of 6 September 1944 on the introduction of the land reform[7] lost the right of ownership of real property, has the right to initiate decree proceedings pursuant to § 5 of the decree implementing the decree of 1 March 1945[8]. stated that the protection of the right to succession provided for in the Constitution of the Republic of Poland should be – also in the case of rights to which former owners of landed property are entitled, and which are connected with the introduction of the agrarian reform – treated equally to the protection of the right to ownership. As a result, since the owner of the landed property (through no fault of his/her own) has often had no real opportunity to assert his/her rights, this kind of entitlement, should be able to be exercised by his/her heir. In the Court's view, since in most cases the provisions related to the post-war transition, regulating the rights of former owners of lost property, also took into account their heirs, it should have been considered that also in the case of the heir of a former owner of landed property, such protection, as resulting directly from the provisions of the

[7] Decree of the Polish Committee for National Liberation of 6 September 1944 on the implementation of land reform (consolidated text, Polish Journal of Laws of 1945 No. 8, item 13, as amended).

[8] Regulation of the Minister of Agriculture and Agrarian Reform of 1 March 1945 on the implementation of the decree of the Polish Committee of National Liberation of 6 September 1944 on the implementation of land reform (Polish Journal of Laws No. 10, item 51, as amended).

Constitution of the Republic of Poland, should take place. The right of the heir of the former owner of a landed property to make an application under § 5 of the regulation of 1 March 1945 is not a civil right. This claim is provided for in an administrative-legal act and for the use of administrative proceedings. The claim allowing for the initiation of administrative proceedings – pursuant to § 5 of the regulation of 1 March 1945 – is of course a specific claim and does not have the character of a civil claim. The creation of a claim in favour of the heir of the former owner of the land, allowing for the verification of the actions of the public authority carrying out the agrarian reform, was based on the direct application of the constitutional provisions due to the purpose that this claim should serve. However, granting successive acquirers of succession interests from a former owner of a landed property the status of a party – within the meaning of Article 28 CAP – in proceedings, conducted pursuant to § 5 of the regulation of 1 March 1945, does not currently achieve such a goal.

An example of referring directly to the constitutional protection of the right of inheritance is also the resolution of seven judges of the Supreme Administrative Court of 22 February 2021 (I OPS 1/20, Legalis), which indicates that the compensation referred to in Article 36(1) of the Act of 12 March 1958 on the principles and method of expropriation of real estate[9], from 1 January 1998 may be determined on the basis of Article 129(5)(3) GospNierU, for the heir of the owner of the real property mentioned in Article 35(1) of the Act of 12 March 1958 on the principles and method of expropriation of real property. In justifying its position, the court pointed out the necessity of verifying the results of the linguistic interpretation of the provisions given with constitutional principles. In the Court's view, adopting the position that the person entitled to compensation is only the expropriated person violates the constitutional principle of protection of property and the right to succession and the permissibility of expropriation with just compensation (Article 21 of the Constitution). In cases where the law provides that the determination of compensation for expropriation takes place in separate proceedings, or in cases where the parties (the expropriated person or the entity obliged to pay compensation) have made the expropriation decision the subject of an appeal, but only in the part concerning the determination of compensation, the death of the expropriated person would make it necessary to discontinue the proceedings concerning the determination of compensation, since the heirs of the expropriated person could not assume the rights and obligations of their testator. This would result in the expropriation of a right without the determination of compensation while depriving the protection of the right to succession. The Polish Constitution mentions the protection of ownership and the right to succession as one of the principles of the state system. The broad protection

[9] Act of 12 March 1958 on the principles and procedure of expropriation of real property (Polish Journal of Laws of 1974 No. 10, item 64, as amended).

under Article 64(1) and (2) of the Constitution covers not only the right to ownership, but also other property rights and the right to succession. Constitutional protection, in addition to the right to ownership and other property rights, has also been extended to the right to succession, which follows from Articles 21(1) and 64(1) of the Constitution. In doing so, these provisions imply equal protection of ownership and succession rights. The protection of the right to succession is at the same time complementary to the protection of the right of ownership and the protection of other property rights. Without the protection of the right to succession, the protection of ownership and other property rights would be incomplete. Inheritance protection ensures that the ownership right does not cease with the death of the owner. The constitutional protection of the right to succession implies an obligation for the legislator to shape property rights as inheritable and to introduce a specific model and rules of inheritance. Constitutional principles are not only addressed to the legislator, but are also a fundamental criterion in the interpretation of laws by those applying the law. The position that the heir of the expropriated person is the subject entitled to receive compensation in lieu of the unsatisfied compensation claim of the expropriated owner is supported first and foremost by the constitutional principle of the protection of the right to succession complementing the protection of the right to property and other property rights due to the existing constitutional relationship of interdependence between the right to ownership and the right to compensation for expropriation constituting a compensatory property right in connection with the loss of the right to ownership. It follows from the constitutional principle of protection of the right to succession, as implemented in the law of succession, that in the event of the death of the owner of the property in the course of expropriation proceedings, the heirs take his or her place. It also follows from this principle that where the death of the previous owner occurs after the expropriation proceedings but before the expropriation compensation has been determined, the deceased is succeeded by his or her heirs. Adopting the position that the heir of an expropriated person is not a person entitled to compensation in place of an owner whose claim for compensation has not been satisfied would be in clear contradiction with the constitutional principle that expropriation can only take place with just compensation. The preservation of this principle in cases where the expropriated person has died before the compensation claim is settled is only possible if, in place of the deceased, the entities entitled to compensation will be his or her heirs. Adopting a contrary position would result in the heirs of the expropriated person, who, as successors in title (universal), enter into all the rights and obligations of the deceased owner, including those relating to the property already expropriated, being deprived of their share in the unsatisfied property rights of their testator vested in the expropriated property, the consequence being expropriation without compensation. The legal basis for determining the circle of heirs as a result of the implementation of the constitutional

principle of the protection of the right to succession is the provisions of the law of succession contained in the Civil Code, as it is only on the basis of these provisions that it is possible to determine the status of the heir as a person statutorily recognised as a subject of the constitutional right to succession.

The presented view was also shared in the resolution of a panel of seven judges of the Supreme Administrative Court of Poland 30 June 2022 (I OPS 1/22, Legalis), in the reasons of which it was indicated, *inter alia*, that a systemic reading of Article 128(1) of the GospNierU together with Article 64(1) of the Constitution leads to the conclusion that the above legal regulations give rise to norms constituting the source of the legal interest of the expropriated person and entities exercising the right to succession after the expropriated person.

§ 5. Concluding remarks

Both conventional and constitutional considerations for the protection of ownership in judicial terms also include the protection of succession as a form of subjective change of property rights in the event of the loss of legal existence of the previous subject of this right. The law of succession thus ensures the continuation of the existence of a property right by vesting it in those who are primarily recognised as heirs by the national legislature. However, succession is not an absolute right – it is subject to limitations like the right to ownership, and therefore its limitation or deprivation generally follows the same reasons that set limits to the protection of the right to ownership.

Abstract

This article outlines the constitutional framework governing the protection of property and inheritance rights, underscoring their intrinsic connection and the equal constitutional protection granted to each. Particular emphasis is placed on expropriation as a legal instrument of state interference in the right of inheritance, which delineates the outer limits of constitutional safeguards aff orded to that right. The analysis further considers selected case-law of the European Court of Human Rights, illustrating the scope of application of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with Article 14 of the Convention, as a basis for assessing potential violations by State Parties in the context of inheritance law. The article also examines relevant rulings of Polish domestic courts – both in the public law spheres – which reflect the judicial incorporation of constitutional guarantees for inheritance rights as a mechanism.

Teresa Zyglewska*

The European Convention on Human Rights as a Legal Means for Environmental Protection – Selected Issues

§ 1. Introductory remarks

Today, environmental protection has become one of the most important global challenges. Air and water pollution, the degradation of green areas, or climate change have a direct impact on human life and health. In this context, the role of international and national laws in ensuring environmental protection is increasingly being mentioned. An essential element for human life is the environment, which the Polish legislator defines as the entirety of natural components, whether or not transformed as a result of human activity, including in particular water, minerals, air, soil, climate, and other elements of biodiversity, as well as mutual interactions between these components[1].

The European Convention on Human Rights does not contain provisions explicitly addressing environmental protection. It is therefore worth considering whether, despite the absence of provisions referring directly to that issue, the Convention may serve as a legal means for environmental protection. The answer to this question should be sought in the jurisprudence of the European Court of Human Rights. The Court's jurisprudence has been influenced by international standards shaped by such enactments as the 1972 Stockholm Declaration on the Human

* Judge of the Supreme Administrative Court of Poland, dr; ORCID: 0000-0002-3867-8461.

[1] Article 3(39) of the Environmental Protection Law.

Environment[2], the 1992 Rio Declaration[3], which expanded the scope of access to courts in matters concerning the protection of natural environment, or the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[4].

§ 2. Environmental protection in the jurisprudence of the European Court of Human Rights

A. The right to respect for private and family life and environmental protection

Article 8 ECHR guarantees the right to respect for private and family life and for one's home. That right covers not only protection against direct, physical interferences but also against negative impacts such as noise or odour (so-called indirect emissions), as well as other actions that hinder the peaceful enjoyment of one's property[5]. In the Court's view, the individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area within reasonable limits[6]. This definition of the right to respect for private and family life and one's home indirectly leads to environmental protection and serves as a legal instrument for such protection. Environmental elements that have fallen within the Court's interest through Article 8 ECHR include, without limitation: noise[7], industrial pollution[8], waste treatment[9], air pollution[10], municipal waste

[2] Resolution of the United Nations Conference on the Human Environment, adopted in Stockholm on 16 June 1972, the so-called Stockholm Declaration, https://docs.un.org/en/A/CONF.48/14/Rev.1 (date of access: 1.8.2025).

[3] Declaration of the United Nations Conference on Environment and Development, adopted in Rio de Janeiro on 14 June 1992, the so-called Rio Declaration, https://docs.un.org/en/A/CONF.151/26/Rev.1(Vol. I) (date of access: 1.8.2025).

[4] Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, adopted in Aarhus on 25 June 1998, Polish Journal of Laws 2003, No. 78, item 706.

[5] *D. Sześciło*, Gloss to the ECtHR judgment of 2 November 2006, 59909/00, Sam. Teryt. 2010, No. 3, pp. 80–83.

[6] ECtHR decision of 1 June 2014, *Koceniak v. Poland*, application no. 1733/06, HUDOC.

[7] ECtHR judgment of 21 February 1990, *Powell and Rayner v. the United Kingdom*, application no. 9310/81, HUDOC.

[8] ECtHR judgment of 9 December 1994, *Lopez Ostra v. Spain*, application no. 16798/90, HUDOC.

[9] ECtHR judgment of 1 January 2012, *Di Sarno and others v. Italy*, application no. 30765/08, HUDOC.

[10] ECtHR judgment of 13 July 2017, *Jugheli and others v. Georgia*, application no. 38342/05, HUDOC.

disposal[11], climate change[12], broadly defined landscape conservation[13], and the protection of green areas[14].

Although the Convention does not provide for a right to a clean and quiet environment, situations in which noise or other pollutants may directly affect an individual may serve as grounds for the Court to find a violation of Article 8 ECHR. The said provision also applies to severe environmental pollution, which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely[15]. It is worth emphasising, from the perspective of protecting environmental values, that the occurrence of a serious danger to health is not required to establish a breach of the interests protected under Article 8 ECHR[16]. Such an approach by the Court provides better conditions for environmental protection.

However, this does not mean that such violations entitle to rely on Article 8 ECHR in every case where they occur. In the Court's opinion, in order for a case to be examined under Article 8 ECHR, the factors relating to environmental breach must directly and seriously affect the applicant's private and family life or home[17]. The threshold for satisfying these criteria is very high and depends on particular circumstances of the case[18].

From the perspective of environmental protection, the ECtHR judgment in *Verein Klimaseniorinnen Schweiz and others v. Switzerland* is particularly important[19]. That case, related to a breach of the right to respect for private and family life in the context of environmental values, concerned climate change, so major global problem.

In that judgment, the Court held that when national governments make decisions in complex matters concerning environmental and economic policies, the decision-making process should include appropriate analyses and studies enabling the authorities to strike a fair balance between various conflicting interests. The making of decisions by domestic authorities may not, however, be conditioned on having comprehensive and quantifiable data regarding every aspect of the case to be resolved.

[11] ECtHR judgment of 1 October 2023, *Locascia and others v. Italy*, 35648/10, HUDOC.

[12] ECtHR judgment of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, application no. 53600/20, HUDOC.

[13] ECtHR judgment of 29 March 2010, *Depalle v. France*, application no. 34044/02, HUDOC.

[14] ECtHR judgment of 18 January 2001, *Chapman v. the United Kingdom*, application no. 27238/95, HUDOC.

[15] ECtHR decision of 17 June 2014, *Koceniak v. Poland*.

[16] ECtHR decision of 17 October 2017 *Wilk v. Poland*, application no. 64719/09, HUDOC.

[17] ECtHR judgment of 8 July 2003, *Hatton and others v. the United Kingdom*, application no. 36022/97, HUDOC.

[18] ECtHR judgment of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*.

[19] *Ibid*.

What is important is that the decision-making process allows for predicting and assessing the consequences of actions that may harm the environment and simultaneously breach the applicants' rights under the ECHR. The State's fundamental obligation is to adopt and effectively implement laws and measures that limit existing and potential, irreversible future effects of climate change. The Court indicated that these guarantees must be practical and effective, not theoretical or illusory.

Based on Article 8 ECHR, the Court concluded that the said provision not only requires the State to refrain from arbitrary interference, thus imposing negative obligations on domestic authorities, but also gives rise to positive obligations inherent in the right to respect for private life[20]. The Court has repeatedly underlined that States bear primarily positive obligations, and should therefore take active steps to secure these rights. These obligations lie with the legislative authorities, which are responsible for enacting appropriate laws, with the administrative bodies applying those laws properly, and with the judicial authorities[21], including not only administrative courts but also bodies applying relevant criminal-law mechanisms[22].

The fundamental principle of environmental law is the principle of sustainable development. According to this principle, sustainable development is socio-economic development in which political, economic and social actions are integrated while maintaining environmental balance and the sustainability of basic natural processes, in order to guarantee the ability to satisfy the essential needs of various communities or citizens, both for the present and future generations[23].

The components of this principle can be identified in the ECtHR jurisprudence based on Article 8 ECHR.

The Court has pointed out that effective respect for the rights protected under the said provision requires States to take such actions aimed at achieving a substantial and progressive reduction of their greenhouse gas emissions so as to avoid disproportionately burdening future generations with reduction targets[24].

The principle of sustainable development is also reflected in the ECtHR judgment in *Hatton and others v. the United Kingdom*[25], where the Court emphasised that, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others. The States are required to minimise interference, as far as possible, by trying to

[20] ECtHR judgment of 24 January 2019, *Cordella and others v. Italy*, application no. 54414/13, HUDOC.

[21] ECtHR judgment of 2 November 2006, *Giacomelli v. Italy*, application no. 59909/00, HUDOC.

[22] ECtHR decision of 4 June 2019, *Tolić and others v. Croatia*, application no. 13482/15, HUDOC.

[23] Article 3(50) of the Environmental Protection Law.

[24] ECtHR judgment of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*.

[25] ECtHR judgment of 8 July 2003, *Hatton and others v. the United Kingdom*.

find alternative solutions and by seeking to achieve their aims in the least onerous way as regards human rights. An important role is thus played by maintaining a fair balance between conflicting interests[26], and the primary criterion for assessing that balance is the principle of proportionality. It should also be stressed that ECtHR pronouncements indicate that, in matters of this kind, States must be granted a wide margin of discretion. This is justified by the need to assess conflicting interests, while domestic authorities have better insight and possibility to evaluate local conditions and needs[27].

The basic duty covered by Article 8 ECHR is the protection of the individual against arbitrary interference by public authorities, but in certain circumstances the provision may also impose on the State an obligation to take positive measures to effectively ensure respect for the rights referred to in that article, even in relations between individuals[28].The duties of public authorities include not only refraining from arbitrary interference with the rights or the individual, but also taking steps necessary to safeguard those rights, including in relations between private persons[29]. An example of such an ECtHR ruling is the judgment in *Apanasiewicz v. Poland*[30], in which the Court held that Article 8 ECHR had been violated due to the applicant's exposure to adverse effects in the form of odours, noise and smoke emitted by a facility operated by her neighbour. This position of the Court is of significant importance for environmental protection, since environmental conflicts often arise between individuals, and not only between an individual and the State.

Procedural safeguards preceding the issuance of certain decisions play a very important role in environmental protection proceedings. Domestic legal systems include internal regulations governing procedures that involve the issuance of environmental decisions. The Court emphasises the particular importance of following procedures in the course of environmental proceedings[31].

An important element of environmental procedures is public participation in such proceedings, as well as the consideration of public views in the decision-making process. The ECtHR jurisprudence also identifies this element as important from the perspective of ensuring procedural guarantees available to the interested parties. The assessment of whether the interests of persons affected, or at risk of being affected,

[26] ECtHR decision of 4 June 2019, *Tolić and others v. Croatia*.

[27] ECtHR judgment of 12 November 2002, *Zvolsky and Zvolska v. the Czech Republic*, application no. 46129/99, HUDOC.

[28] ECtHR judgment of 20 April 2004, *Surugiu v. Romania*, application no. 48995/99, HUDOC.

[29] ECtHR judgment of 19 February 1998, *Guerra and others v. Italy*, applications no. 14967/89, HUDOC.

[30] ECtHR judgment of 3 May 2011, *Apanasiewicz v. Poland*, application no. 6854/07, HUDOC.

[31] ECtHR judgment of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*.

have been violated should be carried out with due regard to the opinions of those persons[32].

B. Access to justice in environmental matters

Access to justice is guaranteed by Article 6 ECHR, which establishes the right to a fair trial, and by Article 13 ECHR, which lays down the right to an effective remedy. The right to a fair trial grants everyone the right to bring before a court all claims concerning their civil rights and obligations, as well as any criminal charge[33]. Article 6 ECHR does not confer a right to bring an action of an environmental nature, but such cases reach the Court due to the alleged infringement of other interests protected by the Convention.

An important issue is the question of standing of the entities entitled to bring an action. It should be remembered that the action does not have the nature of an *actio popularis*, that is, an action brought in the public interest[34]. In environmental cases, this issue is of significant importance, as the applicant is often not an individual but an association.

In the *Verein Klimaseniorinnen Schweiz* judgment, the Court held that the association possessed the necessary standing in the proceedings, as it had been lawfully established, demonstrated that it pursued a purpose in accordance with its statutory objectives in the defence of human rights and the rights of its members and other individuals affected by risks arising from climate change in the respondent State, and that it was genuinely qualified and representative to act on behalf of those individuals who may be subject to specific threats or adverse effects of climate change for their lives, health, well-being and quality of life protected by the Convention[35].

A broad understanding of the concept of "victim" under Article 34 ECHR was presented by the ECtHR in *Gorraiz Lizarraga and others v. Spain*[36], where it held that, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Such an interpretation of that concept opens the way not only for actions brought by individuals regarding en-

[32] *Ibid*.

[33] *M.A. Nowicki*, Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, Warszawa, 2017, p. 509.

[34] *M. Kwiędacz-Palosz*, Dostęp do wymiaru sprawiedliwości w sprawach środowiskowych w orzecznictwie Europejskiego Trybunału Praw Człowieka, EPS 2020, No. 10, pp. 30–36.

[35] ECtHR judgment of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*.

[36] ECtHR judgment of 27 April 2004, *Gorraiz Lizarrga and others v. Spain*, application no. 62543/00, HUDOC.

vironmental protection, but also creates an opportunity for specialised entities, often associations, to use the mechanisms provided by the Convention to safeguard environmental values.

With regard to the Court's jurisprudence on an effective remedy, attention should be paid to the case of *Öneryıldız v. Turkey*[37], which concerned a methane explosion at a rubbish tip where the applicant had built a house without a permit. The alleged violation of Article 13 ECHR, in conjunction with Article 2 ECHR, was based on the inadequate conduct of the criminal proceedings initiated after the fatal accident resulting from the explosion, which failed to protect the right to life. The ECtHR held that the said provisions had been violated because, in the context of Article 2 ECHR, an effective remedy must include the carrying out of a thorough and effective investigation.

C. Environmental cases in relation to other guarantees provided by the Convention

Although environmental issues most frequently appear before the Court in cases concerning the respect for private and family life, so the rights guaranteed in Article 8 ECHR, there are also references to environmental protection matters based on other Convention guarantees.

One of such guarantees is Article 11 ECHR concerning the freedom of assembly. In *Zeleni Balkani v. Bulgaria*[38], the Court found a violation of the freedom of assembly, as the authorities refused the association permission to organise a public rally intended to protest against actions aimed at destroying trees and the habitats of rare, endangered species of birds.

Another basis for examining a case involving environmental elements was Article 3 ECHR. It provides for a prohibition of torture and inhuman or degrading treatment and punishment. The factual circumstances of the case concerned exposure to passive smoking by a fellow prisoner during detention. The ECtHR dismissed the action as manifestly unfounded, since the applicant failed to demonstrate that the treatment by public authorities during his detention reached the minimum level of severity required to apply Article 3 ECHR, and since there was no evidence that occasional smoking by other prisoners constituted anything more than a sporadic

[37] ECtHR judgment of 30 November 2004, *Öneryyldyz v. Turkey*, application no. 48939/99, HUDOC.

[38] ECtHR judgment of 12 April 2007, *Zeleni Balkani v. Bulgaria*, application no. 63778/00, HUDOC.

inconvenience to the applicant; however, the judgment is a signal that the said provision may indirectly serve as a basis for environmental protection under the Convention[39].

It should be noted that in *Mangouras v. Spain*[40], the Court pointed out the need for a "growing and legitimate" concern about offences against the natural environment. In that judgment, based on Article 5 ECHR, the Court indicated the special powers and obligations of the State in preventing marine pollution. It emphasised the importance of the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and impose sanctions on them where necessary. It is also worth noting that, in the Court's opinion, there is a visible need to rely on criminal law to induce compliance with environmental obligations imposed by European and international law.

Conflicts in the field of environmental protection frequently arise on the grounds of protecting the right to property, which means that such disputes are resolved on the basis of Article 1 of Protocol No. 1 to the ECHR. According to the ECtHR jurisprudence, interference with property rights must be justified and proportionate. In V*alle Pierimpie Società Agricola S.p.A. v. Italy*[41], which concerned the expropriation of a fishing farm without compensation to the former owner, the Court had no doubt that the aim of the expropriation was legitimate, as it related to the protection of the natural environment, the conservation of resources and the lagoon ecosystem, and the opening of the lagoon for public use. However, the Court was concerned that the expropriation had been carried out without compensation, which implied a violation of Article 1 of Protocol No. 1 to the ECHR. Similarly, in *G.I.E.M. S.r.l. and others v. Italy*[42], although the Court held that "the legitimacy of State policies in favour of environmental protection cannot be called into question, because the well-being and health of individuals are thereby also guaranteed and defended", it nonetheless found that the automatic confiscation of land unlawfully developed by the owner violated Article 1 of Protocol No. 1 to the ECHR.

As a counterbalance to the presented judgments issued under Article 1 of Protocol No. 1 to the ECHR, reference should be made to *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*[43], which concerned regulating the use of property in re-

[39] ECtHR decision of 28 May 2024, *Kostka v. Poland*, application no. 48781/19, HUDOC.

[40] ECtHR judgment of 28 September 2010, *Mangouras v. Spain*, application no. 12050/04, HUDOC.

[41] ECtHR judgment of 23 September 2014, *Valle Pierimple Sociata Agricola S.p.a. v. Italy*, application no. 46154/11, HUDOC.

[42] ECtHR judgment of 28 June 2018, *G.I.E.M. S.r.l. and others v. Italy*, applications nos. 1828/06, 34163/07 and 19029/11, HUDOC.

[43] ECtHR judgment of 7 June 2018, *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, application no. 44460/16, HUDOC.

lation to a temporary ban on commercial fishing of mussel seed, imposed to comply with European Union directives. Following this ban, the applicant company filed for compensation from the State. The compensation was not awarded.

In this case, the ECtHR did not find a violation of Article 1 of Protocol No. 1 to the ECHR, holding that "environmental protection policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake. In implementing such policies, the State may, in particular, have to intervene in the sphere of public property and even, in certain circumstances, foresee a lack of compensation in a number of situations falling within the control of the use of property. As the Court has held, where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1".

The ECtHR has also relied on Article 10 ECHR, which guarantees freedom of expression, as a basis for protecting environmental resources. The judgment forming grounds for such a conclusion was based on facts that occurred in Poland and involved a Greenpeace blockade of the coal port in Gdańsk, aimed at preventing a merchant vessel carrying coal imported from Mozambique from entering the port[44]. Members of the environmental organisation were detained by the Border Guard. The Court found a violation of Article 5 ECHR and, consequently, a violation of Article 10 ECHR, holding that environmental protests may constitute the expression of opinions within the meaning of Article 10 ECHR and, therefore, the authorities violated these provisions by preventing the protesters from continuing their demonstration.

§ 3. Final remarks

The examples of ECtHR jurisprudence presented above show that, although the ECHR does not contain express legal provisions referring to environmental protection, it indirectly safeguards environmental resources and constitutes a legal instrument for environmental protection.

The absence in the Convention of specific, clearly defined environmental protection rights does not imply that such rights cannot be protected under the Convention[45]. ECtHR jurisprudence strengthens individuals' rights to the environment,

[44] ECtHR judgment of 20 June 2024, *Friedrich and others v. Poland*, application no. 25344/20, HUDOC.

[45] See: *O.M. Piaskowska*, Stwierdzenie naruszenia Europejskiej Konwencji Praw Człowieka i jego skutki w polskim procesie cywilnym, Warszawa, 2021.

even though the Court does not assess ordinary environmental degradation as such, but rather its harmful effects on residents.

It is important to emphasise that environmental elements considered by the Court are linked to numerous rights guaranteed by the ECHR, which helps extend the scope of environmental protection.

Polish administrative courts, in their judicial pronouncements made in environment-related matters, rarely refer to ECtHR jurisprudence, which may be due to the fact that domestic legal solutions already incorporate the same guaranteed rights and principles that form the basis of the Convention[46].

It is worth noting, however, that in those areas of environmental protection that are not regulated in Polish domestic law, administrative courts rely on the legal guarantees provided by the Convention.

An example is the issue of odour nuisance, where despite the absence of national or EU regulations, the Supreme Administrative Court of Poland, when resolving a case, pointed out that it is necessary to respect private life and the ability to peacefully enjoy the values of one's home[47]. The influence of ECtHR jurisprudence on decisions made by administrative courts confirms the significant role played by the ECHR in matters concerning environmental protection.

Abstract

Protecting the environment and creating conditions for functioning in the modern world for current and future generations is becoming an increasingly difficult challenge. It is therefore necessary to use all possible means to achieve this goal. Taking into account the passing of 75 years since the Convention was submitted for signature, it seems particularly important to pay attention to whether such an important document protecting human rights can also be an instrument that effectively protects the environment. Although environmental protection is not a right guaranteed by the Convention, the analysis of the Court's case-law indicates that this act may constitute a legal measure for environmental protection.

[46] *R. Hauser*, Konflikt środowiskowy przed organami i sądami administracyjnymi w kontekście art. 8 Europejskiej Konwencji Praw Człowieka, EPS 2014, No. 1, pp. 28–31.

[47] NSA judgment of 11 October 2022, II OSK 1434/21, CBOSA.

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