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Weronika Szafrańska
University of Silesia in Katowice, Poland
e-mail: weronika.szafranska@us.edu.pl
ORCID: 0000-0002-6903-8758

LIMITATION OF THE PRINCIPLE OF OPENNESS IN POLISH JUDICIAL-ADMINISTRATIVE PROCEEDINGS DURING THE PANDEMIC AND THE STANDARDS OF A FAIR HEARING: THE REASONS FOR POSSIBLE COMPLAINTS BROUGHT BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract

Along with the development of the SARS-CoV-2 pandemic, the Polish legislator, by introducing restrictions on the principle of openness in administrative court proceedings, finally decided to exclude the possibility of conducting hearings in court buildings. Currently, it is only possible to proceed in closed session or in the form of a remote hearing – i.e. with the use of technical devices enabling simultaneous direct transmission of vision and sound. The aim of the article is to assess the "Covid regulations" introduced into the Polish legal system, limiting the right of the parties to open hearing of a case pending before administrative courts in terms of the regulations on the right to a fair trial contained in the Convention for the Protection of Human Rights and Fundamental Freedoms.

KEYWORDS

closed session, administrative courts, Covid-19, principle of openness, Convention for the Protection of Human Rights and Fundamental Freedoms

SŁOWA KLUCZOWE

posiedzenia niejawne, sądy administracyjne, Covid-19, zasada jawności, Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności

1. INTRODUCTION

Before the SARS-CoV-2 pandemic, it took up to 2 years on average for the Supreme Administrative Court of Poland (i.e. the court of second and final instance, hereinafter also referred to as SAC) to decide the case after the complaint was lodged[1]. Even though the first "lockdown" imposed in March 2020 as a result of the pandemic initially led to short-term chaos also in the operation of administrative courts, the Polish legislator reacted promptly to the challenges of the new reality by introducing regulations that allow for the conduct of hearings using means of distance communication. Soon it turned out that the introduced provisions do not match the level of computerization of the country, including the readiness of the parties to make use of such solutions. Consequently, a vast majority of cases are referred for a trial in closed session.

This publication aims to answer the question of whether the interim solutions introduced by the Polish legislator, affecting the judicial-administrative proceedings during the pandemic, are in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms[2], which binds Poland. In connection with the introduction by the legislator of provisions limiting the openness of hearings in administrative courts, it cannot be excluded that Polish citizens will bring complaints before the European Court of Human Rights in Strasbourg, which monitors the signatory states' compliance with the provisions of the above Act.

[1] According to the statistics released on the website of the Supreme Administrative Court, https://www.nsa.gov.pl/statystyki-nsa.php (accessed 1.01.2022).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, as amended by Protocols No. 3, 5, 8, and 15 and supplemented by Protocol No. 2, https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention (accessed 1.01.2022).

2. NORMATIVE BASES FOR THE PRINCIPLE OF OPENNESS IN JUDICIAL-ADMINISTRATIVE PROCEEDINGS

The adoption of the current Constitution of the Republic of Poland[3] (hereinafter PC) in 1997 forced the Polish legislator to introduce far-reaching changes to the structure of administrative courts – the one-instance administrative courts operating since 1980 had to be transformed into a structure consisting of at least two instances (see Art. 176 and 184 PC). Consequently, since 2004 the Polish judicial-administrative proceedings have been a two-tier procedure based, as a rule, on a model of cassation adjudication. Both voivodship administrative courts (hereinafter also referred to as VAC) and the Supreme Administrative Court, as a court of second instance, adjudicate on the basis of the criterion of legality and, with minor exceptions, may not substitute their judgments for the actions of the administration[4].

One of the basic principles currently shaping proceedings before Polish administrative courts is the principle of openness. At the outset, it should be noted that the term "openness" of court proceedings dominates in the Polish legal language, whereas English texts of legal acts use the term "public hearing". The concept of the openness of proceedings is commonly analyzed in Polish science in two aspects: internal openness, which relates directly to the parties concerned, and external (public) openness, which is ensured by the provisions that allow everyone (the public) to become familiar with the case during a public hearing[5]. This understanding of openness combined of these two components is thus one of the elements of the general principle of the right to a fair trial[6] derived from the ECHR, which essentially consists of: the right to an oral hearing and the right to appear personally before the court[7], the right to effective participation[8], the right to publicity, or the right of the applicant to request permission for third parties and the media to be present at the hearing, the right to the public pronouncement of the judgment[9]. Within the understanding of the Polish provisions, the principle

[3] Constitution of the Republic of Poland of 2 April 1997, "Journal of Laws" No. 78, item 483.

[4] Legal bases: the Act of 25 July 2002 – Law on the system of administrative courts, uniform text, "Journal of Laws" 2021, item 137; Act of 30 August 2002 – Law on Proceedings Before Administrative Courts, uniform text, "Journal of Laws" 2019, item 2325, as amended.

[5] P. Grzegorczyk, K. Weitz, *Art. 45*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz do Art. 1–86* [Constitution of the Republic of Poland. A commentary on Art. 1–86], Warszawa 2016, margin No. 86 and 97, pp. 1126–1127, 1134–1135.

[6] See judgment of the ECtHR of 14 November 2000, Riepan vs. Austria, paras 25–41; W. Voermans, *Judicial transparency furthering public accountability for new judiciaries*, "Utrecht Law Review" 2007, Vol. 3, issue 1, p. 151; D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe 2017, pp. 69–70.

[7] See judgement of the ECtHR of 26 May 1988, Ekbatani vs. Sweden, paras 24–33.

[8] See judgment of the ECtHR of 16 December 1999, T. and V. vs. United Kingdom, paras 83–89.

[9] See judgement of the ECtHR of 8 December 1983, Pretto and others vs. Italy, paras 20–28.

of openness includes each of the above rights and fits within the term "right to a public hearing" used in the provisions of the ECHR.

The openness of court proceedings (the right to a public hearing) is present in many legal systems as a constitutional rule[10]. The Polish legislator also decided to give it such rank, which was clearly influenced by the standards set by acts of international law, such as The Universal Declaration of Human Rights (Art. 10), The International Covenant on Civil and Political Rights (Art. 14 para 1), or The Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6 para 1). The principle of openness is reflected in the Charter of Fundamental Rights of the European Union (Art. 47), which binds Poland on the basis of EU law. The fact that the Polish state is bound by the above acts and thus recognizes some of them as universally binding law has an impact on the assessment of the provisions limiting the openness of proceedings that were adopted by the Polish legislator during the pandemic. Thus, pursuant to Art. 45 para 1 PC, everyone shall have the right to a fair and public hearing of the case, without undue delay, before a competent, autonomous, impartial and independent court. In turn, Art. 45 para 2 sentence 2 provides that judgments shall be pronounced publicly.

The Polish literature underlines that the right to the openness of proceedings is applicable regardless of the type of court or the nature of the examined case (it also applies to a judicial-administrative case), or the manner of initiation of proceedings[11]. There is an on-going debate among legal scholars as to whether in terms of the Polish Constitution, the standard under analysis applies also to proceedings before the court of second (and third) instance and to extraordinary proceedings[12].

The above solutions adopted in the PC are reflected also in the Law on Proceedings Before Administrative Courts. In general, the principle of openness is regulated by Art. 10 of that Act, pursuant to which cases are examined openly, unless a specific provision states otherwise. The openness of court sittings is envisaged in Art. 90 para 1 of the Law on Proceedings Before Administrative Courts (LPBAC).

3. GENERAL LIMITATIONS ON THE PRINCIPLE OF OPENNESS IN JUDICIALADMINISTRATIVE PROCEEDINGS

Pursuant to the PC, any limitation on the exercise of constitutional freedoms and rights (i.e. also on the broadly understood principle of openness in its internal

[10] See A. Kościółek, *Zasada jawności w sądowym postępowaniu cywilnym* [Principle of openness in the civil court proceedings], Warszawa 2018, p. 30 *et seq*.

[11] P. Grzegorczyk, K. Weitz, *Art. 45*…, margin No. 89/90, pp. 1128–1129.

[12] *Ibidem*, margin No. 109, pp. 1141–1141.

aspect – in relation to the parties to the proceedings) may be imposed only by statute, and only when necessary in a democratic state for protection of its security or public order, or for protection of natural environment, health or public morals, or other persons' freedoms and rights. Such limitations shall not violate the essence of freedoms and rights (Art. 31 para 3 PC). In turn, the exclusion of the openness of a hearing may take place for reasons of morality, national security and public order, for protection of private life of parties, or other important private interest (Art. 45 para 2 sentence 1 PC)[13].

The Polish literature indicates that every limitation of the principle of openness may not directly affect the very access to an autonomous and independent court, but it affects the scope of the principle of access to court and the possibility of its actual exercise[14]. As a result, while creating laws that limit the principle of openness in its internal aspect, the legislator must take into account both the general requirements relating to the limitation of civil rights and the requirement of proportionality and preservation of the essence of a given right[15]. Even where statutory provisions seem to meet the abovemetioned requirements, they must be constructed in such a manner as not to allow for an arbitrary limitation of the principle of openness by entities using it, which, in the light of the observations made below, puts into question the actions of the legislator that limit the openness of hearings in Polish administrative courts during the pandemic.

As regards the subjective side, the general limitations on the principle of openness set out in the Law on Proceedings Before Administrative Courts are connected with age (Art. 95 para 1 LPBAC provides, in principle, for the requirement of reaching the age of majority to be able to participate in a hearing) or with the organizational possibilities of the court. A limitation on external openness due to the objective criterion is foreseen, *inter alia*, in Art. 96 and 97 LPBAC, which provide for the possibility of holding a sitting in closed court where the examination of the case in open court threatens morality, national security or public order, and where circumstances constituting classified information could be revealed.

Moreover, the objective criterion was also used by the Polish legislator to limit external and internal openness, *inter alia*, in so-called incidental matters

[13] On Art. 45 para 2 PC as the basis for the exclusion of openness of sittings during the SARS-CoV-2 pandemic, see A. Kościółek, *Jawność posiedzeń sądowych w postępowaniu cywilnym w dobie pandemii Covid-19* [Openness of court sittings in civil proceedings during the Covid-19 pandemic], „Przegląd Sądowy" 2021, No. 5, p. 28 *et seq*; different opinion: J. Roszkiewicz, *Jawność postępowania sądowego w świetle Europejskiej Konwencji Praw Człowieka* [Openness of court proceedings in the light of the European Convention on Human Rights], "Radca Prawny. Zeszyty Naukowe" 2021, No. 2, p. 24, fn. 34.

[14] J. Zimmermann, *Prawo do sądu w prawie administracyjnym* [Right to the court in administrative law], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, book 2, p. 312.

[15] P. Sarnecki, *Art. 45*, (in:) L. Garlicki, M. Zubik (eds.), *Konstytucja RP. Komentarz* [Constitution of the Republic of Poland. A commentary], Vol. II, Warszawa 2016, thesis 13, p. 242.

(e.g. consideration of a request for the recusal of a judge, decision on the suspension or reinstatement of a time-limit), in matters relating to formal deficiencies in procedural steps (e.g. examination of the admissibility of a complaint and a cassation appeal), and in matters relating to the examination of a complaint in simplified proceedings[16]. The fourth (last) group encompasses situations where specific provisions exclude the principle of openness[17], or they allow the court to limit it, as in the case of Art. 15zzs[4] of the Act of 2 March 2020 on specific solutions related to the prevention, counteraction and eradication of Covid-19, other infectious diseases and crisis situations caused by them (hereinafter referred to as Covid Act)[18]. It is the last of the above provisions, modified as a result of its subsequent amendments, that is currently causing the greatest controversy.

For the clarity of further arguments, it is necessary to indicate that the provisions of the LPBAC foresee a possibility of limiting the openness of a hearing before the SAC, thus giving the parties to the proceedings a choice in this regard between the speed of handling the case and their active participation. Pursuant to Art. 182 para 2 LPBAC, a party may waive the holding of a hearing. The literature indicates that such a solution should be deemed rational and therefore consistent with the PC in view of the limitation of an ordinary means of appeal, such as the cassation appeal, to the bases strictly defined in the act[19] and the absence of

[16] Art. 119 LPBAC – A case may be examined in the simplified procedure where: 1) the decision or order has the defect of nullity referred to in Art. 156 para 1 of the Code of Administrative Proceedings or in its other provisions, or they were issued in violation of the law, giving rise to the reopening of proceedings, 2) a party submits a request to refer the case for examination under the simplified procedure, and none of the other parties requests a hearing within fourteen days from the notification of the submission of the request, 3) the subject of the complaint is a decision issued in administrative proceedings, which may be complained against, or a decision ending the proceedings, as well as a decision resolving the case as to the essence and decisions issued in enforcement and security proceedings, which may be complained against, 4) the subject of the complaint is inaction or excessive length of proceedings, 5) the decision was issued under the simplified proceedings defined in Division II, Chapter 14 of the Act of 14 June 1960 – Code of Administrative Proceedings. See also M. Kowalski, *Tryb uproszczony w postępowaniu przed wojewódzkimi sądami administracyjnymi – pomiędzy jawnością a szybkością postępowania* [Simplified procedure in proceedings before administrative courts – between the openness and speed of proceedings], „Zeszyty Naukowe Sądownictwa Administracyjnego" 2018, No. 4, p. 25 *et seq*; B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne* [Administrative and judicial-administrative proceedings], Warszawa 2016, p. 453.

[17] Such as e.g. Art. 38 para 2 of the Act of 5 August 2010 on the protection of classified information, uniform text "Journal of Laws" 2019, item 742.

[18] Uniform text "Journal of Laws" 2020, item 1842.

[19] Pursuant to Art. 174 LPBAC, a cassation appeal may be based on 1) violation of substantive law by its erroneous interpretation of incorrect application, 2) violation of the provisions of proceedings where that violation could have had a significant impact on the outcome of the case.

evidence proceedings before administrative courts (which stems from the cassation model of adjudication)[20].

4. LEGAL BASIS FOR THE OPERATION OF POLISH ADMINISTRATIVE COURTS DURING THE PANDEMIC

The time of the pandemic forced the Polish legislator to make far-reaching changes to the implementation of the principle of openness before administrative courts and led to the accelerated computerization of the procedure. The above actions make it possible to identify four phases of the operation of Polish administrative courts, marked by the subsequent amendments to the provisions shaping the openness of proceedings.

The first phase began in connection with the adoption of Art. 15zzs § 6 of the Covid Act, which entered into force on 31 March 2020. Under the provision of this article, the possibility of holding hearings and open sessions in the period of epidemic threat or the state of epidemic was excluded in the entire justice system, with the exception of those conducted in so-called "urgent cases"[21] (covering mainly cases in the area of criminal law). All the cases in administrative courts were therefore tried at that time in closed session, but in practice, the activity of the courts suffered a far-reaching "slowdown" and many sessions were postponed as a result of the so-called "hard lockdown" imposed on the entire country.

Then, on 16 May 2020[22], Art. 15zzs[4] was added to the Covid Act. It remained in force until 2 July 2021. It prescribed that:

> During the period of the state of epidemic threat or the state of epidemic declared due to Covid-19 and within one year from the lifting of the last of them, in cases where the party lodging a cassation appeal has not waived the hearing or another party has requested a hearing, the Supreme Administrative Court may examine the cassation appeal in closed session where all the parties agree to it within 14 days from the date of service of the notice of intention to refer the case to a closed session. In these cases in closed session, the Supreme Administrative Court adjudicates in a panel of three judges (§ 1). During the period of epidemic threat or the state of epidemic declared due to Covid-19 and within one year from the lifting of the last of them, voivodship administrative courts and the Supreme Administrative Court shall conduct a hearing using technical devices that enable the hearing to be conducted

[20] See J. P. Tarno, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *Sądowa kontrola administracji publicznej. System Prawa Administracyjnego* [Court review of public administration. Administrative law system]. Vol. 10, Warszawa 2016, p. 217.

[21] The ones indicated in Art. 14a para 4 and 5 of the Covid Act in its then wording.

[22] Art. 46 para 21 of the Act of 14 May 2020 on the amendment to certain laws on protective measures in connection with the spread of the SARS-CoV-2 virus, "Journal of Laws", item 875.

remotely with a simultaneous direct transmission of image and sound, but the persons participating in it do not have to be present in the court building, except when the holding of a hearing without the use of the above devices does not cause excessive health risk to the persons participating in it (§ 2). The presiding judge may order a closed session if he deems the examination of the case necessary, and the holding of a hearing required by law could cause an excessive threat to the health of the persons participating in it and it cannot be held remotely with a simultaneous direct transmission of image and sound. In closed session in these cases, the court adjudicates in a panel of three judges (§ 3).

The validity of the above provisions marked the start of the second phase of the operation of Polish administrative courts during the pandemic, which came to an end with the emergence of the so-called third SARS-CoV-2 wave in mid-October 2020. At that time, the courts largely adjudicated at hearings while maintaining an appropriate sanitary regime. Some cases were referred for a trial in closed session, either because presiding judges applied Art. 15zzs[4] para 3 of the Covid Act or because of an increased number of requests from parties to hold a hearing under the simplified procedure.

The "symbolic" beginning of the third phase can be traced back to 16 October 2020, i.e. the day of publication of the Regulation No. 39 of the President of the SAC[23], in which it was indicated in an impersonal form that as of 17 October 2020, all hearings before the SAC are cancelled, the judicial activity of the Court will be continued in closed sessions, and cases set for a hearing are to be examined in closed session. Such actions were justified by the intensification of the epidemic and the imposition of additional restrictions, orders and bans by the Polish government.

The above regulation of the President of the SAC and the subsequent regulations of a similar nature issued by particular presidents of voivodship administrative courts had no legal significance in the context of canceling hearings – a regulation of the president of a court is not an act of generally applicable law in the Polish legal order, it is only an internal act binding in the matter of the temporary organization of courts. Similarly, the Covid Act did not entitle presidents of courts to exclude the openness of sittings – nonetheless, it was hard to dispel the impression that those regulations initiated the rapidly increasing use of the aforesaid Art. 15zzs[4] para 3 of the Covid Act by presiding judges (and by court divisions), leading to a specific "automation" of decisions made in this regard. There were even situations where adjudicating panels made references in their rulings to the "October" regulations of presidents of courts in the matter of cancelling hearings in order "to strengthen the argument about the possibility of

[23] http://www.nsa.gov.pl/komunikaty/zarzadzenie-nr-39-prezesa-nsa-z-dnia-16-pazdziernika-2020-r-w-sprawie-odwolania-rozpraw-oraz-wdrozenia-w-nsa-dzialan-profilaktycznych-sluzacych-przeciwdzialaniu-potencjalnemu-zagrozeniu-zakazenia,news,4,770.php (accessed 1.01.2022).

examining the case in closed session"[24], which should be deemed an erroneous action[25] that may be misleading to parties to proceedings, who often act without professional representatives.

An order to examine the case in closed session was formally issued upon consideration of this issue on a case-by-case basis by the presiding judge or the head of a division (it was not specified in the act, the practice of courts varied in this respect). The presiding judge or head of a division assessed whether holding a trial in the court could pose excessive threats to the health of the participants and whether, alternatively, it was at all possible to hold an open sitting in the on-line mode (given the poor computerization of Polish administrative courts, the answer to the latter question seemed obvious). At the same time, where the presiding judge or head of the division deemed the examination of a case necessary (as one can easily guess due to the interest of the party and the nature of the case, although the legislator is silent in respect of the phrase used here) – the case was referred for a sitting in closed session. Because the legislator did not envisage a possibility of appealing against the aforesaid order issued by the presiding judge or head of the division, it does not have to be served on the parties. However, in the light of the effective constitutional and international standards, it should be recognized that the parties must be notified in advance of the fact of referring their case for a sitting in closed court and given a possibility of taking a position on the matter earlier, which, as the practice of the recent months has shown, does not always take place.

Although the above provisions giving the principle of openness in administrative courts a new shape during the pandemic faced opposition from the Polish legal community[26], the legislator chose to take a step further, and since 3 July 2021, a new wording of Art. 15zzs[4] of the Covid Act has come into force[27], pursuant to which, the SAC shall not be bound by a request from a party to hold a hearing. Consequently, it sanctions the possibility of the total exclusion of the presence of the parties from the sessions conducted by the Supreme Administrative Court, regardless of the raised objection. Further, administrative courts may adjudicate

[24] See e.g. judgment of VAC in Wrocław of 1 December 2020, I SA/Wr 817/19, LEX No. 3124514; judgment of VAC in Wrocław of 14 January 2021, I SA/Wr 365/20, LEX No. 3149103.

[25] See e.g. judgment of VAC in Gdańsk of 24 February 2021, II SA/Gd 509/20, LEX No. 3151150; VAC in Bydgoszcz of 19 January 2021, I SA/Bd 737/20, LEX No. 3124172; VAC in Bydgoszcz of 9 February 2021, I SA/Bd 711/20, LEX No. 3146129.

[26] See, *inter alia*, appeal of 14 December 2020 of the Helsinki Foundation for Human Rights https://interwencjaprawna.pl/wp-content/uploads/2020/12/wystapienie_NSA_14.12.2020.pdf, (accessed 1.01.2022); different opinion: M. Sieniuć, *Prawo do jawnego rozpatrzenia sprawy sądowoadministracyjnej a pandemia Covid-19* [The right to a public trial in judicial administrative proceedings during the Covid-19 pandemic], "Acta Universitatis Lodziensis. Folia Iuridica" 2022, Vol. 98, p. 237 *et seq.*

[27] Art. 4 of the Act of 28 May 2021 on an amendment to the Act – Code of Civil Procedure and certain other laws, "Journal of Laws", item 1090.

only in closed session or in the on-line mode for one year from the end of the state of epidemic or epidemic threat. The possibility of holding traditional hearings, i.e. in the court building, has been excluded[28].

5. ASSESSMENT OF THE REGULATION IN THE LIGHT OF THE ECHR

As given above, the regulations currently in force in the Polish legal system may be considered inconsistent with international standards, including, first of all, Art. 6 ECHR, which may give rise to compensation liability of the State Treasury towards persons whose right to a fair trial has been violated.

Given the evolutionary, extending interpretation of the term "civil rights and obligations" used in the above provision that the Court made in its subsequent rulings, it is clear that Art. 6 of the Convention covers numerous proceedings pending before administrative courts of individual States-Parties to the Convention[29].

The transfer and assessment of many rules developed by the ECtHR judges, that allow for the implementation of the principle of reliability in the aspect of broadly understood openness of proceedings, is difficult due to the fact that the rulings relevant in this regard were primarily issued in criminal and civil cases in the narrow sense, i.e. completed before common courts of a given country, and were not given in proceedings concluded in administrative courts or in cases decided strictly on the basis of administrative law provisions. It should be high-

[28] The Supreme Administrative Court accepted such a solution, see e.g. judgment of SAC of 16 March 2022, II GSK 1256/21, LEX No. 3335383; judgment of SAC of 15 July 2021, III OSK 3550/21, LEX No. 3205506.

[29] See judgment of ECtHR of 16 July 1971, Ringeisen vs. Austria, para 94; see also judgment of ECtHR of 8 July 1987, Baraona vs. Portugal, paras 38–44; judgment of ECtHR of 28 June 1978, König vs. Germany; judgment ECtHR of 23 October 1985, Bentham vs. The Netherlands, para 32; judgment of ECtHR of 27 October 1987, Pudas vs. Sweden; judgment of ECtHR of 29 May 1997, Georgiadis vs. Greece, paras 27–36. See also J. E. Kulikowska-Kulesza, *Polskie postępowanie przed sądami administracyjnymi w świetle standardów ETPC w zakresie prawa do rzetelnego procesu sądowego* [Polish proceedings before administrative courts in the light of the ECtHR standards in the area of a fair court trial], Kraków, Legionowo 2016, p. 46 *et seq*.; M. Kłopocka-Jasińska, *Pojęcie sprawy w świetle Art. 6 Konwencji o ochronie praw człowieka i podstawowych wolności* [Notion of a case in the light of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms], „Przegląd Prawa Konstytucyjnego" 2016, No. 3, pp. 308–312; A. Wiśniewski, *Interpretacja autonomiczna w orzecznictwie Europejskiego Trybunału Praw Człowieka* [Autonomous interpretation in the jurisprudence of the European Court of Human Rights], "Gdańskie Studia Prawnicze" 2005, Vol. XIII, p. 128; P. van Dijk, (in:) P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (eds.), *Theory and practice of the European Convention on Human Rights*, Antwerp, Oxford 2006, pp. 516 *et seqq*; W. A. Schabas, *The European Convention on Human Rights. A commentary*, Oxford 2015, p. 274.

lighted that the Court adjudicates also based on the interpretative principle *a casu ad casum*, which allows it to issue a judgment based on the specific circumstances of a given case, without the need to be guided by rules developed, admittedly, by the Court itself, but in rulings given in different factual states[30]. Since Art. 6 para 1 ECHR may form the basis for an assessment of rulings given also by administrative courts, it is worthwhile to relate the current standards of openness of proceedings developed by the ECtHR to the current legal regulations shaping proceedings before Polish administrative courts. It cannot be excluded that parties deprived of the right to participate in a hearing in open court, both in the first and second instance, will submit their complaints to the Court in Strasbourg.

It should be noted that the aim defined in Art. 6 para 1 of the Convention, which is fair and just proceedings, is not reflected, as indicated above, in the openness of proceedings only in the aspect of internal openness, i.e. in relation to the parties. As the Court has pointed out on numerous occasions, the right to open proceedings protects the parties in a broad manner against covert, arbitrary action of the judiciary without public control, it serves the public interest by informing the public about the procedure and subjects it to public scrutiny ("the watchful eye of the public")[31], and thus makes it possible to maintain trust in lower and higher courts[32].

As the pandemic unfolded, the Polish legislator chose to impose the aforesaid far-reaching limitations on the openness of judicial-administrative proceedings. First, it should be noted that such legal solutions can be seen from the outset as incompatible with Art. 6 para 1 of the Convention, which, in the opinion of some scholars, may not constitute grounds for the exclusion of the openness of proceedings (their limitation) in order to protect health[33]. Although the Convention does not require that limitations have their source in a normative act (condition of formal legality), their imposition is possible once a condition defined in Art. 6 para 1 ECHR is satisfied. On the one hand, a limitation must serve to protect one of the values set out in the provision – it leads to the achievement of a specific objective relating to the protection by a public authority: of morals, public order, national security, juveniles, private life of the parties, or the interests of justice, which are specific circumstances. Even though the Convention recognizes the notion of the protection of health, which was used in its other provisions (e.g. Art. 8 para 2, Art. 9 para 2, Art. 10 para 2), Art. 6 para 1 sentence 2 does not contain

[30] See J. Roszkiewicz, *op. cit.*, p. 14.

[31] See judgment of ECtHR of 6 December 1988, Barberŕ, Messegué and Jabardo vs. Spain, para 89.

[32] See judgment of ECtHR of 8 December 1983, Pretto and others vs. Italy, para 21; judgment of ECtHR of 8 December 1983, Axen vs. Germany, paras 25 and 76; judgment of ECtHR of 8 February 2000, Stefanelli vs. San Marino, para 19; judgment of ECtHR of 12 November 2002, Bakova vs. Slovakia, para 30.

[33] J. Roszkiewicz, *op. cit.*, p. 24.

that condition. The imposition of a limitation on openness by virtue of the Covid Act without prejudice to the Convention would thus be possible, in line with the above view, on the basis of Art. 15 paras 1 and 3 ECHR, pursuant to which, any High Contracting Party may take measures derogating from the obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Any High Contracting Party shall keep the Secretary General of the Council of Europe fully informed of the measures it has taken. Poland has not made such a notification[34].

Even if one accepts that the limitation of the openness principle foreseen by the Polish provisions is consistent with the aforesaid conditions for substantive legality provided in Art. 6 para 1 of the Convention, some doubt remains as to whether such far-reaching limitations set out in the Covid Act satisfy the proportionality condition, under which the action must be taken and must lead to the protection of one of the above-mentioned values. Moreover, since the provisions of the Convention do not require a specific legal basis for a limitation of the principle of openness, it should be highlighted that both the justification of the draft legislative amendments limiting the openness due to the pandemic and the very substantiations of judgments given in closed session by application of Art. 15zzs[4] of the Covid Act must be very reliable and comprehensive. However, an analysis of the case-law to date shows that adjudicating panels very frequently fail to explain to the parties why it is impossible to hold an on-line hearing in their case[35].

Apart from the general issue of the possibility of excluding the openness of judicial-administrative proceedings due to the SARS-CoV-2 epidemic on the basis of Art. 6 ECHR, it is necessary to reflect overall on whether the holding of judicial-administrative proceedings in closed session before one or both court instances may as such violate the provision of Art. 6 para 1 of the Convention in a situation where the Polish judicial-administrative proceedings are based on a cassation model of adjudication, which foresees the criterion of legality as the only review criterion.

In the opinion of the ECtHR judges, the entitlement to have the case heard in public is not an absolute right[36] and may be limited, *inter alia*, where the parties do not contest the credibility of evidence, of the facts, and the courts may decide the

[34] It follows from the information given on the Court website: https://www.coe.int/en/web/conventions/derogations-covid-19 (accessed 1.01.2022).

[35] See resolution of SAC of 30 November 2020, II OPS 6/19, LEX No. 3085952; decision of SAC of 22 October 2020, II FSK 1389/18, LEX No. 3067338; of 1 December 2020, II FSK 2207/18, LEX No. 3087498 and a series of judgments in which a reference was made to the above rulings, e.g. judgment of VAC in Kraków of 13 July 2021, I SA/Kr 649/21, LEX No. 3217850; judgment of VAC in Warsaw of 15 January 2021, V SA/Wa 1461/20, LEX No. 3173286.

[36] See judgment of ECtHR of 21 February 1990, Håkansson and Sturesson vs. Sweden, para 66.

case on the basis of the parties' submissions and other written materials[37]. No doubt arises in a situation where a party waives his/her right to proceedings in open court of their own free will (also tacitly, implicitly, but raising no doubt) for the sake of the speed of the proceedings. The Court stressed that Art. 6 ECHR does not stand in the way of waiving, of one's own free will and in an unequivocal manner, the entitlement to have one's case heard in public, regardless of the conditions for the exclusion of openness indicated in this provision[38]. At the same time, however, a minimum of guarantees must be provided to safeguard the right to a fair trial[39].

The author of this article believes that the minimum is not provided where a party expressly objected to the examination of his/her case in closed session and/or was not notified at all of the date of the examination of the case in closed session[40]. In the absence of information on the date of a closed session, the party is completely deprived of the possibility of presenting his/her final written position before a decision is issued, which may be of importance if a significant period of time passes between his/her complaint and the issuance of a ruling (sometimes even a period of several months)[41].

The Court holds the view that dispensing with a hearing may also be justified in some situations, e.g. in cases with "merely legal issues of a limited nature/limited nature of the issues"[42], or in cases with "no particular complexity"[43]. When

[37] See judgments of ECtHR: of 12 November 2002, Döry vs. Sweden, para 37; 4 March 2014, Grande Stevens and others vs. Italy, para 119; decision of ECtHR of 25 November 2003, Pursiheimo vs. Finland.

[38] See judgments of ECtHR of 30 November 1987, H. vs. Belgium, para 54; 23 June 1994, De Moor vs. Belgium, para 60; of 23 November 1993, Poitrimol vs. France paras 29–39; of 28 May 1997, Pauger vs. Austria, para 58; of 5 July 2005, Exel vs. the Czech Republic, para 46; of 26 January 2017, Lena Atanasova vs. Bulgaria, para 52; of 23 July 2020, Chong Coronado vs. Andorra, paras 42–45. The conditions for waiving the right to a public hearing: the party concerned must give consent to it, whether expressly or tacitly (judgment of ECtHR of 23 June 1981, Le Compte, Van Leuven and De Meyere vs. Belgium, para 59), of his own free will and in an unequivocal manner (judgments of ECtHR: of 10 February 1983, Albert and Le Compte vs. Belgium, para 35; of 21 February 1990, Håkansson and Sturesson vs. Sweden, para 67. It must not run counter to any important public interest (judgment of ECtHR of 21 February 1990, Håkansson and Sturesson vs. Sweden, para 66).

[39] M. A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* [Towards The European Convention. A commentary to the European Convention on Human Rights], Warszawa 2021, p. 712.

[40] As the representatives of the practice indicate, such situations are common nowadays – see P. Szymaniak, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8183895,rozprawy-online-sad-administracyjny-przepisy.html (accessed 1.01.2022).

[41] For more on the lack of information on the on-going proceedings, see judgment of ECtHR of 12 February 2015, Sanader vs. Croatia, para 77.

[42] "Merely legal issues of a limited nature/limited nature of the issues" – see judgments of ECtHR: of 19 February 1998, Allan Jacobsson vs. Sweden (No. 2), 48–49; of 1 June 2004, Valová, Slezák and Slezák vs. Slovakia, para 68.

[43] "No particular complexity" – see decisions of ECtHR: of 25 April 2002; Varela Assalino vs. Portugal; of 5 September 2002, Speil vs. Austria; judgment of ECtHR of 25 March 1998, Belziuk vs. Poland.

resolving complaints against the proceedings conducted before the one-instance Austrian Administrative Court, ECtHR judges noted that a public oral hearing must take place in a situation where a case was not of a highly technical or exclusively legal nature[44]. One must not lose sight of the fact that a hearing also serves to subject the activity of the court to social control, contributing to the fulfilment of the conditions of a fair trial[45]. A systemic dispensing with holding hearings can therefore affect not only the legal situation of parties to the proceedings, but can also result in lowering confidence in the judiciary[46].

As indicated above, although the Polish judicial-administrative proceedings are based on a model of cassation adjudication, in which the legality of the actions and omissions of the administration is the only review criterion, it should be noted that these courts may repeal the contested administrative acts if they are convinced that administrative organs incorrectly collected evidence in the case and/or incorrectly assessed it. Consequently, even though the court conducts review in terms of compliance with the law, the applicant's complaint may refer to incorrect findings of the fact, which led to the organ's incorrect decision in the case. Moreover, as of 2015, Polish administrative courts may adjudicate in an indirectly reformatory manner. i.e. in the form of the German judgment ordering the organ to issue a decision that was further specified by the court. One of the conditions for giving such judgment is the absence of doubts as to the facts of the case[47].

It can be indicated in defense of the provisions that allow for ignoring the objection of a party who wished his/her case to be heard at a hearing, also before the SAC, that according to the ECtHR the application of the protective standard of the openness of proceedings laid down in Art. 6 para 1 ECHR in proceedings before a court of higher instance depends on a particular nature of specific proceedings and may be excluded if the court does not decide on the merits[48]. It is

[44] See judgments of ECtHR: of 10 December 2009, Koottummel vs. Austria, para 20; of 27 July 2007, Jurisic and Collegium Mehrerau vs. Austria, para 65 and other rulings cited there; of 27 July 2006, Coorplan-Jenni GmbH and Hascic vs. Austria, para 63; of 21 February 1990, Håkansson and Sturesson vs. Sweden, para 64; of 23 February 1994, Fredin vs. Sweden (No. 2), paras 21–22; of 11 July 2002, Göç vs. Turkey, para 47.

[45] See judgments of ECtHR: of 21 February 1975, Golder vs. UK, para 36; of 17 July 2003, Craxi vs. Italy (No. 2), para 64.

[46] See judgments of ECtHR: of 10 April 2012, Lorenzetti vs. Italy, para 32; of 17 December 2013, Nikolova and Vandova vs. Bulgaria, para 70.

[47] An amendment to the LPBAC made it possible also for a court to adjudicate in a directly reformatory manner, i.e. substitute a judgment for the administrative decision, however, this provision has not been applied to date.

[48] See judgment of ECtHR of 29 Octiber 1991, Helmers vs. Sweden; and judgment of 24 October 2010, Eker vs. Turkey, paras 29–31, in which it was indicated that the legal issues were not especially complex (the dispute related to textual and technical issues), but it was necessary to conduct the proceedings promptly, it was thus found that the lack of a public hearing does not violate Art. 6 para 1 of the Convention.

necessary to take into consideration the specific features of the entirety of the proceedings taking place under the national legal system, the role of the court of higher instance, while taking into account the right to a hearing within a reasonable time and the need to handle the case fast and effectively. At the same time, the judges made it clear that the absence of a hearing may be justified if a hearing has been held at first instance[49]. The Court also held in one of its decisions that the lack of a public hearing at the Grand Chamber of the Supreme Administrative Court in Turkey does not raise an issue under Art. 6 para 1 of the Convention because its review is restricted to points of law, and its decisions do not quash or replace those of lower courts, but reverse and remit them for further examination[50].

In the light of the above, on the one hand, it can be argued that the impossibility of subsequent supplementation of the grounds of a cassation appeal or the lack of evidential proceedings are the features of "appeal" proceedings which, in the light of the ECtHR case-law, would qualify proceedings before the SAC for excluding openness.

On the other hand, it should be highlighted that the SAC may refer the case for reconsideration in its judgment, but it may also rule, as it were, in lieu of VAC, when it is convinced that the facts of the case raise no doubt. Moreover, the SAC may apply the provision allowing it to adjudicate immediately in the indirectly reformatory manner in a case (or even the directly reformatory manner, though as indicated above, in practice this provision is not applied even before courts of first instance). The above amendments introduced into the LPBAC in recent years, which are intended to accelerate the judicial-administrative proceedings, meant that the SAC ceased to be a strictly cassation court. The cassation proceedings are therefore not merely a classical judgment on the law – they are also indirectly (as is the case with proceedings before VAC) a judgment on the facts, as the SAC must assess whether a court of first instance made a correct assessment in relation to the facts established by the organs, i.e. whether the facts of the case established by the organ were correct and were based on the principle of free evaluation of evidence. It should be noted that the full SAC ruled in its resolution of 26 October 2009[51] that the basis for the cassation appeal provided in Art. 174 point 2 LPBAC, i.e. a violation of the provisions of proceedings, refers to a violation of the provisions of both administrative proceedings and judicial-administrative proceedings if that violation could have had a significant impact on the outcome of the case. Therefore, it is possible to invoke errors of the organ as to the establishment of the facts also in proceedings before the SAC, which this court must examine, even

[49] See judgments of ECtHR: of 29 October 1991, Helmers vs. Sweden, para 36; of 26 May 1988, Ekbatani vs. Sweden, para 32; M. A. Nowicki, *Europejski Trybunał Praw Człowieka. Orzecznictwo* [European Court of Human Rights. The case-law], Warszawa 2001, p. 457.

[50] See decision of ECtHR of 23 May 2006, Türk Ticaret Bankasi Munzam Sosyal Güvenlik Emekli Ve Yardim Sandigi Vakfi vs. Turkey.

[51] Resolution of SAC of 26 October 2009, file No. I OPS 10/09, LEX No. 524941.

though it is a court of second instance and, as a rule, of a cassation nature. The establishment by the SAC that a court of first instance incorrectly assessed the operation of an organ in the area of the establishment of the facts may lead to the conclusion that the VAC thus violated the provisions of judicial-administrative proceedings, and the SAC may consequently quash such judgment. Referring to the above-mentioned case-law of the Court, it is difficult to accept that Polish administrative courts currently adjudicate in strictly legal or merely technical issues, which would justify dispensing with court proceedings in open session in both instances.

It should be noted that the existing provisions were constructed in a manner that gives judges the possibility to refer a case to a closed court procedure if they find that it is impossible to conduct a remote hearing with a simultaneous direct transmission of image and sound. First, the highly evaluative and imprecise[52] condition for the impossibility of holding an e-hearing prescribed by the provision gives rise to a risk of its arbitrary interpretation[53]. Second, the regulations do not provide for the possibility of objecting to such a procedure, not to mention the necessity to obtain consent from the party. The above will therefore lead to a situation where a case is heard in closed sessions before both VAC and the SAC, although the party did not agree to such a solution, but the legislator deprived him/her of any influence on the situation.

The author of this article holds the view that depriving a party of the possibility to object to the referral of his/her case to a closed session in connection with the epidemic, assuming that the courts of both first and second instance conducted the proceedings in closed session against his/her will, violates Art. 6 para 1 ECHR[54]. Inasmuch as proceedings in closed session only before the SAC (even without consent from the party), in the light of the above considerations and the case-law of ECtHR, may be deemed acceptable, barring the way to an open hearing of the case in both instances, even in a system of adjudication that is, as a rule, of a cassation nature, cannot be deemed to comply with the proportionality

[52] About overuse of general and vague terms in the Covid acts – H. Izdebski, *Legislacja dotycząca Covid-19 i ustawowy nihilizm prawny* [Legislation relating to Covid-19 and the legislative legal nihilism], (in:) T. Gardocka, D. Jagiełło (eds.), *Pandemia Covid-19 a prawa i wolności obywatela* [Covid-19 pandemic and human rights and freedoms], Warszawa 2021, p. 41 *et seq.*

[53] Cf. T. Zembrzuski, *Ograniczenia jawności postępowania w sprawach cywilnych w dobie pandemii – potrzeba chwili czy trwałe rozwiązania?* [Limitations of the openness of proceedings in civil cases during the pandemic – an exigency or a permanent solution?], „Forum Prawnicze" 2021, No. 3, p. 14.

[54] In its rulings, the ECtHR noted that the waiving of the right to participate in a hearing before a court of second instance is possible where a hearing was held at an earlier stage, see judgment of ECtHR of 18 October 2006, Hermi vs. Italy, para 60; different opinion: A. Paduch, *The Right to a Fair Trial Under Article 6 ECHR during the COVID-19 Pandemic: The Case of the Polish Administrative Judiciary System*, "Central European Public Administration Review" 2021, No. 2, Vol. 19, p. 7 et seq.

principle. Even apart from the aforesaid issue of the impossibility of the limitation of openness due to the need to protect health, which is not prescribed by Art. 6 para 1 of the Convention, the solutions introduced by virtue of the Covid Act appear to be disproportionate to their intended purpose – the protection against the spread of the virus on a massive scale. It may be indicated that the SARS-CoV-2 pandemic turned out to be a global threat, previously unknown and therefore not yet examined, but there are no studies showing that the admission of the institution of objection resulting in a necessity to examine some cases in hearings would contribute to a significant increase in Covid-19 infections. There are also no studies showing that holding hearings in court buildings, with the application of all possible restrictions, would lead to a significant increase in infections. The far-reaching limitations on civil rights, as the ones described here, should be introduced with due consideration.

6. CONCLUSIONS

Cases of individuals in administrative proceedings before the organs are decided in camera in an imperative and unilateral manner. This means that by virtue of the principle of the openness of court proceedings, there was a possibility to have the decisions of the public authority evaluated by an independent arbitrator – court, using the principle of equality of the parties to the proceedings. Every time a party is deprived of the possibility of "having an insight" into the operations of courts entails a lack of possibility of a direct comparison of her views with the assessment made by the administrative organ, thus eroding the diminishing sense of trust in state institutions[55].

Given the above, it is hard to accept that the system that bars the way to an open review of the operation of the authorities by courts conforms to the principle of a democratic state ruled by law, in particular when the legislator excluded the possibility of raising an objection to a hearing in closed court, i.e. giving a party to the proceedings a chance to decide whether the speed of proceedings or an open examination of the case is more important to him/her.

In the light of the considerations made here, the judicial-administrative proceedings conducted on the basis of the Polish provisions that shape the principle of openness in the judicial-administrative proceedings adopted during the pan-

[55] See R. Stankiewicz, J. Piecha, *Legal opinion on a government draft legislation to amend the law – Code of Civil Procedure and certain other laws*, *form No. 899*, https://orka.sejm.gov.pl/ Druki9ka.nsf/0/AB8821AB3FA8D0D5C125867D0048133A/%24File/899-007.pdf (accessed 1.01.2022).

demic should therefore be deemed to be in violation of the fair trial standards, including the public hearing principle enshrined in Art. 6 para 1 ECHR.

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