THE RIGHT OF AN INDIVIDUAL TO A COURT HEARING IN THE POLISH ADMINISTRATIVE COURT PROCEEDINGS (SELECTED ISSUES)

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Abstract

The right to a court hearing is one of the fundamental rights of an individual in democratic legal states. Formally, this right is derived first of all from regulations of the international law, including Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] and Art. 14 of the International Covenant on Civil and Political Rights[2]. The right to a court hearing is also a fundamental value adopted in the Community law. Pursuant to Art. 6 of the Treaty on European Union, the Union is founded on the principles of freedom, democracy, respect for human rights and fundamental freedoms as well as the rule of law, and those values are common to all Member States. On the other hand, pursuant to Art. 47 of the Chart of Fundamental Rights, every person whose rights and freedoms guaranteed by the EU law have been infringed, is entitled to submit efficient remedies in the court, pursuant to the conditions specified in this article. Each person has the right for his case to be examined by the independent and impartial court that has been previously established, at a proper time and in fair, public proceedings (...)[3].

Keywords: *Convention for the Protection of Human Rights and Fundamental Freedoms, principles of freedom, democracy, respect for human rights and fundamental freedoms.*

In Poland, the right of an individual to a court hearing arises directly from Art. 45.1 and Art. 77.2 of the Constitution of the Republic of Poland[4]. In the light of those provisions, everybody has the right to a just and public hearing of the case, without undue delay, before a competent, independent, impartial and detached court. Statutes cannot bar recourse by anybody to the courts in pursuit of claims alleging breach of freedoms or rights. Pursuant to Art. 175 of the Constitution of the Republic of Poland, the judicial power in the Republic of Poland is exercised by the Supreme Court, the common courts, administrative courts and military courts. The present article, due to its limits, has been devoted to the subject of the execution of the right of an individual to a court hearing on the grounds of the Polish administrative court procedure, which is regulated, first of all, in

[1] Dz. U. of 1993, No. 61, item 284 as amended.
[2] Dz. U. of 1977, No. 38, item 167.
[3] B. Adamiak, *Rozgraniczenie właściwości sądów w polskim systemie prawnym*, (In:) Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005, J. Góral, R. Hauser, J. Trzciński (eds.), Warszawa 2005, pp. 7-8.
[4] The Act of 2 April 1997 Constitution of the Republic of Poland (Dz. U. No. 78, item 483 as amended) - hereinafter the Constitution of the Republic of Poland.

the Act of 30 August 2002 on the Law on Proceedings Before Administrative Courts[5]. In order to provide a better presentation of the subject matter under analysis, it would be necessary to quote some regulations of the Act of 25 July 2002 Law on the System of Administrative Courts[6] and provisions of the Constitution of the Republic of Poland. The formula of the right to a court hearing is created therefore by norms of the constitutional law, laws on the system of courts and procedural standards, which create the right to a court hearing, specify organization of courts and establish the scope of legal protection that can be pursued in proceedings before courts, as well as set up the system of securities and guarantees, which ensure that this right will be effectively used for protection of rights and freedoms of a human being. These guarantees are, on one hand, of a systemic nature and, on the other, they are related to the need to provide the individual requesting legal protection with specified procedural standards[7].

Currently, pursuant to Art. 2 of the LSAC, administrative courts in Poland include the Supreme Administrative Court and provincial administrative courts. In the light of Art. 184 of the Constitution of the Republic of Poland and Art. 1 of the LSAC, these courts administer justice by controlling the legality of the activities performed by public administration.

The administrative judiciary is created in a law-abiding state for the protection of the subject rights of an individual in the sphere of public law. Accomplishment of this aim requires the appointment of the body (court) to which the position of the public administration authority and the individual would be equal. At the same time, it should be noted that although in the sphere of the public law including, first of all, the course of administrative proceedings, the public administration authority is bound by the common law regulations, but it decides on rights and obligations of the individual towards this administration – therefore, it is "a judge in its own case". Additionally, this body exercises administrative powers, which manifest itself not only in the possibility of providing unilateral settlement concerning the legal situation of the individual, but also in securing the execution of the competence of the authority, through the application of coercive means in order to enforce imposed obligations. Such inequality of entities ceases only before the administrative court, in which independent judges[8] settle the dispute between the individual and the public administration authority. Currently, each entity is entitled to lodge a complaint to the administrative court against every form of public administration activity if such an activity authoritatively determines the legal position of this entity. Statutory exclusions of the competences of administrative courts, specified in Art. 5 of the LPBAC, refer therefore only to the so-called internal relations in administration (official submission, holding offices in administration) and they do not cover any situation in which the administration establishes the legal situation of entities that are not related to it in an organizational way[9].

While analysing the issue of the right of an individual to court, we should highlight the existence of three inseparably combined elements in this subject matter, from which specific guarantees for the entity arise, namely:

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[5] Dz. U. No. 153, item 1270 as amended – hereinafter the LPBAC.

[6] Dz. U. No. 153, item 1269 as amended – hereinafter, the LSAC.

[7] T. Woś, (In:) T. Woś, H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2005, p. 16.

[8] As a matter of principle, cases in administrative court proceedings are adjudicated by a panel of three judges (Art. 16.1 of the LPBAC).

[9] R. Hauser, J. Drachal, E. Mzyk, *Dwuinstancyjne sądownictwo administracyjne. Omówienie podstawowych zasad i instytucji procesowych. Teksty aktów prawnych*, Warszawa-Zielona Góra 2003, p. 78.

1) the right of access to court,
2) the right to proper setting up of the court procedure,
3) the right to a court decision[10].

The right to access to court is related first of all to the possibility to instituting administrative court proceedings by an interested person. These proceedings are based on the accusatorial procedure, which means that it can only be initiated after the entitled entity has filed its demands in this matter. As already mentioned, each entity is entitled to bring an legal case to the administrative court if the action of the public administration authority appealed against authoritatively determines its legal position (Art. 50 of the LPBAC). From such a perspective, the right of access to a court is granted both to natural persons, as well as to other entities participating in legal relations, but the entities of the public law have this right only when they do not participate as public authority bodies in an authoritative way, but are seeking the protection of their rights according to the same rules as other participants of the relations. Therefore, not every situation in which the administrative court procedure is instituted will be related to the execution of the right to court. If the regulations entitle the authorities to initiate proceedings before the administrative court in order to control the legality of the activity of another public administration authority[11], then initiation of the court proceedings under such conditions is not related to the enforcement of the right to court. Execution of the entitlement (or rather the execution of the obligation) to initiate administrative court proceedings is then only used to implement the principle of lawfulness[12].

However, the possibility to initiate the control before the provincial administrative court as the court of first instance depends on the fulfilment by the claimant of a series of conditions, including previous exhaustion of the means of review or request to remove the breach of law (Art. 52 of the LPBAC), as well as preserving the statutory time limit (Art. 53 of the LPBAC). Information on these obligations is included, first of all, in decisions of public administration authorities issued in administrative proceedings which are subject to the control by this court. In other cases, appropriate information in this regard is provided by court information departments operating at each administrative court. Other limitations related to filing a complaint to the provincial administrative court include court costs, in particular. Therefore, a lack of financial means can be a significant barrier preventing the proper execution of this right. However, it should be noted that Art. 239 point 1 of the LPBAC provides for subject exemption from the obligation to pay court costs in cases concerning social welfare and social assistance, unemployment, occupational diseases and medical services, official subordination and employment relations, social insurances and general military service. Also, in other cases, the legislature provides for the possibility, after fulfilling certain conditions, to grant the right of assistance to the party and exempt it fully or partially from the obligation to incur court costs. This takes place when the party demonstrates that it is not able to bear any costs of the proceedings or is not able to bear the full costs of the proceedings without detriment to the necessary maintenance of this party or its family (Art. 246 of the LPBAC). Such a solution as regards court costs does not

[10] The judgement of the Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50.

[11] Such a situation takes place, for instance, when the province governor as a supervising authority lodges a complaint to the provincial administrative court against the resolution of the municipal council which, in his or her opinion, is contrary to law.

[12] M. Romańska, *Realizacja prawa do sądu w postępowaniu przed sądami administracyjnymi (wybrane zagadnienia*), (In:) Jednostka w demokratycznym państwie prawa, Józef Filipek (ed.), Bielsko Biała 2003, pp. 541-542.

infringe the right of a party to court, but properly rationalizes it[13]. Proceedings in case of granting the right to assistance is intended to create such a situation in which the person without necessary financial means would be able to participate on equal terms with the others in court proceedings. In other words, the point is that the material status of the claimant should not deprive him of the possibility to defend his rights before the court. The institution of the right to assistance is used before administrative courts as part of special proceedings instituted at the request of the party interested. This request is free from court fees, but it is nevertheless highly formalized since it is related to the need to complete an official form by the party and to file this request before instituting the court proceedings or at least while it is pending[14].

However, an indirect mode of lodging a complaint to the provincial administrative court (through the public administration authority) is not a significant barrier to initiation of the administrative court control (Art. 54 of the LPBAC). In practice, direct lodging of a complaint to the court does not result in its rejection, but in transferring it to the authority by the court in order to make it take proper course. However, in such a case, the day of lodging a complaint is considered to be the day when the court transfers the complaint to the authority. It should be emphasized here that Art. 55 of the LPBAC provides for the means of preventing possible failure to act by an authority as regards transferring the complaint to the court, which includes the request to fine the authority, institution of signalling and possibility of issuing the decision by the court on the basis of the copy of the complaint provided by the party. Undoubtedly, those means are intended as proper security guaranteeing the access to court by the party who must adhere to the indirect mode of lodging a complaint.

Additionally, while lodging a complaint to the provincial administrative court as the court of first instance, no compulsory representation by a lawyer is required, and consequently, no particular requirements as regards the content of the complaint have been provided for. From the moment of instituting administrative court proceedings, the entire burden of the assessment as to whether it is necessary to eliminate the challenged act or activity from legal relations in order to make the action of the administration lawful, rests on the court. The court is bound by the limitations of the case, but is not bound by the charges of the complaint or its conclusions or the legal basis referred to therein (Art. 134.1 of the LPBAC). Additionally, binding by the limits of the case depends on the infringements which will be revealed in course of this case, since the examination and adjudication can cover all acts and activities taken in the case and not only indicated in the complaint (Art. 135 of the LPBAC). To this end, the court acts according to the inquisitional principle since it executes *ex officio* the function of prosecuting non-compliancy with the law in order to respect the principle of lawfulness. The establishment of the prohibition against deteriorating the situation of the complainant does not change much in this regard, since this prohibition is not absolute but must yield in case of revealing a defect of invalidity of an act or an activity (Art. 134.2 of the LPBAC)[15].

Proceedings before the provincial administrative court have been based on the principle of a dispute between the complainant and the public administration authority concerning the lawfulness of the activity subject to the control of this court. In this dispute, both parties act on equal rights, which means, for the court, an obligation to serve

[13] H. Dolecki, *Nadużycie prawa do sądu*, (In:) Sądownictwo administracyjne…, op. cit., p. 137.
[14] R. Hauser, *op. cit*., p. 123.
[15] J. Borkowski, *Elementy oportunizmu w sądowej kontroli administracji publicznej*, (In:) Sądownictwo administracyjne…, op. cit., p. 24.

statements of claims lodged in the course of the proceedings to those parties, to provide them with the possibility to express their opinion on the claims of the adverse party and to notify them on the dates of the trials, where, as a matter of principle, the presence of the parties is not compulsory (Art. 107 of the LPBAC). Additionally, before the court settles the dispute about the legality of the activity complained against, there must occur a series of other factors which will make it possible to execute the right of a party to properly establish the court procedure. This right is made of the following elements: first of all, the right to an impartial court, adjudicating as a result of the public proceedings and carried out within a reasonable time limit[16].

The impartiality of the court issuing decisions is to be guaranteed by such principles as independence and sovereignty. This relates not only to institutional securities related to the entire court and its operation, but also to securities related to the judge and his position, manifested particularly in the irremovability and immunity that the judge is entitled to, as well as, of course, proper remuneration for the judge to avoid suspicions concerning financial dependency[17]. Impartiality of the court also means the lack of grounds to formulate charges by the parties and the participants of the proceeding concerning identification of the adjudicating body with any of the parties of the proceedings. This applies to family relationships, professional involvement or the personal interest of the person that is to adjudicate as well as situations in which due to certain actual relationships existing between the adjudging or the person holding the function in the authority, the other party would have doubts as to the rightness of the settlement[18]. Thus, the institution of disqualification of the judge, which also applies to a recording clerk, a law clerk, a judge associate and a prosecutor (Arts. 18-24 of the LPBAC), is to preserve objectivity while settling court and administrative cases. Additionally, this aim is also pursued by the manner of appointing judges by heads of the departments in any provincial administrative court, in a way established by the court board. The change of the judging panel can only take place for unforeseen circumstances or when a given judge cannot participate in the judging panel due to legal obstacles (Art. 17 of the LPBAC).

The principle of openness of the court proceedings, formulated in Art. 45 of the Constitution of the Republic of Poland and Art. 10 of the LPBAC is also a specific security ensuring the impartiality of the judge. In the light of this principle, all major procedural activities that are necessary for issuing the decision in the case, as well as the announcement of the judgments should take place with the participation of parties and possibly the public. Those persons can observe the course of proceedings, and the party can additionally actively participate in it. The aim of implementing this principle in court proceedings is therefore to subject the course of those proceedings to social control, which, as it is assumed, is to positively influence not only the judges but also the parties to the proceedings and is to result in creating an appropriate level of trust of the society towards the actions of the judiciary. Procedural provisions which specify the manner of taking up actions in specific cases examined by courts, provide a basis for distinguishing between the openness of the proceedings towards its participants, and the general openness. Court and

[16] For more on this issue, see A. Mudrecki, *Prawo strony do rzetelnego procesu przed sądem administracyjnym*, (In:) Sądownictwo administracyjne…, op. cit., p. 347 and subsequent. Cf. Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)*, "Państwo i Prawo" 1997, No. 11-12, p. 102 and subsequent.

[17] B. Banaszak, M. Jabłoński, (In:) *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku*, J. Boć (ed.), Wrocław 1998, p. 91.

[18] Cf. the judgement of the Constitutional Tribunal of 13 December 2005, SK 53/04, OTK 2005, No. 11, item 134.

administrative proceedings are fully open to its participants, but it is generally open only with regards to activities performed on open trials and sessions[19]. Pursuant to Art. 95 of the LPBAC, at an open court session, the courtroom can be accessed – besides the parties and the persons summoned – only by persons who have attained majority. On the other hand, pursuant to Art. 96 of the LPBAC, exclusion of the openness of the court session is acceptable only when public examination of the case presents a threat to morality, state security or public order, as well as when it can lead to disclosure of circumstances classified as state or official secrets, or at the request of the party, if it is required for the protection of the private life of the party or other important private interests.

Another element which makes up a part of the right to a properly established procedure is the principle of rapid resolution of the case, as included in Art 7 of the LPBAC, ordering concentration of evidence so that the case could be solved at the first session. This aim is intended by the principle resulting from Art. 133.1 of the LPBAC of issuing a judgement by the court on the basis of the records of the case transferred by the public administration authority and possibility to examine by the administrative court only the additional documentary evidence (Art. 106.3 of the LPBAC). Institutions enabling implementation of the principle of procedural expediency on the grounds of administrative court procedures also includes the so-called "particular" proceedings, which include conciliatory and simplified proceedings (Art. 115-122 of the LPBAC)[20]. The aim of conciliatory proceedings, which can be conducted after lodging the complaint to the court, is first of all to create the possibility of accelerating the administrative court case without the need to issue a subject-matter decision by the administrative court. What matters is the possibility of additional examination of the circumstances of the case related to the charges specified in the complaint which, in turn, may constitute grounds to fully accept the complaint by the authority (Art. 54.3 of the LPBAC)[21]. Also, a simplified mode is intended to accelerate the proceedings, which unlike the conciliatory proceedings, is a subject matter examination of the complaint by the court, with the difference that the decision in this mode is issued only in a closed session in a panel of one judge. However, these proceedings can be only initiated in certain cases, after the fulfilment of conditions set forth in Art. 119 of the LPBAC and Art. 121 of the LPBAC, while even with those conditions being fulfilled, the reference of the case to be examined in a simplified mode is not obligatory. The right of a party to lodge a complaint to the Supreme Administrative Court for the length of the court proceedings provides an efficient guarantee of preserving the directive of the expediency of court procedures[22].

An element of the right to a properly established procedure is also the general principle of granting assistance by the court to parties appearing in the case without a professional representative (a barrister or a legal counsel), as set forth in Art. 6 of the LPBAC. The aim of this principle is to prevent inequality of parties in court and

[19] M. Romańska, (In:) T. Woś, H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu przed sądami administracyjnymi, op. cit.*, p. 118.

[20] Introduction of these proceedings was recommended by the directives of the Committee of Ministers of the Council of Europe, cf. Recommendation adopted by the Committee of Ministers of the Council of Europe Rec(2001)9 of 5 September 2001 on alternatives to litigation between administrative authorities and private parties.

[21] R. Hauser, *op. cit.*, p. 117.

[22] The procedure for lodging an examination of this complaint is regulated in the Act of 17 June 2004 on complaints about the infringement of the right of a party to have the case examined in preparatory proceedings conducted or supervised by a prosecutor and court proceeding without an unjustified delay (Dz. U. No. 179, item 1843 as amended).

administrative proceedings, which may result from the ignorance of the law by one party and proper knowledge of the adverse party in this regard[23]. However, it should be emphasized that the court is not obliged to grant instructions to such a party as regards every possible behaviour, but only such that are purposeful from the point of view of the proper course of the proceedings and procedural safeguards of the party. This obligation is executed mainly through informing a party about measures of appeal this party is entitled to (Art. 140 and Art. 163.2 of the LPBAC) and activities which can be of importance for its procedural rights concerning, for example, the reimbursement of due costs of proceedings, which can be adjudicated only after a party lodges a proper request in this regard (Art. 210.1 of the LPBAC).

As already mentioned, the primary task of administrative courts is to exercise control over public (state and local government) administration, which means, however, a certain subordination of court activities with regard to public administration authorities. The role of administrative court is to examine the legality of actions or failures to act by those authorities and not to replace them in settling the cases by issuing a final decision in a given case. This court is therefore, as a matter of principle, a cassation court adjudicating lawfulness or unlawfulness of an act, action or failure to act by a public administration authority. In the nature of things, adjudications of the administrative court, in case of accepting the complaint, decide about revoking or establishing invalidity of the challenged act or obligate the public administration authority to behave in a specific manner in the course of further settlement of the case by this authority. Assuming competences of public administration by the administrative court for final settlement of the case would constitute a transgression over the court boundaries of controlling the performance of public administration, specified in Art. 184 of the Constitution of the Republic of Poland[24]. Therefore, the right to a court ruling must be understood as the right of the party to obtain a court decision compliant with the criterion of control exercised by this court. This control should always run in three planes, namely: assessment of the compliance of the settlement (decision, another act) or action with the substantive law, preserving the procedure required by law and respecting rules of competences[25].

The cassation nature of decisions issued by administrative courts required formation of a guarantee of re-examination of the case by public administration authorities pursuant to the recommendations of the court, aiming at removal of the non-compliancy. Such guarantees are first of all regulations of Art. 153 -154 of the LPBAC, which provide for binding the authority with a legal appraisal and recommendations as to further proceedings expressed in the court's decision and the possibility of a party filing a complaint against a failure to perform the decision, accepting a complaint about the failure of the administration to act after the decision and accepting the complaint against an act or an action. On the other hand, Art. 155 of the LPBAC provides for signalling powers for the adjudicating panel of the court, which can inform its superior bodies about established irregularities or infringements in the actions of their subordinate authorities. Only from such a perspective is it possible to acknowledge that in the administrative court procedure the right of an individual to court adjudication is also executed.

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[23] M. Jaśkowska, (In:) M. Jaśkowska, M. Masternak, E. Ochendowski, *Postępowanie sądowoadministracyjne*, Warszawa 2004, p. 77.

[24] Cf. M. Masternak-Kubiak, *Prawo o ustroju sądów administracyjnych. Komentarz*, Warszawa 2009, p. 21.

[25] A. Kabat, (In:) B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Kraków 2005, p. 16.

The right to a court decision is also closely related to the right of the party to appeal against unlawful decisions of the provincial administrative court to the Supreme Administrative Court as the court of second instance, while this court also has, as a matter of principle, only cassation powers. From the point of view of the limitations of the right to court, adoption of such a model of the appealing procedure before administrative courts results in that a new decision of the provincial administrative court, issued after prior revoking by the Supreme Administrative Court of the previous decision of this court, can be also subject to the inspection by a higher instance, namely the court of second instance. However, it should be noted that proceedings before the Supreme Administrative Court can be initiated as a result of filing a cassation appeal (against decisions and judgements ending the proceedings) or a complaint (against decisions if the statutes provides so), whereas conditions to file a cassation appeal have been much tightened in relation to the complaint lodged to the provincial administrative court. Besides the obligation to preserve the statutory time limit, a requirement has been also introduced for this means of recourse to be prepared by a professional representative (Art. 175 of the LPBAC), and for charges to be properly formulated (Art. 174 of the LPBAC), within which the cassation appeal is then examined (Art. 183.1 of the LPBAC). Just like before the court of first instance, also in proceedings before the Supreme Administrative Court, in order to facilitate access to court, a possibility has been provided to the party to use the institution of the right to assistance, both as regards exemption from court costs, as well as establishment of a professional representative *ex officio*. An important guarantee of access to the court of second instance is also the possibility to file a cassation appeal after previous drafting by the court-appointed representative of an opinion on the lack of grounds to lodge the complaint. Despite the lack of clear legal regulation, in such a situation the time limit for lodging a cessation appeal runs from the day on which the party was informed about the refusal to file a cessation appeal by the court-appointed representative, and not as directly results from Art. 177.1 of the LPBAC, from the day of serving the decision along with its justification[26].

To summarize, it should be stated that in the Polish administrative court procedure, the primary importance is placed granting the right of court access to the individual, and then also on such establishment of procedural relations with the public administration authority and the court so as to ensure the possibility of efficient protection of the legal interests of the individual. However, the right to an administrative court is executed mainly before provincial administrative courts, and proceedings before the Supreme Administrative Court have been treated by the legislature as a necessary correction of major errors by the court of first instance[27]. Nevertheless, in both of these proceedings, infringement of the right of a party to court, including, first of all, the right to a properly established procedure, can be the basis for revoking the decision issued in a given case. Appropriate conditions in this regard are included, first of all, in grounds for the nullity of proceedings specified in Art. 183.2 of the LPBAC, which are considered by the Supreme Administrative Court while examining the cassation appeal. After validation of the administrative court decision, they could be the grounds for reopening court proceedings (Art. 271 of the LPBAC).

[26] Decision of the European Court of Human Rights of 14.09.2010 in the Subicka vs. Poland case, complaint No. 29342/06.
[27] M. Masternak-Kubiak, *op. cit*., p. 49.