DEVELOPMENTS

ECHR Rules on Illegal Ban of Warsaw Equality Parade: The Case of *Bączkowski and Others v. Poland*

By Sina Van den Bogaert[*]

A. Introduction

On 3 May 2007, the European Court of Human Rights in Strasbourg (hereinafter "the Court") rendered a judgment in the case *Bączkowski and Others v. Poland*[1] The Court stated that Poland violated Article 11 (freedom of association and assembly), Article 13 (right to an effective remedy) in conjunction with Article 11 and Article 14 (prohibition of discrimination) in conjunction with Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Indeed, in this case it was obvious that the refusal issued by the Mayor of Warsaw to the Foundation for Equality and its members to exercise their right to freedom of assembly was unlawful. Further, it was also obvious that the refusal was motivated by the fact that the Foundation for Equality and its members campaign on behalf of persons of homosexual orientation. Should such an illegal refusal take place under German law, the applicants would probably have obtained the quashing of this illegal refusal in time (that is, before the date of the planned assembly) by means of a temporary injunction before the German Federal Constitutional Court (*Bundesverfassungsgericht*). Conversely, in Poland victims of an illegal refusal to hold an assembly are very unlikely to obtain a final decision in time. This relates to the fact that, on the one hand, a request to hold an assembly may be submitted 30 days before the planned date of the assembly at the earliest, which leaves victims of an illegal refusal less than a month to go through all appellate procedures. On the other hand, victims of an illegal refusal to hold an assembly do not dispose of the possibility to obtain a temporary injunction nor any other form of preliminary ruling under Polish law.

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[*] PhD candidate at the University of Heidelberg, currently working on a doctoral dissertation within the framework of the European Graduate College (*Europaeisches Graduiertenkolleg*) of the Universities of Mainz, Heidelberg and Cracow (www.graduiertenkolleg.eu). I am indebted to Sergiusz Szuster and Wojciech Burek for some very helpful conversations and suggestions. Email: sina0213@hotmail.com.

[1] *Bączkowski and Others v. Poland*, App. No. 1543/06, Eur. Ct. H.R. 2007.

The facts of the case should be seen in the larger context of the current negative attitude towards the lesbian, gay, transgender and bisexual (LGTB) community presented by some elected politicians as well as different groups in society and referred to in several reports by NGOs and international organizations.[2] It seems that the situation of the LGTB community in Poland has worsened after Lech Kaczyński, a member of the conservative "Right and Justice" (*Prawo i Sprawiedliwość*) party, was elected as President of Poland in October 2005.

The Warsaw Equality March planned for June 2005 was not the only pro-LGTB march unlawfully banned in Poland in 2005. In November 2005, the Poznań Equality March was banned by the Poznań Mayor and dispersed by the police.[3] 68 of some 500 demonstrators were assaulted and arrested. In the banned Poznań demonstration, police did not intervene when members of the All Polish Youth - the youth department of the extreme-right League of Polish Families party - threw eggs and projectiles at the gay demonstrators while shouting "Gas the fags!" and "We'll do to you what Hitler did to the Jews!" Instead, the police arrested the gay demonstrators marching in contravention of the ban, carrying lighted candles and chanting: "This is a funeral for democracy."[4] Following appeals, the Polish Supreme Administrative Court declared that the reasons given for the banning of the march were insufficient to justify restrictions on freedom of assembly.

The organizers of the Poznań march did not bring their case to the European Court of Human Rights. However, the organizers of the Warsaw march, with the help of the Helsinki Foundation for Human Rights in Warsaw,[5] did.

B. The Facts of the Matter and the Proceedings in Poland

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[2] Amnesty Int'l, *Poland: LGBT rights under attack*, Nov. 25, 2005 (statement expressing concern about the climate of intolerance in Poland against the LGTB community). *available at* http://web.amnesty.org/library/Index/ENGEUR370022005?open&of=ENG-POL. *See also* Letter from Alvaro Gil-Robles, High Commissioner for Human Rights of the Council of Europe, to the Polish Government, (June 20, 2007) (The High Commissioner for Human Rights of the Council of Europe referring to the problems encountered by LGTB people in Poland and to the unlawful ban of both the marches in Warsaw and Poznań in its Memorandum to the Polish Government of 20 June 2007). *Available at* https://wcd.coe.int/ViewDoc.jsp?id=1155005&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[3] http://www.legislationline.org/news.php?tid=200&jid=39.

[4] DIRELAND, http://direland.typepad.com/direland/2005/11/gay_poland_prot.html.

[5] HELSINKI FOUNDATION FOR HUMAN RIGHTS, http://www.hfhrpol.waw.pl/en/index.html.

The applicants in this case were the Foundation for Equality (*Fundacja Równości*) and five of its members, namely Tomasz Bączkowski, Robert Biedroń, Krzysztof Kliszczyński, Inga Kostrzewa and Tomasz Szypuła. In the context of a campaign called Equality Days, organised from 10 to 12 June 2005 by the Foundation for Equality, the applicants wished to organize a march to take place in the streets of Warsaw. The march was planned for 11 June 2005 and was aimed at bringing public attention to discrimination against minorities, women and the disabled.

After having received an instruction of the Warsaw Mayor's Office on requirements of the 1997 Road Traffic Act[6] (*Prawo o Ruchu Drogowym*), with which organizers of public assemblies must comply, the Foundation for Equality submitted a request to the City Council Road Traffic Office on 12 May 2005[7] for permission to organize a march on 11 June 2005.

On 20 May 2005 while the request for permission was still pending, the "Gazeta Wyborcza", a national newspaper, published an interview with the Mayor of Warsaw who said that he would ban the said march in all circumstances, regardless of the content of the request, and that, in his view, "propaganda about homosexuality is not tantamount to exercising one's freedom of assembly."[8]

On 3 June 2005 a representative of the Mayor of Warsaw, acting on the latter's behalf, refused permission for the march. The reason for that decision was based on the organisers' failure to submit a "traffic organisation plan" (*projekt organizacji ruchu*) within the meaning of Article 65 (a) of the Road Traffic Act. The applicants alleged that they had never been asked to submit such a document.

Article 65(i) of the 1997 Road Traffic Act stipulates that, for matters not dealt with in the Road Traffic Act,[9] the general provisions of the Administrative Procedural Code (*Kodeks Postępowania Administracyjnego*)[10] apply. This Code[11] foresees a two

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[6] Polish Official Journal, No. 98, item 602, (1997) (Pol.) (Dziennik Ustaw z 1997, Nr 98, poz. 602).

[7] This is exactly 30 days before the planned date of the assembly, in accordance with Article 7(1) of the Assemblies Act (*Prawo o Zgromadzeniach*) stipulating that a request to hold an assembly must be submitted not earlier than 30 days and not later than 3 days before the planned date of the assembly.

[8] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 27, Eur. Ct. H.R. 2007.

[9] Such as the appellate procedure on which the 1997 Road Traffic Act is silent.

[10] Polish Official Journal, No. 98, item 1071, (2000) (Pol.) (Dziennik Ustaw z 2000, Nr 98, poz. 1071).

[11] KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO (Pol. – Administrative Procedural Code) art. 127, para. 2, and art 17.1.

week period to lodge an appeal to the Local Government Appellate Board (*Samorządowe Kolegium Odwoławcze*) and a one month period for the Local Government Appellate Board to issue a judgment. Having only about a week left before the planned date of the march and knowing that they would never obtain the quashing of the refusal in time, the applicants decided to apply for a permit to hold stationary assemblies on 12 June 2005 in seven different squares in Warsaw. Some stationary assemblies were intended to slate discrimination against various minorities, while others were intended to denounce discrimination against women.

On 9 June 2005 the Mayor of Warsaw issued decisions banning 6 of the 8 planned stationary assemblies.[12] In his decision, the Mayor relied on the argument that under the provisions of the Assemblies Act of 1990 (*Prawo o Zgromadzeniach*)[13] stationary assemblies had to be organised away from roads used for road traffic, given that more stringent requirements applied when using roads so as to avoid disturbance. Permission was also refused on the ground that there had been a number of other requests to organize stationary assemblies with opposing ideas and intentions and that it could have resulted in clashes between the demonstrators.

On the same day, the stationary assemblies concerning discrimination against women were given permission to take place. Permission was also granted to various other demonstrations, to be held by organizations with opposing ideas and with themes such as: "Against propaganda for partnerships," "Christians who respect God's and nature's laws are citizens of the first rank" and "Against adoption of children by homosexual couples."

Despite the negative decision of 3 June, the march did take place on 11 June 2005. It was attended by approximately 3,000 people and was protected by the police.[14] The stationary assemblies which had been granted permission to take place were held on the same day.

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[12] Please note that since the refusal to hold the stationary assemblies was based on the provision of the 1990 Assemblies Act, the appellate procedure for the applicants were different from the appellate procedure against the refusal of the march, which was based on the provisions of the 1997 Road Traffic Act.

[13] Polish Official Journal, No. 51, item 297, (1990) (Pol.) (Dziennik Ustaw z 1990, Nr 51, poz. 297).

[14] Polish police forces under the competence of the government, and not under the competence of the Mayor. In June 2005 at the time of the ban on the march in Warsaw, the government in power was a left-wing government, whilst Mr. Kaczyński, who banned the march, is a member of the "Law and Justice" party, which is a conservative catholic party. This might explain why the police did protect the march in spite of the ban by Mr. Kaczyński. The march in Poznań, in contrast, to which the police reacted violently, on the contrary, took place in November 2005, after the 23 October 2005 election of President Mr. Kaczyński.

On 17 June 2005 the Mazowsze governor (*Wojewoda Mazowiecki*) and on 22 August 2005 the Local Government Appellate Board (*Samorządowe Kolegium Odwoławcze*) quashed the decisions of 9 and 3 June respectively, on the grounds that they had been poorly justified and were in breach of the applicable laws. Those decisions of 17 June and 22 August 2005 were pronounced after the dates on which the applicants had planned to hold the demonstrations. Therefore the proceedings, henceforth devoid of purpose, were discontinued.

On 18 January 2006 the Polish Constitutional Court (*Trybunał Konstytucyjny*)[15] examined a request submitted to it by the Ombudsman to determine the constitutional compatibility of certain provisions of the Road Traffic Act. Article 65's requirement of submitting a "traffic organisation plan" was repealed as a result of the judgment of the Constitutional Court. It held that the provision did not conform to Article 57 of the Constitution[16] since it encompassed "assemblies." The Court stated that: "The legislator made an error by failing to account for the constitutional nature of freedom of assembly as a fundamental political freedom. Therefore, freedom of assembly may not be subject to the same regulation as the Road Traffic Act 1997 envisages for the organisation of athletic competitions, rallies, races and similar events, which are by nature politically neutral."[17]

[15] Council of Europe documents use the English term 'Court' when referring to the highest judicial organ in Poland. English documents available at official Polish websites, such as the Constitutional Tribunal Act, use the term 'Tribunal' which is closer to the original Polish version of *Trybunał*. We have chosen to use the term Court, since this is the term used in the judgments of the European Court of Human Right. Only when referring to the Constitutional Tribunal Act, we chose to use the term Tribunal. *See* Constitutional Tribunal Act (1997) (Pol.). *available at* http://www.trybunal.gov.pl/eng/Legal_Basis/Act_Trib97.htm.

[16] Article 57 of the Constitution reads: "The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute."

[17] Trybunał Konstytucyjny (Polish Constitutional Court), K 21/05, para. 9 (Jan. 18, 2006), http://www.trybunal.gov.pl/eng/ summaries/documents/K_21_05_GB.pdf (Requirement to obtain permission for an assembly on a public road, para. 9 of the unofficial English summary of judicial decisions).

C. The Reasoning of the Court

I. On the Government's Preliminary Objections

1. Whether the Applicants Can Claim to Have the Status of Victims

The Polish government argued that as the applicants had not claimed to have sustained any pecuniary or non-pecuniary damage, the domestic authorities had not been under an obligation to offer them any redress. The Court acknowledged here that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The Court observed that the refusals to give authorization could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the ground that there was not official authorization and therefore no governmental protection against possible hostile counter-demonstrators.[18] Moreover - and unfortunately, this aspect has not been mentioned by the Court in its judgment - the organizers of the march also ran the risk of criminal prosecution for having violated article 52 para. 1 point (2) of the Minor Offences Code[19] (*Kodeks Wykroczeń*).[20] This Article stipulates that the organizing of or presiding over an assembly for which permission was not requested or had been forbidden is punishable by a 14-day imprisonment, a limitation of freedom or a fine.

2. Exhaustion of Domestic Remedies

The government also stated that, in its view, the applicants did not exhaust all possible domestic remedies since they did not lodge a constitutional complaint provided for by Article 79 of the Constitution. The Government recalled that the Court had held in a previous judgment[21] that the Polish constitutional complaint could be recognized as an effective remedy. This remedy was applicable where the individual decision, which allegedly violated the Convention, had been adopted in a direct application of an unconstitutional provision of national legislation. In that case, the Court concluded that the applicants should have had recourse to this

[18] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 45-48 and 67, Eur. Ct. H.R. 2007.

[19] As opposed to the Criminal Code (*Kodeks Karny*) which deals with crimes regarded as a matter of criminal law.

[20] Polish Official Journal, No. 12, item 114, (1971) (Pol.) (Dziennik Ustaw z 1971, Nr 12, poz. 114).

[21] *Szott-Medyńska v. Poland*, App. No. 47414/99, Eur. Ct. H.R. 2003.

remedy.[22] Regarding the Government's reliance on an individual constitutional complaint, the Court noted that in the context of Polish administrative procedure, two-tiered judicial review of second-instance administrative decisions is available. The Court argued that only a judgment of the Supreme Administrative Court is considered to constitute a final decision in connection with which a constitutional complaint is available. In the present case the applicants, having obtained decisions of the second-instance administrative bodies essentially in their favor after the quashing of the permit refusals, had no legal interest in bringing an appeal against these decisions to the administrative courts. Hence, the Court stated that "the way to the Constitutional Court was not open to them."[23]

II. On the Violation of Article 11 ECHR (Right to Peaceful Assembly)

In finding a violation of Article 11 ECHR, in order to prove the unlawfulness of the Mayor's refusal, the Court referred to the decision of the Local Government Appellate Board of 22 August 2005 and the decision of the Mazowsze Governor of 17 June 2005, both quashing the Mayor's refusal. It also referred to the judgment of the Polish Constitutional Court where Article 65 of the Road Traffic Act was repealed.[24] We will not go into detail on this issue, since both the decision of the Local Government Appellate Board and the decision of the Mazowsze Governor were uncontroversial.

III. On the Violation of Article 13 ECHR (Right to an Effective Remedy)

The applicants argued that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date they were planning to hold the assembly. The Court underlined that it is important for the effective enjoyment of the freedom of assembly that the applicable laws provide for reasonable time limits within which State authorities, when giving relevant decisions, should act and that the notion of an effective remedy implies the possibility to obtain a ruling before the time of the planned events. Since the authorities in this case were not obliged by any legally binding time frame to give their final decisions before the planned date of the demonstration, the Court held that Article 13 ECHR, in conjunction with Article 11 ECHR, had been violated.[25]

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[22] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 49-54, Eur. Ct. H.R. 2007.

[23] *Id.* at para. 80.

[24] *Id.* at para. 70-71.

[25] *Id.* at para. 76 and 80-84.

IV. On the Violation of Article 14 ECHR (Non-discrimination) in Conjunction with Article 11 ECHR

The applicants argued they had been discriminated against since they had been required to submit a "traffic organisation plan" while other organizations had not been required to do so. The Court upheld their argument and also referred extensively to the interview with Mr. Kaczyński.[26] It held that elected politicians are required to show restraint when exercising their freedom of expression, as their views can be regarded as instructions by civil servants whose employment and careers depend on their approval. In the Court's view, the opinions of Mr. Kaczyński could have affected the decision making process and impinged on the applicants' right to freedom of assembly in a discriminatory matter.[27]

D. The Competence of the Constitutional Court and Temporary Injunction: a Polish – German Comparison

First, it should be noted that the competence of the German Federal Constitutional Court is much broader than that of the Polish Constitutional Court when it comes to individual constitutional complaints. According to Article 93, para. 1 point 4a of the Basic Law for the Federal Republic of Germany (*Bundesverfassungsgesetz*), the German Federal Constitutional Court (*Bundesverfassungsgericht*) is competent to rule on constitutional complaints. These complaints may be filed by any person alleging that one of his basic rights has been infringed upon by public authority. The Polish Constitutional Court, on the contrary, is only competent[28] to determine conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on freedoms, rights or obligations specified in the Constitution.[29]

Under German Law, there is a possibility of seizing the Constitutional Court in cases of an unlawful refusal to hold an assembly, even without a previous administrative procedure, provided that the refusal to hold an assembly would amount to a severe and inevitable prejudice for the organizer of the assembly.[30] The

[26] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 27, Eur. Ct. H.R. 2007 (The English translation of the interview with Mr Kaczyński in "Gazeta Wyborcza" of 20 May 2005 is entirely reproduced under the "circumstances of the case).

[27] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 98-99, Eur. Ct. H.R. 2007.

[28] I will elaborate on this in a subsequent section.

[29] KONSTYTUCJA (Pol. – Constitution) art. 79, para. 1 .

[30] BUNDESVERFASSUNGSGERICHTSGESETZ (GG – Federal Constitutional Court Act) art. 90, para. 2.

Constitutional Court issues a temporary injunction, as stipulated by Article 32 para. 1 of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*). In extremely urgent cases, the Court issues the temporary injunction without involvement of the competent administrative authorities.[31]

On the other hand, the Polish legal system does not know the legal tool of temporary injunction. The Polish Constitutional Tribunal Act of 1 August 1997[32] does provide for the suspension of judgments or administrative decisions in certain instances, as stipulated in the first paragraph of Article 50:

> The Tribunal may issue a preliminary decision to suspend or stop the enforcement of the judgment in the case to which the complaint refers if the enforcement of the said judgment, decision or another ruling might result in irreversible consequences linked with great detriment to the person making the complaint or where a vital public interest or another vital interest of the person making the complaint speaks in favor thereof.

In cases of a refusal to hold an assembly, the suspension of the refusal – while awaiting a final judgment on the constitutionality of the provisions on which the refusal was based – will be used very rarely because of the fact that the Polish Constitutional Court is competent only, as indicated above, after all possible appellate procedures have been exhausted, a very unlikely scenario for less than 30 days time.[33]

Hence, due to the non-existence of the possibility of obtaining a temporary injunction in cases of an unlawful refusal to hold an assembly under Polish law and the lack of laws providing for reasonable time-limits within which the competent State authorities are to act, there are no legal means available to ensure that a lawful assembly can take place on the planned date.

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[31] ALFRED DIETEL, KURT GINTZEL AND MICHAEL KNIESEL, Demonstrations- und Versammlungsfreiheit: Kommentar zum Gesetz über Versammlungen und Aufzüge, 161 (2004).

[32] Polish Official Journal, No. 102, item 643, (1997) (Pol.) (Dziennik Ustaw z 1997, Nr 102, poz. 643). *available at* http://www.trybunal.gov.pl/eng/Legal_Basis/Act_Trib97.htm.

[33] The problem lies also in the fact, that Article 7 of the 1990 Assemblies Act stipulated, that a request to hold an assembly must be submitted to the municipality not earlier than thirty days before the planned date of the demonstration. *See supra* note 7.

E. Comments

I. On the Exhaustion of Domestic Remedies

When it comes to the issue of exhaustion of domestic remedies, two questions arise. The first concerns a question of jurisprudence of the European Court of Human Rights: Does this Court consider a constitutional complaint under Polish law as an effective remedy and a necessary step for the exhaustion of domestic remedies?

The second question is situated at the level of Polish national law: Can a positive judgment at a lower administrative level be considered as a final decision in connection with which a constitutional complaint is available?

1. The Constitutional Complaint as an Effective Remedy

In the decision *Szott-Medyńska and Others v. Poland*,[34] the Court held that the Polish constitutional complaint could be recognized as an effective remedy where the individual decision, which allegedly violated the Convention, had been adopted in a direct application of an unconstitutional provision of national legislation. In previous cases, both the Court and the Commission have ruled that procedures before constitutional courts, to which individuals have direct access under domestic law, constitute a remedy to be exhausted before filing a complaint with the European Court of Human Rights.[35] However, the Court observed in the *Szott-Medyńska* decision that the Polish model of constitutional complaint is characterized by two important limitations, namely as to its scope on the one hand and the form of redress it provides on the other hand. The first limitation is that a constitutional complaint can only be lodged against a statutory provision and not against a judicial or an administrative decision as such. Therefore, recourse to the constitutional complaint is possible only in a situation in which the alleged violation of the Convention resulted from the application of a statutory provision that can reasonably be questioned as unconstitutional. Furthermore, such statutory provision had to constitute the direct legal basis for the individual decision in respect to which the violation is alleged. Thus, the procedure of constitutional complaint cannot serve as an effective remedy if the alleged violation resulted only from erroneous application or interpretation of a statutory provision which, in its content, is not unconstitutional. Furthermore, the constitutional complaint cannot

[34] *Szott-Medyńska and Others v. Poland*, App. No. 47414/99, Eur. Ct. H.R. 2003.

[35] *X. v. Germany*, App. No. 8499/99, Eur. Ct. H.R. (1980). *Castells v. Spain*, App. No. 11798/85, para. 24-32, Eur. Ct. H.R. (1992).

serve as an effective remedy if the provision in question has not constituted the legal basis for the final judicial or administrative decision, but merely was applied at some stage of the main procedure to take an interim or incidental measure.[36]

The second limitation of a constitutional complaint under Polish law concerns the redress the constitutional complaint provides to the individual. The Court observed in the *Szott-Medyńska* decision that, according to Article 190 of the Constitution, the only direct effect of the judgment of the Constitutional Court is the abolition of the statutory provision which has been found unconstitutional. Such judgment, however, does not automatically quash an individual decision in relation to the constitutional complaint which was lodged. Article 190 para. 4 of the Constitution grants the author of a successful constitutional complaint the right to request that the procedure in his case be reopened or otherwise revised, "in a manner and on the basis of principles specified in provisions applicable to the given proceedings." Therefore, redress will be available for the grievances of an individual who has been a victim of a violation of his Convention rights by virtue of the application of an unconstitutional statutory provision where procedural law in the specific area concerned provides for a clear right to have the procedure reopened or otherwise revised following a judgment of the Constitutional Court.[37]

Having analyzed the above-mentioned limitations of the Polish procedure of constitutional complaint, the Court observed that it can be recognized as an effective remedy within the meaning of the Convention only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation, and 2) procedural regulations applicable for revision of such type of individual decisions provide for the reopening of the case or quashing the final decision upon the judgment of the Constitutional Court in which unconstitutionality had been found.[38]

Consequently, the exhaustion of the procedure of the constitutional complaint should be required under Article 35 § 1 of the European Convention for Human Rights in situations in which both above-mentioned requirements have been met.

In the case of *Bączkowski*, the reopening of the case after the judgment of the Polish Constitutional Court on the unconstitutionality of the Road Traffic Act would not

[36] *Brudnicka v. Poland*, App. No. 54723/00, Eur. Ct. H.R. 2003.

[37] *Szott-Medyńska and Others v. Poland*, App. No. 47414/99, Eur. Ct. H.R. 2003.

[38] *Id.*

serve any legal purpose since the planned date of the assembly had lapsed. Thus, one could argue that the second condition referred to in the *Szott-Medyńska* decision had not been fulfilled and that therefore the constitutional complaint in the *Bączkowski* case was not a precondition for the exhaustion of domestic remedies.

It is regrettable that the Court did not uphold this argument, which would have been consistent with its former jurisprudence and would have allowed the Court not to go into the question of whether under Polish law the way to the Constitutional Court was or was not open for the applicant.

It should be also noted that the issue of unconstitutionality of the provisions of the Assemblies Act, upon which the second refusal of the Mayor of 9 June 2005 was based, was never raised in this case. The argument of non-exhaustion of domestic remedies thus does not come into play concerning the refusal of the Mayor of 9 June 2005, where it was clear that the refusal in itself was unconstitutional, but the Act upon which it was based was not.

2. The Interpretation of Article 46 Paragraph 1 of the Constitutional Tribunal Act

Article 46 paragraph 1 of the Constitutional Tribunal Act read as follows:

> Constitutional claim, further referred to as the "claim" can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the plaintiff, the final decision or other final judgment.

When, on 22 August 2005, the Local Appellate Board quashed the Mayor's refusal of 3 June 2005, one could argue that according to the first paragraph of the higher mentioned article the applicants obtained a final decision against which no legal means were allowed. On the basis of a literal interpretation of Article 46 para. 1 of the Constitutional Tribunal Act, one could state that the applicant fulfilled the preconditions for submitting a constitutional claim on the unconstitutionality of the provisions of the Road Traffic Act.

It is generally accepted in Poland, though, that no constitutional complaint can be filed after having obtained a positive judgment from a lower administrative court.

The European Court of Human Rights could have avoided elaborating on this complicated issue by merely examining the question of whether a constitutional complaint in this case is a precondition for the exhaustion of domestic remedies.

Since the answer to this last question is negative in our view, there was no need to examine the competence of the Polish Constitutional Court under Polish law.

II. On an Interview as a Legal Basis to Find a Violation of Article 14 ECHR

When judging the violation of Article 14 in conjunction with Article 11 of the European Convention for Human Rights, the Court noted first that in the proceedings before the Traffic Officer, the applicants had been asked to submit a "traffic organization plan" whilst it had not been shown that other organisers had been required to do this.[39] Secondly, the Court underlined it could not speculate on the existence of motives, other than those expressly articulated in the administrative decisions complained of but that it "[could not] overlook the fact that on 20 May 2005 an interview with the Mayor was published in which he stated he would refuse permission to hold the assemblies."[40]

A question here arises: To what extent can and should the European Court of Human Rights rely on a newspaper interview of an official holding a public office as a legal basis for holding a violation of Article 14 of the Convention?

In our view, the Court might have been a lot more careful, should this have been the only argument to rely on concluding that Article 14 ECHR had been violated. In this case, the violation of the said article already resulted from the fact that only the applicants – and not the organizers of other assemblies, who also intended to make use of roads meant for public traffic – had to submit a "traffic organization plan." This fact might have prompted the Court to be a bit bolder in its observations as to the interview with Mr. Kaczyński.

The problematic content of the interview was mainly related to the fact that, at the time the interview was published, the request for the assembly permits was still pending. Indeed, an official holding an administrative function should not make any public statements on the outcome of a procedure while the administrative procedure is still pending, not in the least because the applicant is entitled to be informed of the outcome of the case before the press is.

What can be criticized here is that in the last paragraphs of the judgment, the Court seems to contradict itself. First, it states that that the requirements of objective and subjective impartiality, which are applicable in judicial proceedings, should not be applicable in administrative proceedings. But, in spite of this statement, it holds

[39] *Bączkowski and Others v. Poland*, App. No. 1543/06, para. 95, Eur. Ct. H.R. 2007..

[40] *Id*. at para. 97.

that the opinions of the Mayor could have affected the decision making process in this case and, as a result, impinged on the applicant's right to freedom of assembly in a discriminatory matter.[41]

It remains to be seen how far the Court's reliance upon the interview of Mr. Kaczyński as an argument for finding a violation of Article 14 ECHR will be considered as a precedent in future cases when it comes to the requirements of impartiality in administrative proceedings.

F. Conclusion

In the *Bączkowski* case, the European Court of Human Rights convicted Poland for having violated the right to assembly, the right to an effective remedy in cases of an unlawful refusal to hold an assembly and the right not to be discriminated against in administrative procedures aiming at obtaining permission to assembly. In its judgment, the Court reiterated that it attaches particular importance to pluralism, tolerance and broadmindedness and that the positive obligation of a State to secure genuine and effective respect for freedom of association and assembly is of particular importance to those with unpopular views or belonging to minorities, because they are more vulnerable to victimization. Let us hope this judgment might be a double incentive for Poland: an incentive not to tolerate discrimination against the LGTB community by public officials as well as an incentive to provide for reasonable time limits within which State authorities, when issuing second instance decisions on a refusal to assemble, should act. This should ensure that those who see their request to hold an assembly unlawfully refused may dispose of an effective remedy.

[41] *Id*. at para. 99-100.