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Recent Polish ECtHR judgments: fewer systemic problems - more fine-tuning

Adam Bodnar, Ph.D., Board member & legal division head, Helsinki Foundation for Human Rights; Associate professor, Human Rights Chair, Faculty of Law and Administration, Warsaw University'

For many years Poland has been known at the ECtHR for a series of done or repetitive cases reflecting structural problems in human rights protection in Poland. However, it seems that the ECtHR has managed to cope successfully with most of these and, as a result, Poland has had to adopt a number of legislative and practical measures. While dealing with the cases the ECtHR developed its jurisprudence (especially with respect to procedural matters) reinforcing the principle of subsidiarity in relations between the national legal system and the ECtHR.

ECtHR judgments in Polish cases have concerned such important structural problems as:

- length of proceedings (*Kudła v Poland* (No. 30210/96) 26/10/00) which led to the introduction of an effective domestic remedy that is now a model for other Council of Europe countries;
- compensation for property beyond the Bug river (*Broniowski v Poland* (No. 31443/96) 22/6/04) - the first ever pilot judgment;
- a statutory limit to rent increases for private housing at the expense of landlords (*Hutten-Czapska v Poland* (No. 35014/97) 19/6/06) - the second pilot judgment;

It could be argued that having resolved all these serious matters, which required a number of interventions, visits to Poland and the need to deal with thousands of applications, the ECtHR may now have more time and energy to deal with the numerous applications about individual problems. The first half of 2010 illustrates this well. The ECtHR issued 56 judgments against Poland. Many of these were of a 'fine-tuning' nature. They identified a specific problem existing in legislation or practice and condemned the Polish authorities for a given violation. Most ECHR rights were considered during this period (Arts. 2, 3, 5, 6, 8, 10, 12, 13 and Art. 1 of Protocol 1) however, the majority of cases were still in some way related to an ineffective judiciary (Art. 5 and 6).

While not all Polish cases made European headlines they were, however, of extreme importance for public debate and human rights protection in Poland. Some of them were widely discussed among politicians, judges and society, and had a significant impact on changing societal attitudes. They also raise important issues as regards their enforcement.

One of the most important recent cases for the general development of the ECHR system was *Frasik v Poland* (No. 22933/02) 5/1/10 (and the related case *Jaremwicz v Poland* (No. 24023/03) 5/1/10). The ECtHR rarely deals with the right to marry (Art.

of Arts. 12 and 13 (right to an effective remedy) were found. The ECtHR underlined that whilst the authorities could base their refusals on such considerations as danger, personal assessments could not be relied upon. The right to marry is fundamental and individuals, free or not, should have great liberty in choosing their partners. They should also have an effective remedy to challenge decisions.

The case of *Wasilewska & Katucka v Poland* (Nos. 28975/04 & 33406/04) 23/2/10 was a serious blow to the Polish authorities. It is rare that an EU member state is found in breach of Art. 2 (right to life) ECHR. This case concerned an attempt to stop a suspect, who was allegedly going to flee. Policemen fired 40 bullets in 15 seconds from an automatic gun at a car driving at 20 km/h. An alleged suspect was shot several times and died just after the intervention. The whole operation was inadequately prepared (for example, there were no ambulances nearby) and the policemen showed a low level of professionalism (for example, the car tyres were not shot at first). An investigation by the prosecutor into potential abuse of power by policemen was ineffective. The prosecutor concluded that the police followed all the relevant rules. The ECtHR disagreed, finding that the degree and the manner of the use of force were not proportionate and that the operation was not properly prepared. Consequently Poland had violated the substantive limb of Art.

- abuse of pre-trial detention (*Kauczor v Poland* (No. 45219/06) 3/2/09) - a quasi-pilot judgment;
 - overcrowding in prisons and detention centres (*Orchowski v Poland* (No. 17885/04) 22/10/09 and *Sikorski v Poland* (No. 46004/99) 9/11/04) - quasi-pilot judgments.
- 12). Here, two prisoners were deprived of the possibility to marry whilst in prison. In official decisions the prison authorities examined the nature of the relationship and found it unsuitable for marriage. The prisoners did not have an effective remedy to complain against the decisions. Violations
2. The ECtHR also condemned the inefficient investigation of the incident and highlighted that the Government, for unknown reasons, did not submit any observations on the case.
- The enforcement of this case is now a serious issue. It should be a textbook example of how not to organise police

operations and should be included in police training. Secondly, it should be re-examined to find those responsible for the poor planning and implementation of the operation. Recently, the prosecutor's office stated that certain actions in this respect will be undertaken.

One of the most famous Polish cases of recent years is *Bączkowski & Others v Poland* (No. 1543/06) 3/5/07, which established standards as regards the organisation of assemblies by LGBT groups. The recent judgment in *Kozak v Poland* (No. 13102/02) 2/3/10 was the second Polish case concerning sexual minority rights. In this case, in some ways similar to *Karner v Austria* (No. 40016) 24/7/03, the ECtHR had to decide whether the Polish courts were right in preventing a homosexual partner from stepping into a lease agreement after the death of a partner. Polish law permitted this at the relevant time for persons in 'de facto marital relationships'. However, the Polish courts interpreted the law as referring to heterosexual couples and marriages and refused any rights to same-sex couples. The ECtHR disagreed, finding that states have a narrow margin of appreciation when it comes to sexual minorities' rights and here there were no convincing arguments why homosexual couples should be excluded from the succession of tenancies. Importantly, the ECtHR underlined that societal changes are taking place with respect to family issues and the perception of social, civil-status and relational issues. States should take into account that there is more than one way of leading and living one's family or private life and shape their policies accordingly.

Kozak v Poland was influential in leading to serious discussions about the need to pass a same-sex partnership law. LGBT groups have prepared and are campaigning for a draft law. This was also an important topic during the last presidential elections. Neverthe-

less, it will still take time to pass such a law in Parliament. In the meantime, new cases - before the Polish courts and ECtHR - are to be expected challenging different regulations or restrictions in the exercise of the rights of LGBT people.

A very important recent case was *Grzelak v Poland* (No. 7710/02) 15/6/10 in which the ECtHR found violations of Arts. 9 (freedom of religion) and 14 (prohibition of discrimination) due to the poor organisation of ethics classes in Polish schools. In principle Polish pupils have the choice of attending either religious classes (usually Catholic) or ethics classes. However, in practice, only 1% of Polish schools offer ethics classes. No ethics classes were available throughout the whole period of the applicant's schooling and his school certificate had no mark against religion/ethics. This gave the impression that he was not a member of a majority religious group for which religious classes were organised. Furthermore, recently the religion/ethics grade had begun to be included in the calculation of the grade point average (GPA) putting those who do not attend religious classes at a disadvantage. On 2 December 2009, the Polish Constitutional Court found this to be in compliance with the Constitution.

The ECtHR found these circumstances to amount to unwarranted stigmatisation and a violation of Art. 14 because of discrimination against non-believers who wanted to attend ethics classes, particularly in the light of the religion/ethics grade being included in the GPA. A violation of the freedom not to manifest one's religion or belief, as guaranteed under Art. 9

was also found due to the absence of a mark in the school leaving certificate.

The judgment in *Grzelak* was issued after the Smolensk air crash tragedy and just before the presidential elections. The Catholic Church's strong involvement in public ceremonies of

mourning and open support of one of the presidential candidates produced a backlash in society. Currently, a strong movement towards the secularisation of the State can be observed. The ECtHR's indication that the Polish State favours the Catholic Church and does not provide ethics classes for non-believers or members of minority churches is one of the issues in this wider debate on relations between the State and the Catholic Church. In this respect, many politicians, NGOs and opinion-makers refer to the enforcement of *Grzelak*. It seems, therefore, that this judgment may become a milestone in bringing the Polish constitutional principle of secularity into the reality of daily life. Up to now this has been frequently neglected and the Catholic Church has enjoyed many unjustified privileges and preferential treatment from the State.

The above cases indicate that the first half of 2010 was interesting in terms of the development of jurisprudence and resolution of some pending issues at the national level. Society tends to view the ECtHR as providing a solution to most problems that could not be resolved by the domestic authorities for various reasons or where local remedies proved to be ineffective. *Grzelak* is especially significant here. It is rare that the ECtHR indirectly criticises a constitutional court and its assessment of an existing problem. Other serious cases that 'fine-tune' the system of human rights protection in Poland should be expected over the coming months and years. Victims of human rights abuses will continue to

bring their problems to the attention of the ECtHR, however these cases will be more sophisticated than the typical length of proceedings or pre-trial detention cases.

1 E-mail: a.bodnar@hthr.org.pl.