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FLASH REPORT

Country:	Poland
Title:	The provision prohibiting discrimination in access to goods and services declared unconstitutional (the verdict of the Constitutional Court caused by the case of printing house employee who was found guilty of refusal to print a roll-up banner for an LGBT initiative)
Date:	4 July 2019
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Update of flash reports:	Poland - Printing house employee found guilty of refusal to print a roll-up for LGBT initiative. Unprecedented reaction of Minister of Justice (PDF 162 kB) and Poland - Printing house employee guilty of refusal to print a roll-up for LGBT initiative. Supreme Court upholds the verdict (PDF 166 kB)
<u>Context</u>	
Issue at stake:	Balance between the prohibition of discrimination and freedom of thought, beliefs and views as well as economic freedom and freedom of transactions
Ground of discrimination:	Sexual orientation in particular, but other grounds as well including age and disability (race, ethnic origin, religion and belief are protected by other provisions).
Source:	National Court decision (Constitutional Tribunal, 26 June 2019; K 16/17)
Field:	Access to goods and services
Applicable law:	Code of Petty Crimes, ¹ Constitution of the Republic of Poland

Content

The constitutional complaint was caused by the case of the refusal of a small printing company to print a roll-up banner of the Civil Society Organization LGBT Business Forum. In light of the violation of Art. 138 of the Code of Petty Crimes,² a fine of EUR 45 (PLN 200) was imposed on the company by the *Lodz-Widzew* District Court in a simplified procedure.³ The accused brought an appeal against the Court verdict. The District Court in a standard procedure upheld the decision but waived the punishment.⁴ The subsequent appeals of the accused, the public prosecutor and of the auxiliary prosecutor (CSO Campaign Against Homophobia) were rejected by the second instance Regional Court.⁵

¹ Poland, Law of 20 May 1971 on petty crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*).

² Art. 138 of the Code of Petty Crimes reads as follows: 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine.'

³ Procedure where there is no hearing. The sanction is only based on a motion filed by the police. Sąd Rejonowy dla Łodzi-Widzewa (Łódź-Widzew District Court); July 2016; Police v. Printing house.

⁴ District Court for Łódź-Widzew; 31 March 2017.

⁵ The Regional Court for Łódź (Sąd Okręgowy); 26 May 2017.

The Prosecutor General/Minister of Justice (PG/MJ) challenged the court's decision before the Supreme Court.⁶ The Supreme Court pointed out⁷ that freedom of conscience and religious beliefs may justify a refusal to provide a service. However, a balance between freedom of conscience and religious beliefs on the one hand and the prohibition of discrimination on the other should always be struck in the light of the circumstances of the case. In the given case the Supreme Court held that the accused had no legitimate reason to refuse to perform a service motivated by his convictions.

The PG/MJ decided to challenge Art. 138 of the Code of Petty Crimes before the Constitutional Tribunal as being contrary to the principle of a democratic state of law expressed in the Constitution (Art. 2: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice').

Decision of the Court:⁸ The Constitutional Tribunal (CT) held (in a majority decision, 3 to 2) that the Art. 138 is unconstitutional. There was no public hearing, only enunciation of the verdict (the written justification is not available yet).

The PG/MJ in his complaint to the CT formulated three allegations.

1. The lack of proportionality between the outcomes of the challenged provision and the burdens and restrictions imposed on the entity that professionally provides services (lack of adequacy of penalizing the refusal to provide services for the purposes that this provision was to achieve, Article 2 of the Constitution).
2. Article 138, in the part in which it penalizes the refusal to provide a service without a *just cause*, understood in such a way that the principles of faith and conscience are not a *just cause* for refusing to provide services, disproportionately restricts the constitutional freedom of conscience and religion (Article 53 paragraph 1 Constitution).
3. Article 138 constitutes a disproportionate restriction on the freedom of economic activity of persons who are *professional service providers* or acting on behalf of an entity conducting such activity (Article 20, Article 22 of the Constitution).

In assessing the first (widest) of the allegations, the Tribunal stated that the legislator's decision to penalize the refusal to provide services by a *professional service provider* (even *deliberately, without just cause*) is inadequate to the legislative objective to be met by Art. 138 of the Code of Petty Crimes, and thereby violates Art. 2 of the Constitution. In the Tribunal's view doubts are related in particular to the notions of 'being obliged to provide a service' or 'unjustified refusal to provide a service'. The imprecise nature of these concepts may – at the application stage – lead to various interpretations, including such broad ones that they will not be justified by constitutional principles and values. Interpretation doubts about these concepts cannot be removed by way of interpretation in accordance with the Constitution. For this reason, the Tribunal was required to intervene.

The Constitutional Tribunal considered it unnecessary to adjudicate on the second and third allegations, since the judgment on the unconstitutionality of the entire challenged norm from the perspective of Art. 2 of the Constitution made further proceeding without object.

Key points of analysis: After the verdict of the SC, the Prosecutor General/Minister of Justice Z. Ziobro commented during the special press conference that 'The Supreme

⁶ Supreme Court, 14 June 2018; II KK 333/17.

⁷ Based on the information available on the Supreme Court's website:
http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.

⁸ Based on the information from the website of the Constitutional Tribunal:
<http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>.

Court found that such behaviours can be condemned and punished. The SC in this case spoke against freedom, the SC took part in the state's violence, serving the ideology of homosexual activists. Against the freedom guaranteed in the Polish Constitution to every citizen, regardless of their political beliefs'.⁹ Because the verdict of the SC was final, the PG/MJ decided to challenge Art. 138 of the Code of Petty Crimes before the Constitutional Tribunal. Since the CT held this provision unconstitutional, this is a basis for the resumption of the court proceedings.

Holding that Article 138 of the Code of Petty Crimes is not in conformity with the Constitution means that it ceases to be in force. On the basis of this article, people refusing access to goods and services were punished in the past, for example for refusal to provide goods and services to persons with a disability. As a consequence, at the moment, victims of discrimination may only seek the protection of their rights based on the general principles of civil law.

Internet link source:

Information about the ruling of the CT:

<http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>.

Motions submitted in the constitutional complaint case (K16/17): complaint of the Prosecutor General; position of the Ombud opposing the complaint; position of the Parliament supporting the complaint:

<https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2016/17>.

Supreme Court verdict – information from the SC website:

http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.

The court verdicts of 1st and 2nd instance are not available.

⁹ Publication quoting Polish Press Agency report: <http://www.rmfm24.pl/fakty/polska/news-ziobro-sad-najwyzszy-ws-drukarza-wypowiedzial-sie-przeciwko-,nId,2594196>.