



COMMISSIONER FOR HUMAN RIGHTS

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Adam Bodnar

VII.7031.3.2018.KD

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With reference to: *Bartosz Sypiola against Poland and 17 related cases*

Application No. 783/16 and 17 related cases

In reference to the letter of June 6, 2018 from the Section I Registrar of the European Court of Human Rights, Mr. Abel Campos, which granted Polish Commissioner for Human Rights the right to submit written observations before the European Court of Human Rights by June 27, 2018, Commissioner Adam Bodnar with the Warsaw-based Office of the Commissioner for Human Rights, citing on the basis of Article 36(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on November 4, 1950 (Journal of Laws of 1993, No. 61, item 284, as amended) and Article 44(3)(a) of the Rules of Court of the European Court of Human Rights of November 1, 1998 (Journal of Laws of 1993, No. 61, item 284, as amended; in the version in force starting from January 1, 2016) as well as provisions stipulated in the Act of July 15, 1987 on the Commissioner for Human Rights (Journal of Laws of 2017, item 958, as amended) wishes to submit written observations regarding the cases of: *Bartosz Sypiola against Poland* (Application no.783/16), *Kacper Harabin against Poland* (Application no. 804/16), *Paulina Pachniak against Poland* (Application no. 990/16), *Monika Łojek against Poland* (Application no. 1153/16), *Bartłomiej Piasecki against Poland* (Application no. 1256/16), *Marta Gajuk against Poland* (Application no. 1289/16), *Bartłomiej Salapa against Poland* (Application no. 1597/16), *Dorota Skrzypczak against Poland* (Application no. 1602/16), *Marta Zawicka against*

Poland (Application no. 1609/16), Daniel Filip Długosz against Poland (Application no. 1619/16), Michal Kozak against Poland (Application no. 1698/16), Agnieszka Wróblewska against Poland (Application no. 1925/16), Adrianna Raczyńska against Poland (Application no. 1987/16), Katarzyna Wiak against Poland (Application no. 1995/16), Paulina Wajtryt against Poland (Application no. 1999/16), Mariusz Krelowski against Poland (Application no. 2153/16), Paulina Kucharska against Poland (Application no. 2305/16), Paweł Kosiarz against Poland (Application no. 2332/16).

Adam Bodnar

Bartosz Sypiola against Poland and 17 related cases
(Application No. 783/16 and 17 related cases)

Written observations by Polish Commissioner for Human Rights

I. The Commissioner's activities connected with calling, preparing, organizing, administering, and marking matura exams to date

The Commissioner is vested with the authority to uphold freedoms, as well as human and civil rights, as defined by the Constitution of the Republic of Poland from April 2, 1997 (Journal of Laws No. 78, item 483, as amended) and by other pieces of legislation, including the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on November 4, 1950 (Journal of Laws of 1993, No. 61, item 284, as amended). The Commissioner examines whether public authorities' actions or lack thereof have resulted in a violation of law, principles of coexistence, and/or social justice, and whether there have been acts of discrimination.

Bearing the aforementioned principles in mind, the Commissioner for Human Rights is particularly interested in issues relating to the structure and functioning of the education system which would, in the Commissioner's opinion, affect the free execution of an individual's right to education, as expressed in Article 70 of the Constitution of the Republic of Poland and Article 2 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1995, No. 36, item 175). The Commissioner pays special attention to the issue of matura examination being properly called, prepared, organized, administered, and marked. On multiple occasions the Commissioner has addressed competent public authorities with motions to exercise legislative initiative or to bring forward or amend other pieces of legislation in the aforementioned scope.¹

To date, the Commissioner has received numerous motions regarding irregularities in both the process of formulating matura exam questions as well as irregularities in matura exam papers marked by external examiners appointed by heads of the district examination boards. The

¹ See e.g.: an address to the Polish Minister of National Education regarding the procedure of administering oral examination in Polish dated July 11, 2016 (ref. no.: VII.7031.4.2016) and/or an address to the Polish Minister of National Education on the differences in the difficulty levels of matura examination dated September 1, 2015 (ref. no.: VII.7031.3.2015).

Commissioner for Human Rights addressed the Polish Ministry of National Education with general statements on multiple occasions, pointing out the lack of ability to appeal against matura examination results² among other issues, which, in the Commissioner's professional assessment, is as important as the lack of the ability to challenge the decision to disqualify an examinee from the matura exam – a problem which is being examined by the European Court of Human Rights. The Commissioner has been monitoring the aforementioned problems (the lack of ability to appeal against matura examination results and the lack of ability to challenge a decision by the head of a district examination board regarding an examinee's disqualification from the matura exam) for many reasons; one of them being the fact that the above issues may, on more than one occasion, have directly affected examinees' lives. Moreover, the Commissioner has decided to monitor the proceedings before the District Court in Krakow initiated by a matura examinee suing the State Treasury- District Examination Board for a violation of personal rights in connection with the lack of ability to appeal against the results of her matura examination. The decision to monitor the above mentioned proceedings was made upon receipt of multiple signals received in the relevant area.

Furthermore, the Commissioner has decided to join the proceedings before the Constitutional Tribunal initiated by constitutional claims made by the Complainants, whose case is currently being considered by the European Court of Human Rights. The Commissioner joins the proceedings to address the problem connected with the lack of control over decisions made by bodies entrusted with administering the examination.

There have been numerous motions addressed to the Commissioner dealing with the uncertainties referring to the calling, organizing, preparing, administering, and marking matura examination. Additionally, the diverse general statements before competent authorities, requesting legislative action, attest to the fact that there is room for improvement within Polish legislature in this field, and that multiple guarantees need to be introduced, so that matura examinees can take full advantage of their constitutional right to education.

These circumstances have led to the Commissioner's decision to present written observations before the European Court of Human Rights in the matter at hand.

II. Introduction

The Commissioner for Human Rights wishes to emphasize that the proceedings before the European Court of Human Rights are of utmost importance both from the point of view of the

² See e.g. an address to the Polish Minister of National Education dated February 18, 2016 (ref. no.: VII.7031.36.2015).

Commissioner to date, as well as in practical terms. The subject matter has been addressed in legislation; however, it has yet to be settled in a comprehensive manner. The regulations on education foresee that the decision to disqualify an examinee from the matura exam cannot result in a complaint before the administrative court. Therefore the European Court of Human Rights' judgment in the case in question shall lead to incremental changes to the Polish law.

III. Commissioner's position in proceedings before the Constitutional Tribunal ref no. SK 29/13 and its standing in light of the European Convention

The Commissioner for Human Rights is deeply concerned with the issue of lack of control over decisions made by bodies entrusted with administering the matura examination. On the basis of the powers granted under Article 27(8) and Article 52(1) of the Act of August 1, 1997 on the Constitutional Tribunal (Journal of Laws No. 102, item 643, as amended) and Article 16(2)(3) of the Act of July 15, 1987 on the Commissioner for Human Rights (Journal of Laws of 2001 No. 14, item 147, as amended), on January 10, 2014, the Commissioner decided to join the proceedings before the Constitutional Tribunal in the constitutional proceedings under the common reference no SK 29/13.³ In the proceedings, the Commissioner took the following position: 1) Article 9c(2a) of the Act of September 7, 1991 on the Education System (Journal of Laws of 2004, No. 256, item 2572, as amended), in so far as it excludes a complaint before the administrative court regarding disqualification from matura examination, is incompatible with Article 2 in connection with Article 45(1) in connection with Article 184 in connection with Article 70(1) and Article 47 of the Constitution of the Republic of Poland; 2) Article 9c (2a) of the Act referred to in point (1) in so far as it excludes the possibility to challenge the decision to disqualify an examinee from matura examination is incompatible with Article 2 in connection with Article 78 in connection with Article 70(1) and Article 47 of the Constitution of the Republic of Poland; 3) § 99 section 2 of the Regulation by the Polish Minister of National Education of April 30, 2007 on the conditions and methods of marking, classifying, and promoting students and administering tests and exams in public schools, in part which does not guarantee being heard in case of being disqualified from matura examination, is incompatible with Article 2 in connection with Article 51(4) in connection with Article 70(1) and Article 47 of the Constitution of the Republic of Poland; 4) § 99 section 2 of the Regulation by the Polish Minister of National Education of April 30, 2007 on the conditions and methods of marking, classifying, and promoting students and administering tests and exams in public schools (Journal of Laws No. 83, item 562, as amended), in part which does not guarantee

³ Commissioner's Position on January 10, 2014 (ref. no.: I.7031.1.2014/NC).

access to evidence collected in cases connected with matura examination disqualification is incompatible with Article 2 in connection with Article 51(3) in connection with Article 70(1) and Article 47 of the Constitution of the Republic of Poland.

In the ruling dated June 22, 2015,⁴ the Constitutional Tribunal *en banc* held that the inability to lodge a complaint before the administrative court regarding disqualification from matura examination in connection with academic dishonesty uncovered in the process of marking examination papers is compatible with Article 45(1) of the Constitution of the Republic of Poland (access to justice). In the remaining scope, the Constitutional Tribunal discontinued the proceedings.

In view of the above, the Commissioner for Human Rights is of the opinion that the Constitutional Tribunal ruling did not provide the complainants with any effective means to protect their rights and freedoms under the Constitution of the Republic of Poland and the Convention. It is therefore necessary that the European Court of Human Rights hear and decide the complaints referred to in the introduction of these written comments.

At the same time, taking into account the circumstances in the case before the European Court of Human Rights, the Commissioner for Human Rights would like to express his doubts as to the possible violation of rights protected by the Convention, i.e. Article 6(1) (right to a fair trial) and Article 8 (right to respect for private and family life). Moreover, it should be noted that the possible violation of the Complainants' rights guaranteed under Article 2 of Protocol No. 1 to the Convention (right to education) is also concerning.

The right to a fair trial guaranteed under Article 6(1) of the Convention creates the possibility to address the court, understood as a independent public authority meeting the requirements laid down by the State, in any case involving rights and freedoms. It is one of the fundamental rights of an individual and one of the fundamental guarantees granted by the Convention. Preventing an individual from challenging a decision issued by the head of the District Examination Board in Łódź, in connection with matura examination disqualification proceedings, limits the possibility to exercise the above right guaranteed by the Convention. Pursuant to Article 184 of the Constitution of the Republic of Poland, the Supreme Administrative Court and other administrative courts exercise control over the public administration sector. Therefore, whenever public administration is involved, administrative courts safeguard the right to a fair trial. The district examination board is indisputably a public authority which shapes the legal aspects of an individual life, acting on the basis of powers granted by the letter of the law. The decision by the head of the

⁴ OTK-A 2015, no 6, item 83.

district examination board to disqualify examinees from matura examination affects the free exercise of rights guaranteed under the Convention, i.e. the right to respect for private and family life as well as the right to education. The Claimants' demand that the administrative court reviews the legality of the decision by the head of the district examination board to disqualify examinees from matura examination is therefore well-founded. The Commissioner wishes to underline here that the court's review shall be limited to the analysis of the procedural and legality aspects of the decision by the head of the district examination board, not interfering to the merits of the analyzed matura exam (quality of the exam passed by the candidate).

In light of the above argumentation it must be determined that the Complainants' rights guaranteed by Article 6(1) of the Convention were violated.

The Commissioners would also like to voice his concerns surrounding the violation of Article 8 of the Convention, i.e. the right to respect for private and family life. The essence of the right to private life is the individual's freedom to make decisions about his or her personal life. The law should provide the individual with the possibility to use legal protection in the event of a violation of the right to respect for private life. In the situation in question, the lack of possibility to appeal against the decision to be disqualified from matura examination prevented the Complainants from pursuing the career and life paths they had planned for themselves. Moreover, it should be noted that the Complainants were accused of academic dishonesty, which the society deems morally reprehensible. The lack of adequate procedural guarantees, such as the possibility to access case files or to submit explanations, prevented the Complainants from deciding whether they wish to correct the incorrect and/or incomplete information and prevent their actions from being deemed reprehensible. Depriving them of the opportunity to defend themselves violates their right to obtain legal protection in connection with their right to respect for private life in general, and their reputation and honor in particular. It should be stressed that the right to respect for private life may be subject to limitations, but only for the reasons set out in Article 8(2) of the Convention. This is not the case with the Complainants.

In view of the above, the Complainants' rights guaranteed under Article 8 of the Convention were violated.

The essence of the right to education, as defined by Article 2 of Protocol No. 1 to the Convention, is the ability to receive an education and acquire and broaden one's knowledge. The right to education also covers an individual's efforts to be accepted to an institution of higher education. It should be emphasized, that the state has the obligation to shape legal acts in such a way that allows every person to have real access to an education, including higher education, respecting their talents and skills. Decisions to arbitrarily prevent a group of people from applying

to be accepted at an institution of higher education, as was the case with the Complainants, are inadmissible. The results of matura examinations form the basis for decisions taken during the recruitment process to accept students at institutions of higher education. Moreover, they attest to the fact that an individual has received an education. The decision, taken by the head of the district examination board, to disqualify examinees from matura examinations, which the examinees had no possibility to challenge, prevented the Complainants from taking part in such recruitment processes on an equal standing with other candidates. Therefore, the unchallengeable decision to disqualify examinees from matura examinations resulted in limiting the free exercise of that right guaranteed by the Convention.

In view of the above arguments, the Complainants' rights guaranteed under Article 2 of Protocol No. 1 to the Convention were violated.

IV. Supreme Audit Office to Head of District Examination Commission on March 21, 2012.

The Commissioner for Human Rights would like to notify the European Court of Human Rights that the disqualification case of the examinees from Ostrowiec Świętokrzyski was also subject to audit by the Polish Supreme Audit Office, who upon conclusion of their proceedings addressed the head of the district examination board in Łódź on March 21, 2012.⁵ The Supreme Audit Office found a number of irregularities in the process of disqualifying 53 examinees from the 2nd and 3rd High Schools in Ostrowiec Świętokrzyski [Polish: II i III Liceum Ogólnokształcące w Ostrowcu Świętokrzyskim] from the written part of the advance chemistry matura examination. However, as the Complainants detailed this address before the European Court of Human Rights, the Commissioner wishes to proceed to further comments in the case at hand.

V. Attempts to resolve issues surrounding the procedure designed to disqualify an examinee from the matura exam in case of academic dishonesty – Act of February 20, 2015 amending the Act on education system and certain other acts (Journal of Laws of 2015, item 357)

The Commissioner wishes to notify the European Court of Human Rights that the legislator amended the Act on the education system and certain other acts with an act on February 20, 2015 (Journal of Laws of 2015, item 357, later referred to as: Act on education system and certain other acts). The proceedings initiated by the Complainants before the Constitutional Tribunal, as well as

⁵ https://www.nik.gov.pl/kontrola/wyniki-kontroli-nik/pobierz,kno~s_11_011_201205221310451337685045~id0~01,typ,kj.pdf

official stands presented before the Constitutional Tribunal and taken i.a. by the Commissioner, and the ruling the Constitutional Tribunal of September 24, 2013 (ref. no. K 35/12)⁶ from the request by the Commissioner, undoubtedly contributed to the aforementioned amendment, changing the education system act dated September 7, 1991 (Journal of Laws of 2004, No. 256, item 2572, as amended; later referred to as: education system act) with respect to the matura examination disqualification procedure.

In accordance with Article 44zzw(1) introduced by Article 1, point 44 of the Act on the education system and certain other acts, if, during the process of marking an exam, the examiner determines that an examinee is guilty of academic dishonesty resulting from cheating on one or multiple questions by using external help or if the examiner notices identical wording indicating that the provided solutions have been made available to another examinee or that the solutions have been used by another examinee, the head of the district examination board shall address the graduate through the school principal with a written notification informing him or her about the intention to disqualify him or her from the written part of the matura examination in a given subject in question, indicating the reason for initiating the procedure. The school principal shall forthwith communicate this information to the examinee.

The Commissioner wishes to stress that Article 44zzw(2) of the education system act guarantees matura examinees the right to take a stand during the decision-making process in their case, since the examinee has the right to access the documentation which forms the basis on which the head of the district examination board in question intends to invalidate a given written part of the matura examination in a given subject. The head of the district examination board enables the examinee to familiarize himself or herself with the documentation and submit explanations indicating the place and time (Article 44zzw(3) of the education system act), which differentiates this case from the cases of the Complainants being decided by the European Court of Human Rights.

At present, the head of the district examination board in making a decision to disqualify an examinee from a written part of the matura exam in a particular subject is obliged to notify the examinee in writing that a written part of his or her matura exam in a particular subject is subject to disqualification proceedings, stating the reasons behind such a decision (Article 44zzw(4) and Article 44zzw(5) of the education system act).

The role of the head of the Central Examination Board was also amended with respect to their part in the matura examination disqualification proceedings. At present, examinees have the

⁶ OTK ZU Nr 7/A/2013, item. 94.

possibility to raise objections before the head of the Central Examination Board regarding a decision made by the head of a district examination board (Article 44zzw(6) of the education system act).

The Commissioner for Human Rights welcomes news on legislative actions aimed at providing matura examinees with further procedural guarantees. It is important to stress that the Commissioner has been monitoring the introduction of amendments and their consecutive execution, including possible problems resulting in connection with the above changes, which could potentially constitute a violation of the right to education or a violation of the common and equal access to education.

Nevertheless, it must be pointed out that the aforementioned amendment which provides examinees with certain procedural guarantees has been applicable since the day of its introduction into law and does not apply to legal proceedings from before its adoption. This is the case with the Complainants who lodged their complaints before the European Court of Human Rights. The rights of these individuals protected by the Convention were violated and the amended act did not rectify that. The aforementioned individuals' rights protected by the Convention were affected, which was not rectified by the amendment.

VI. Central Examination Board data on matura examination disqualification as a result of academic dishonesty (*ex post*)

Taking into consideration the above amendments and legal acts from the period before the introduction of the amendments, which were applied at choice, based on a procedure which did not provide the examinee even with a modicum of procedural guarantees, the Commissioner for Human Rights wishes to quote data obtained from the Central Examination Board on matura examination disqualification as a result of academic dishonesty *ex post*, i.e. after the matura examination took place.

From 2012 through 2017, the Central Examination Board determined a following number of cases in which examiners uncovered academic dishonesty after the matura examination and which led to disqualification: 2012 – 299, 2013 – 442, 2014 – 312, 2015 – 122, 2016 – 110, 2017 – 61⁷. The numbers show a clear declining trend starting from 2013. Especially noteworthy is the fall from

⁷ Central Examination Board. Preliminary information on the results of the matriculation examination held in May 2017, as at June 28, 2018; https://cke.gov.pl/images/_EGZAMIN_MATURALNY_OD_2015/Informacje_o_wynikach/2017/20170630%20Wstepna%20informacja%20o%20wynikach%20matury%202017%20PREZENTACJA.pdf

2016 and 2017, which could result from an act that entered into power on September 1, 2015 on amending the education system and certain other acts. The act provided examinees with a range of fundamental remedies to be used during matura examination disqualification proceedings initiated in connection with academic dishonesty. The substantial number of cases from before 2016 causes concern and raises doubts as to whether the decisions taken by heads of district examination boards were correct and reliable. It is possible that the regulations valid before 2015, which made access to relevant documentation as well as submitting explanations during the disqualification proceedings impossible, influenced the status quo ante.

VII. Conclusions

- 1) Numerous motions addressed to the Commissioner for Human Rights involving doubts surrounding the calling, preparing, organizing, executing, and marking of matura examination as well as the abundant general statements addressed to relevant organs, requesting that legislative actions be taken, attest to the fact that the Polish legislature in that field is imperfect and requires constant supervision as well as the introduction of multiple guarantees benefitting examinees.
- 2) The Commissioner is of the opinion that the ruling by the Constitutional Tribunal (ref. no SK 29/13) did not provide the Complainants with effective protection of their rights and freedoms resulting from the Constitution of the Republic of Poland and the Convention.
- 3) The Supreme Audit Office confirmed irregularities in the process of disqualifying examinees from matura examinations in their post-audit address to the head of the district examination board in Łódź in 2011.
- 4) The Act amending the act on the education system and certain other acts was also aimed at resolving the issues faced by matura examinees with respect to the disqualification procedure. The Central Examination Board statistical data show a positive trend attesting to the fact that this regulation is undoubtedly effective.
- 5) Nevertheless, one must consider if the already introduced legislative changes providing examinees with additional rights during matura examination disqualification proceedings are a sufficient and effective means of safeguarding their freedoms and rights.

Adam Bodnar