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NEWS REPORT

Country:	Poland
Title:	Motion of the Ombud to the Constitutional Tribunal regarding constitutionality of the ETA discontinued
Date:	28 July 2017
Expert:	Lukasz Bojarski
<u>Context</u>	
Issue at stake:	Is ETA by limiting the scope of protection to only some discriminatory grounds in line with the Constitution that prohibits discrimination on any grounds or is that legislative omission unconstitutional?
Ground of discrimination:	All grounds
Source:	National court decision, national equality body
Field:	All fields
Applicable law:	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment ¹ (ETA) and Constitution of the Republic of Poland ²

Content

In March 2016, the Ombud challenged in the complaint to the Constitutional Tribunal the constitutionality of the provisions of the ETA "in so far as they limit the scope of the Act because of the closed catalogue of discriminatory grounds. The law excludes some social groups that experience discrimination in many areas of their lives. This legislative omission unjustifiably differentiates the procedural situation of the persons discriminated against. The challenged statutory solutions are, in the Ombudsman's view, contrary to the constitutional principle of equality and the right to court, as well as the provisions of the Convention on the Rights of Persons with Disabilities."³

The Ombud argued that "The catalogue of discriminatory grounds of unequal treatment provided for in the Act is closed because of the closed catalogue of the discriminatory grounds in the EU directives that the law was to implement. However, the Constitution (Art. 32) prohibits discrimination on any grounds."⁴ Article 32 states: (1) All persons shall be equal before the law. All persons shall have the right to equal treatment by the public authorities. (2) No-one shall be discriminated against in political, social or economic life for any reason whatsoever. So, in the opinion of the Ombud, the parliament, when

¹ Poland, Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) (hereafter as 'ETA').

² Poland, Constitution of the Republic of Poland as adopted by the National Assembly on 2nd April 1997 (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*), available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

³ See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu> (this and subsequent quotes translated by author).

⁴ See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

implementing EU antidiscrimination law, should consider the necessity of ensuring the conformity of national law with the provision of the Constitution.

According to the Ombud "Persons experiencing discrimination that does not fall within the scope of the Equal Treatment Act may benefit from legal protection measures provided for in the Civil Code. However, their procedural situation is far less favourable than those who experience discrimination within the scope of the Equal Treatment Act. Seeking damages caused by the breach of the principle of equal treatment under the Equal Treatment Act is much simplified in relation to the general provisions of the Civil Code, what constitutes the expression of the constitutionally protected right to court."⁵

After one year the Parliament (March 7th, 2017) and the Prosecutor General (March 28th, 2017) submitted their opinions on the Ombud's complaint. The opinions are long and detailed, but the main argument is that this case should be dropped by the CT because it does not deal with unconstitutionality of the law, but with the lack of regulation, conscious legislative omission and as such may not be held unconstitutional from this point of view.

Decision of the Court: Some weeks later, quite unexpectedly the Ombud with a motion dated April 13th, 2017, that was received by Constitutional Tribunal on April 17th, 2017, withdrew the complaint and asked for discontinuation (redemption) of the case. The Ombud did not inform about this decision and its reasons.

The reason of the withdrawal by the Ombud of the complaint is unknown but cannot have been based on the opinions of the Parliament or the Prosecutor General that opposed the Ombud's complaint. The Ombud was expecting this argumentation, and in fact analysed it in depth in its complaint. The reason is not official – it is probably misgiving based on the hypothesis, assumption, that the CT may use this case to actually narrow down the scope of the protection.

Formally speaking the case will be dropped once the CT in response to the motion of the Ombud takes a resolution on this (which surprisingly has not yet happened at the time of writing, 22 July 2017, and the case is still indicated as 'pending' in the CT).

Key points of analysis: It is a pity that the CT will not discuss the Ombud's complaint. It was a very interesting motion, dealing with not direct unconstitutionality of the law but so-called legislative omission. It is in fact interesting that the very wide provision of the Constitution was limited in the ETA that aimed at verbatim implementation of the directives in order to provide as little protection as possible.

Internet link source: Reference number of the case: K 17/16, see all documents of the case at: <http://trybunal.gov.pl/s/k-1716/>.

Information about the case on the Ombud site:

<https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

⁵ See at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.