
COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

**CASE OF BĄCZKOWSKI AND OTHERS v. POLAND**

*(Application no. 1543/06)*

JUDGMENT

STRASBOURG
3 May 2007

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Bączkowski and Others v. Poland,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 April 2007

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 1543/06) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Tomasz Bączkowski, Mr Robert Biedroń, Mr Krzysztof Kliszczyński, Ms Inga Kostrzewa, Mr Tomasz Szypuła and by the Foundation for Equality (*Fundacja Równości*), on 16 December 2005.

2. The applicants were represented before the Court by Professor Zbigniew Hołda, a lawyer practising in Warszawa.

3. The respondent Government were represented by their Agent, Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

4. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They alleged that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date of the planned assemblies. They also complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the assemblies whilst other persons had received such permissions.

5. By a decision of 5 December 2006, the Court declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objections.

6. The applicants filed further written observations (Rule 59 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### *1. Preparation of the assemblies*

7. The applicants, a group of individuals and the Foundation for Equality (of whose executive committee the first applicant is also a member empowered to act on its behalf in the present case), wished to hold, within the framework of Equality Days organised by the Foundation and planned for 10-12 June 2005, an assembly (a march) in Warsaw with a view to alerting public opinion to the issue of discrimination against minorities - sexual, national, ethnic and religious - and also against women and disabled persons.

8. On 10 May 2005 the organisers held a meeting with the Director of the Safety and Crisis Management Unit of Warsaw City Council. During this meeting an initial agreement was reached as to the itinerary of the planned march.

9. On 11 May 2005 Mr Bączkowski obtained an instruction of the Warsaw Mayor's Office on "requirements which organisers of public assemblies have to comply with under the Road Traffic Act" if the assembly was to be regarded as an "event" (*impreza*) within the meaning of Article 65 of that Act.

10. On 12 May 2005 the organisers requested the City Council Road Traffic Office for permission to organise the march, the itinerary of which would lead from the buildings of Parliament (*Sejm*) to the Assembly Place (*Plac Defilad*) in the centre of Warsaw.

11. On 3 June 2005 the Traffic Officer, acting on behalf of the Mayor of Warsaw, refused permission for the march, relying on the organisers' failure to submit a "traffic organisation plan" (*"projekt organizacji ruchu"*) within the meaning of Article 65 (a) of the Road Traffic Act, which they had allegedly been ordered to submit.

12. On the same day the applicants informed the Mayor of Warsaw about stationary assemblies they intended to hold on 12 June 2005 in seven different squares of Warsaw. Four of these assemblies were intended to protest about discrimination against various minorities and to support actions of groups and organisations combating discrimination. The other three planned assemblies were to protest about discrimination against women.

13. On 9 June 2005 the Mayor gave decisions banning the stationary assemblies to be organised by Mr Bączkowski, Mr Biedroń, Mr Kliszczyński, Ms Kostrzewa, Mr Szypuła, and another person, Mr N. (who is not an applicant), who are active in various

non-governmental organisations acting for the benefit of persons of homosexual orientation. In his decision the Mayor relied on the argument that assemblies held under the provisions of the Assemblies Act of 1990 (*Ustawa o zgromadzeniach*) had to be organised away from roads used for road traffic. If they were to use roads, more stringent requirements applied. The organisers wished to use cars carrying loudspeakers. They had failed to indicate where and how these cars would park during the assemblies so as not to disturb the traffic and how the movement of persons and these cars between the sites of the assemblies would be organised.

14. Moreover, as there had been a number of requests submitted to organise other assemblies on the same day, the tenor of which ran counter to the ideas and intentions of the applicants, permission had to be refused in order to avoid any possible violent clashes between the participants of various demonstrations.

15. On the same day the municipal authorities, acting on the Mayor's behalf, allowed the three planned assemblies concerning discrimination against women to be held as requested by the applicants.

16. On the same day the same authorities permitted six other demonstrations to be organised on 12 June 2005. The themes of these assemblies were as follows: “For more stringent measures against persons convicted of paedophilia”, “Against any legislative work on the law on partnerships”, “Against propaganda for partnerships”, “Education in Christian values, a guarantee of a moral society”, “Christians respecting God's and nature's laws are citizens of the first rank”, “Against adoption of children by homosexual couples”.

### *2. Meetings held on 11 June 2005*

17. On 11 June 2005, despite the decision given on 3 June 2005, the march took place. It followed the itinerary as planned in the original request of 12 May 2006. The march, attended by approximately 3,000 people, was protected by the police.

18. Apart from the march, nine stationary assemblies were held on the same day under permissions given by the Mayor on 9 June 2005 (see paragraphs 15-16 above).

### *3. Appellate proceedings*

#### a) The march

19. On 28 June 2005 the applicant Foundation appealed to the Local Government Appellate Board against the decision of 3 June 2005, refusing permission for the march. It was argued that the requirement to submit “a traffic organisation plan” lacked any legal basis and that the applicants had never been requested to submit such a document prior to the refusal. It was

also argued that the decision amounted to an unwarranted restriction of freedom of assembly and that it had been dictated by ideological reasons, incompatible with the tenets of democracy.

20. On 22 August 2005 the Board quashed the contested decision, finding that it was unlawful. The Board observed that under the applicable provisions of administrative procedure the authorities were obliged to ensure that parties to administrative proceedings had an opportunity of effectively participating in them. In the applicant's case this obligation had not been respected in that the case file did not contain any evidence to show that the applicant Foundation had been informed of its procedural right to have access to the case file.

The Board's decision further read, *inter alia*:

> "In the written grounds of the decision complained of, the first-instance authority refers to the fact that the traffic organisation plan is not to be found in the case file. Under section 65 (a) item 3 (9), an organiser of a demonstration is obliged to develop, in co-operation with the police, such a project, if he or she was obliged to do so by the authority. However, in the case file there is not as much as a mention that the organisers were obliged to submit such a project. (...) The document on the procedure for obtaining permission to organise an event which was served on the organisers did not contain information on such an obligation either.
>
> Having regard to the fact that the organisers' request concerned a march to be held on 11 June 2005 and having also taken into account the fact that the appeal was received by the Board's Office [together with the case file] on 28 June 2005, the proceedings had already become on that latter date devoid of purpose. "

**b) The assemblies**

21. On 10 June 2005 the applicants appealed to the Mazowsze Governor against the Mayor's refusals of 9 June 2005 of permission to hold six out of the eight planned assemblies. They argued that the ban on the assemblies breached their freedom of assembly guaranteed by the Constitution and that the assemblies were to be entirely peaceful. They submitted that the assemblies did not pose any threat to either public order or to morals. They contested the argument relied on in the decision that they were obliged to submit a document on the planned itinerary between the places where assemblies were to be held, arguing that they only intended to organise stationary assemblies, not any movement of persons between them and that they should not be responsible for any organisation or supervision of such movement.

22. On 17 June 2005 the Mazowsze Governor gave six identical decisions by which he quashed the contested refusals to hold the assemblies given on 9 June 2005.

It was first observed that these decisions breached the law in that the parties had been served only with copies of the decisions, not with originals

as required by law on administrative procedure. It was further noted that the Mayor had informed the media of his decisions before they had been served on the applicants, which was manifestly in breach of principles of administrative procedure.

23. It was further observed that the 1990 Act of Assemblies was a guarantee of freedom of assembly both in respect of organisation of assemblies and participation therein. The Constitution clearly guaranteed the freedom of assembly, not a right. It was not for the State to create a right to assembly; its obligation was limited to securing that assemblies be held peacefully. This way the applicable law did not provide for any permit for an assembly to be held.

24. The Governor noted that the requirement to submit a permit to occupy a part of the road, based on the provisions of the Road Traffic Act, lacked any legal basis in the provisions of the Assemblies Act. The Mayor had assumed that the demonstration would occupy a part of the road, but had failed to take any steps to clarify whether this had really been the organisers' intention, while he was obliged to do so by the law.

It was further observed that a decision banning an assembly had to be regarded as a method of last resort because it radically restricted freedom of expression. The principle of proportionality required that any restriction of constitutionally protected freedoms be permitted only insofar as it was dictated by the concrete circumstances of a particular case.

25. The Governor noted in this connection that the Mayor's reliance on the threat of violence between the demonstrations organised by the applicants and the counter-demonstrations planned by other persons and organisations for the same day could not be countenanced. It would have been tantamount to accepting that the administration endorsed the intentions of organisations which clearly and deliberately intended to breach public order, whereas the protection of freedom of expression guaranteed by the Assemblies Act should be an essential task of the public powers.

26. He further discontinued the proceedings as they had become devoid of purpose, the assemblies having taken place on 11 June 2005.

*4. Translation of an interview with the Mayor of Warsaw published in "Gazeta Wyborcza" of 20 May 2005*

27. "E. Siedlecka: The Assemblies Act says that the freedom of assembly can only be restricted if a demonstration might entail a danger to life or limb, or a major danger to property. Did the organisers of the march write anything in their registration request that would show that there is such a danger?

Mayor of Warsaw: I don't know, I haven't read the request. But I will ban the demonstration regardless of what they have written. I am not for discrimination on the ground of sexual discrimination, for example by

ruining people's professional careers. But there will be no public propaganda of homosexuality.

E. S. What you do in this case is exactly discrimination: you make it impossible for people to use their freedom only because they have a specific sexual orientation.

MoW: I do not forbid them to demonstrate, if they want to demonstrate as citizens, not as homosexuals.

E. S.: Everything seems to suggest that – like last year – the Governor will set your prohibition aside. And if the organisers appeal to the administrative court, they will win, because preventive restrictions on freedom of assembly are unlawful. But the appellate proceedings will last some time and the date for which the march is planned will pass. Is this what you want?

MoW: We will see whether they win or lose. I will not let myself be persuaded to give my permission for such a demonstration.

E. S.: Is this correct that the exercise of people's constitutional rights depended on the views of powers that be?

MoW: In my view, propaganda of homosexuality is not tantamount to exercising one's freedom of assembly".

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### *1. Relevant provisions of the Constitution*

28. Article 57 of the Constitution reads:

> The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

29. Article 79 § 1 of the Constitution, which entered into force on 17 October 1997, provides as follows:

> "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

30. Article 190 of the Constitution, insofar as relevant, provides as follows:

> "1. Judgments of the Constitutional Court shall be universally binding and final.
>
> 2. Judgments of the Constitutional Court, ... shall be published without delay.
>
> 3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of

the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. ...

*2. The Assemblies Act*

31. Pursuant to section 1 of the 1990 Assemblies Act, everyone has the right to freedom of peaceful assembly. A gathering of at least fifteen persons, called in order to participate in a public debate or to express an opinion on a given issue is to be regarded as an assembly within the meaning of the Act.

32. Under section 2, freedom of assembly can only be restricted by statutes and where it is necessary for the protection of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others.

33. All decisions concerning the exercise of freedom of assembly must be taken by the local municipalities where the assembly is to be held. These decisions can be appealed against to the Governor.

34. Under section 3 of the Act, the municipality must be informed by the organisers of the intention to hold a public gathering organised in the open air for an indeterminate number of persons. Under section 7, such information must be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and not later than three days before it. Such information must contain the names and addresses of the organisers, the aim and programme of the demonstration, its place, date and time as well as information about the itinerary if the demonstration is intended to proceed from one place to another.

35. Pursuant to section 8, the municipality shall refuse permission for the demonstration if its purpose is in breach of the Act itself or of provisions of the Criminal Code, or if the demonstration might entail a danger to life or limb, or a major danger to property.

36. A first-instance refusal of permission to hold a demonstration must be served on the organisers within three days of the date on which a relevant request has been submitted and not later than three days before the planned date of the demonstration. An appeal against such a refusal must be lodged within three days of the date of its service. The lodging of such an appeal does not have a suspensive effect on the refusal of permission to hold the demonstration.

37. A decision given by the appellate authority must be served on the organisers within three days of the date on which the appeal was submitted.

*3. The Road Traffic Act*

38. Under section 65 of the Road Traffic Act of 1997, as amended in 2003, the organisers of sporting events, contests, assemblies and other

events which may obstruct road traffic are obliged to obtain permission for the organisation of such assemblies.

39. Under section 65 read together with section 65 (a) of the Act, organisers of such events are obliged to comply with various administrative obligations specified in a list contained in this provision and numbering nineteen items, including the obligation to submit a traffic organisation plan to the authorities.

40. These provisions were repealed as a result of the judgment of the Constitutional Court, referred to below.

*4. Judgment of the Constitutional Court of 18 January 2006*

41. In its judgment of 18 January 2006 the Constitutional Court examined the request submitted to it by the Ombudsman to determine the compatibility with the Constitution of the requirements imposed on organisers of public events by the provisions of the Road Traffic Act in so far as they impinged on freedom of assembly, arguing that they amounted to an excessive limitation of that freedom.

42. The Constitutional Court observed that the essence of the constitutional problem was whether the requirements imposed by section 65 of the Act were compatible with freedom of expression as formulated by the Constitution and developed by the Assemblies Act. It noted that the 1990 Assemblies Act was based on the premise that the exercise of this freedom did not require any authorisations or licences issued by the State. As it was a freedom, the State was obliged to refrain from hindering its exercise and to ensure that it was enjoyed by various groups despite the fact that their views might not be shared by the majority.

43. Accordingly, the Assemblies Act provided for a system based on nothing more than the registration of an assembly to be held.

The Court observed that subsequently the legislature, when it enacted the Road Traffic Act, had incorporated various administrative requirements which were difficult to comply with into the procedure created for the organisation of sporting events, contests and assemblies, thus replacing the registration system by a system based on permission. In doing so, it placed assemblies within the meaning of the Assemblies Act on a par with events of a commercial character or organised for entertainment purposes. This was incompatible with the special position that freedom of expression occupied in a democratic society and rendered nugatory the special place that assemblies had in the legal system under the Constitution and the Assemblies Act. The Court also had regard to the fact that the list of requirements imposed by the Road Traffic Act contained as many as nineteen various administrative obligations. The restrictions on freedom of assembly imposed by that Act were in breach of the requirement of proportionality applicable to all restrictions imposed on the rights guaranteed by the Constitution.

44. The Court concluded that section 65 of the Road Traffic Act was incompatible with the Constitution in so far as it applied to assemblies.

# THE LAW

## I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

### A. Whether the applicants can claim to have the status of victims

45. The Government contended by way of a preliminary submission that the applicants could not claim to be victims of a violation of the Convention within the meaning of Article 34. It transpired from the written grounds of the second-instance administrative decisions that the appellate authorities had fully shared the applicants' arguments and had quashed the contested decisions in their entirety. The Governor, in his decision of 17 June 2005 (see paragraph 22 above), had gone even further in that he had stressed that prohibiting an assembly on the ground of a threat of violence between the demonstrators and counter-demonstrators would have been tantamount to accepting that the authorities endorsed the intentions of organisations which deliberately intended to breach the public order. When quashing the contested decisions, the appellate authorities had stated that their assessment had been made bearing in mind the applicants' freedom of assembly. As these decisions had eventually been found unjustified, the applicants could not claim to have a victim status.

46. The Government were of the view that as the applicants had not claimed to have sustained any pecuniary or non-pecuniary damage, the domestic authorities had not been under an obligation to offer them any redress. A decision or measure favourable to the applicant was not in principle sufficient to deprive him of his status as a "victim" unless the national authorities had acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (*Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, § 66).

47. The applicants submitted that the authority relied on by the Government, the *Eckle v. Germany* case, was of little relevance to the case at hand. They reiterated that it was only when those two conditions were cumulatively satisfied that the subsidiary nature of the protective mechanism of the Convention precluded examination of an application (see *Scordino v. Italy (dec.)*, no. 36813/97, 27 March 2003). In their case it could not be said that those two conditions had been satisfied. No redress had ever

been afforded at domestic level for any of the breaches of the Convention alleged in their application.

48. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of whether the applicants could claim to be victims of a breach of their rights (see paragraph 5 above). The Court confirms its approach.

### B. Exhaustion of domestic remedies

49. The Government submitted that the applicants had had at their disposal procedures capable of remedying the alleged breach of their freedom of assembly. Section 7 of the Assemblies Act provided for time-limits which should be respected by persons wishing to organise an assembly under the provisions of this Act. A request for a decision about an assembly to be held had to be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and no later than three days before it.

50. If the applicants had considered that the provisions on the basis of which the domestic decisions in their cases had been given had been incompatible with the Constitution, it had been open to them to challenge these provisions by lodging a constitutional complaint provided for by Article 79 of the Constitution. Thus, the applicants could have obtained the aim they sought to attain before the Court, namely an assessment of whether the contested regulations as applied to their case had infringed their rights guaranteed by the Convention.

51. The Government recalled that the Court had held that the Polish constitutional complaint could be recognised as an effective remedy where the individual decision, which allegedly violated the Convention, had been adopted in a direct application of an unconstitutional provision of national legislation (*Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003). The Government concluded that the applicants should have had recourse to this remedy.

52. The applicants disagreed. They submitted that because of the specific nature of their case, a remedy that had not been capable of providing them with a judicial or administrative review of the ban on holding their assemblies before 11 June 2005 could not be regarded as effective. Therefore, any subsequent review by the Constitutional Court would not have served any practical purpose.

53. In any event, even if it were to be accepted that an *ex post facto* review could be contemplated as a remedy to be used in their case, the applicants were of the view that it would have been ineffective also for other reasons. A constitutional complaint under Polish law was a remedy available only when a possibility existed to apply for the re-opening of the original proceedings in the light of a favourable ruling of the Constitutional

Court. This condition alone would have rendered this remedy ineffective since, in view of the specific and concrete nature of the redress sought by the applicants, the reopening of their case would have been an entirely impracticable and untimely solution. Furthermore, the quashing of the final decisions would have been futile as the decisions of 3 and 9 June 2005 had already been quashed by the Self-Government Board of Appeal and the Governor of Mazowsze Province on 22 August and 17 June 2005, respectively.

54. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 5 above). The Court confirms its approach to the exhaustion issue.

## II. THE MERITS OF THE CASE

### A. Alleged violation of Article 11 of the Convention

55. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. They invoked Article 11 of the Convention which reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

#### *1. The arguments of the parties*

56. The Government were of the view that there had been no interference with the applicants' rights guaranteed by Article 11 of the Convention. They referred in this respect to their submissions concerning the applicants' victim status (see paragraphs 45-48 above).

57. The Government did not contest the fact that the second-instance decisions of the domestic authorities had been given after the date for which the assemblies had been planned. However, the applicants had been aware of the time-limits provided by the applicable laws for the submission of requests for permission to hold an assembly.

58. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. It followed from the very character of the freedom of assembly that the requirements which laws imposed on organisers of public meetings should be restricted to a reasonable minimum and to those of a technical character.

59. Under the 1990 Assemblies Act the authorities could ban the organisation of an assembly only when its purpose ran counter to provisions of criminal law or when it might entail danger to life or limb or a major danger to property. On the other hand, the requirements that could be imposed on organisers of assemblies once the authorities classified the assembly to be held as an "event" under the Road Traffic Act went much further. They lacked precision, leaving the decision as to whether the organisers satisfied them entirely to the discretion of the authorities.

60. In the applicants' view, the Mayor's refusals lacked proper justification. The assemblies to be held were of a peaceful character, their aim being to draw the society's attention to the situation of various groups of persons discriminated against, in particular persons of homosexual orientation. The relevant requests had complied with the very limited requirements laid down by the Assemblies Act. As to the Equality March, the refusal had been motivated by the alleged failure of the applicants to submit the project of traffic organisation which the authorities had never required to be submitted prior to this refusal. These assemblies had lawful aims and there had been no special grounds, such as a major danger to property or danger to life or limb, which could justify the refusals.

*2. The Court's assessment*

61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society" (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II; *Christian Democratic Peoples Party v. Moldova*, 28793/02, 14 May 2006).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine

recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, 17 February 2004).

63. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], nos. 25088/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

64. In *Informationsverein Lentia and Others v. Austria* (judgment of 24 November 1993, Series A no. 276) the Court described the State as the ultimate guarantor of the principle of pluralism (see the judgment of 24 November 1993, Series A no. 276, p. 16, § 38). A genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V; *Ouranio Toxo v. Greece*, no. 74989/01, 20 October 2005, § 37). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.

65. In this connection, the Court reiterates that according to the Convention organs' constant approach, the word "victim" of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 27, and *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 41).

66. Turning to the circumstances of the present case, the Court observes that the authorities banned the planned march and the six stationary assemblies. The appellate authorities, in their decisions of 17 June and 22 August 2005, quashed the first-instance decisions and criticised them for

being poorly justified and in breach of the applicable laws. These decisions were given after the dates on which the applicants had planned to hold the demonstrations.

67. The Court acknowledges that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of the freedom of assembly and freedom of expression. The Court observes that the refusals to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the ground that they did not have official authorisation and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities.

68. Hence, the Court is of the view that, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The Court observes that legal remedies available to them could not ameliorate their situation as the relevant decisions were given in the appellate proceedings after the date on which the assemblies were held. The Court refers in this respect to its finding concerning Article 13 of the Convention (see paragraph 84 below). There has therefore been an interference with the applicants' rights guaranteed by Article 11 of the Convention.

69. An interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims.

70. In this connection, the Court observes that on 22 August 2005 the Local Government Appellate Board found the decision of 3 June 2005 unlawful (see paragraph 20 above). Likewise, on 17 June 2005 the Mazowsze Governor quashed the refusals of 9 June 2005, finding that they breached the applicants' freedom of assembly (see paragraphs 22 – 26)**.** The Court concludes that the interference with the applicants' right to freedom of peaceful assembly was therefore not prescribed by law.

71. In the context of the examination of the lawfulness of the interference complained of, the Court notes, in addition, the relevance of the judgment of the Constitutional Court given on 18 January 2006. That Court found that the provisions of the Road Traffic Act applied also in the applicants' case were incompatible with the constitutional guarantees of the freedom of assembly. It observed that the restrictions on the exercise of this freedom imposed by the impugned provisions were in breach of the proportionality principle applicable to all restrictions imposed on the exercise of rights guaranteed by the Constitution (see paragraphs 39-42 above).

The Court is well aware that under the applicable provisions of the Constitution these provisions lost their binding force after the events concerned in the present case (see paragraph 30 above). However, it is of the view that the Constitutional Court's ruling that the impugned provisions were incompatible with the freedom of assembly guaranteed by the Constitution cannot but add force to its own above conclusion concerning the lawfulness of the interference complained of in the present case.

72. Having regard to this conclusion, the Court does not need to verify whether the other two requirements (legitimate aim and necessity of the interference) set forth in Article 11 § 2 have been complied with.

73. The Court therefore dismisses the Government's preliminary objection regarding the alleged lack of victim status on the part of the applicants and concludes that there has been a violation of Article 11 of the Convention.

## B. Alleged violation of Article 13 of the Convention

74. The applicants further complained that Article 13 of the Convention had been breached in their case because they had not had at their disposal any procedure which would have allowed them to obtain a final decision prior to the date of the planned demonstrations.

Article 13 of the Convention reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

### *1. The arguments of the parties*

75. The Government reiterated their submissions concerning the question of exhaustion of domestic remedies. In particular, the applicants should have lodged a constitutional complaint to challenge the provisions on the basis of which the decisions in their case had been given.

76. The applicants complained that, when the first-instance decisions had banned the holding of the assemblies, they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date on which it was planned to hold them. This was so because if a refusal was issued, the second-instance authority could only quash this decision and could not issue a new one. This meant that the organisers had to start the procedure all over again. In fact, that was how the relevant procedural provisions had been applied in the applicants' case.

77. The applicants submitted that pursuant to section 7 of the Assemblies Act, a request for approval of an assembly to be organised could be submitted thirty days before the planned date at the earliest. That meant that it was impossible to submit such a request earlier. Under Polish law, if the

authorities considered that the planned assembly was to be regarded as an "event" covered by the provisions of the Road Traffic Act as applicable at the relevant time, it was altogether impossible to comply with the thirty-day time-limit, given the unreasonably onerous requirements to submit numerous documents relating to the traffic organisation aspects of such an assembly which could be imposed on the organisers under that Act.

78. The applicants concluded that in any event, the State should create such procedure, a special one if need be, which would make it possible for organisers of public meetings to have the whole procedure completed within the time-frame set out in the Act, i.e. from 30 to 3 days prior to the planned date, and, importantly, before the day on which the assembly was planned to be held.

*2. The Court's assessment*

79. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145).

In the present case the Court found that the applicants' rights under Article 11 were infringed (see paragraph 73 above). Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

80. As regards the Governments' reliance on an individual constitutional complaint, the Court first notes that in the context of Polish administrative procedure, two-tiered judicial review of second-instance administrative decisions is available. Only a judgment of the Supreme Administrative Court is considered to constitute a final decision in connection with which a constitutional complaint is available. In the present case, the applicants, having obtained decisions of the second-instance administrative bodies essentially in their favour, in that the refusal of permissions had been quashed, had no legal interest in bringing an appeal against these decisions to the administrative courts. Hence, the way to the Constitutional Court was not open to them.

81. Further, the Court accepts that the administrative authorities ultimately acknowledged that the first-instance decisions given in the applicants' case had been given in breach of the applicable laws. However, the Court emphasises that they did so after the dates on which the applicants planned to hold the demonstrations. The Court notes that the present case is similar to that of *Stankov and the United Macedonian Organisation Ilinden* (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*

(nos. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported) in which the former Commission held that "it [had been ] undisputed that had the applicants attempted [an appeal against the refusal of the district court to examine the appeal against the mayoral ban], the proceedings would have lasted for at least several months and any favourable outcome would have resulted long after the date of a planned meeting or manifestation". In other words, bearing in mind that the timing of the rallies was crucial for their organisers and participants and that the organisers had given timely notices to the competent authorities, the Court considers that, in the circumstances, the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

82. In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such a meeting. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration, if such a refusal is compatible with the requirements of Article 11 of the Convention, but cannot change the date on which the organisers plan to hold it. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. The freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless.

83. The Court is therefore of the view that it is important for the effective enjoyment of the freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. The applicable laws provided for the time-limits for the applicants for the submission of their requests for permission. In contrast, the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the demonstration**.** The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a *post-hoc* character, could provide adequate redress in respect of the alleged violations of the Convention.

84. Therefore, the Court finds that the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their freedom of assembly. Consequently, the Court dismisses the Government's preliminary objection regarding the alleged non-exhaustion of domestic remedies and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention.

## C. Alleged violation of Article 14 in conjunction with Article 11 of the Convention

85. The applicants complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the march and some of the assemblies. They relied on Article 11 read together with Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

### *1. The arguments of the parties*

86. The Government submitted that the applicants had challenged the administrative decisions given in their cases on 3 and 9 June 2005. In the former, the Traffic Officer, acting on behalf of the Mayor of Warsaw, had refused permission for the march, relying on the organisers' failure to submit a "traffic organisation plan" within the meaning of section 65 (a) of the Road Traffic Act. In the latter, the Mayor had relied on the argument that the applicants had failed to comply with more stringent requirements imposed by the law on organisers of assemblies held on roads used for road traffic.

87. The Government were of the view that these decisions had been sufficiently reasoned and that their reasoning had been based on section 65 of the Road Traffic Act. It could not, in their opinion, be assumed that the decisions banning the assemblies had been influenced by the personal opinions held by the Mayor of Warsaw as presented in an interview published in "Gazeta Wyborcza" of 20 May 2005. The facts of the case had not indicated that any link existed between the Mayor's views expressed in the press and the official decisions given in the applicants' case.

88. The Government argued that in the instant case no provisions, acts or omissions of the public authorities had exposed the applicants to treatment less favourable than that to which other persons in an analogous situation would have been subjected. There had been no indication that this treatment had been based on any prohibited ground. Consequently, the applicants had not suffered discrimination in the enjoyment of their freedom of assembly contrary to Article 14 of the Convention.

89. The applicants stressed that they had been required to submit the "traffic organisation plan", while other organisations had not been requested to do so. In the absence of particularly serious reasons by way of justification and in the absence of any reasons provided by the Government for such differences in treatment, the selective application of the requirement to submit such a plan had sufficiently demonstrated that they had been discriminated against.

90. The applicants further argued that they had been treated in a discriminatory manner essentially because they were refused permission to organise the demonstrations on 12 June 2005, while other organisations and persons had received relevant permissions. This difference of treatment had not pursued a legitimate aim, the more so as the Mayor and his collaborators had made it plain to the public that they would ban the demonstrations because of the homosexual orientation of the organisers, regardless of any legal grounds.

91. The applicants further argued that the decisions of 3 and 9 June 2005 had been formally issued in the name of the Mayor of Warsaw. They referred to the interview with the Mayor published in May 2005 in which he had stated that he would ban the assemblies irrespective of what the organisers had submitted in their requests for permission. They submitted that it could not be reasonably concluded that there had been no link between the statements made by the Mayor and the decisions subsequently given in his name. They emphasised that the practical outcome of the proceedings in their case had been consistent with the tenor of the Mayor's statements.

92. The applicants observed that the Government's argument about the lack of a causal link between the opinions publicly expressed by the Mayor and the administrative decisions given in his name amounted to implying that at the relevant time decisions had been issued in the Mayor's office with no regard to his opinions expressed publicly in his capacity as head of the municipal administration.

*2. The Court's assessment*

93. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, p. 184, § 33; *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, § 36).

94. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

95. The Court first notes that the first-instance administrative decisions concerned in the present case did not refer to any direct motive that could be qualified as one of the forbidden grounds for discrimination within the

Convention meaning of the term. These decisions focused on technical aspects of the organisation of the assemblies and on compliance with these requirements (see paragraphs 11 and 13 above). It has been established that in the proceedings before the Traffic Officer the applicants had been requested to submit a "traffic organisation plan" and that their request had been refused because of a failure to submit such a plan. At the same time, the Court notes that it has not been shown or argued that other organisers had likewise been required to do this.

96. The Court further notes that the decision of 3 June 2005, refusing permission for the march organised by the applicants, was given by the Road Traffic Officer, acting on behalf of the Mayor of Warsaw. On 9 June 2005 the municipal authorities, acting on the Mayor's behalf, gave decisions banning the stationary assemblies to be organised by the first five applicants, referring to the need to avoid any possible violent clashes between the participants of the various demonstrations to be held on 12 June 2005. It is also not in dispute that on the same day the same authorities gave permission for other groups to stage six counter-demonstrations on the same date.

97. The Court cannot speculate on the existence of motives, other than those expressly articulated in the administrative decisions complained of, for the refusals to hold the assemblies concerned in the present case. However, it cannot overlook the fact that on 20 May 2005 an interview with the Mayor was published in which he stated that he would refuse permission to hold the assemblies (see paragraph 27 above).

98. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest, in particular as regards politicians themselves (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236). However, the exercise of the freedom of expression by elected politicians, who at the same time are holders of public offices in the executive branch of the government, entails particular responsibility. In certain situations it is a normal part of the duties of such public officials to take personally administrative decisions which are likely to affect the exercise of individual rights, or that such decisions are given by public servants acting in their name. Hence, the exercise of the freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention (as regards statements by public officials, amounting to declarations of a person's guilt, pending criminal proceedings, see *Butkevičius v. Lithuania*, no. 48297/99, § 53, ECHR 2002-II (extracts); see also *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-44, ECHR 2000-X). When exercising their freedom of expression they may be required to show restraint, bearing in mind that their views can be regarded

as instructions by civil servants, whose employment and careers depend on their approval.

99. The Court is further of the view, having regard to the prominent place which freedom of assembly and association hold in a democratic society, that even appearances may be of a certain importance in the administrative proceedings where the executive powers exercise their functions relevant for the enjoyment of these freedoms (see, *mutatis mutandis*, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). The Court is fully aware of the differences between administrative and judicial proceedings. It is true that it is only in respect of the latter that the Convention stipulates, in its Article 6, the requirement that a tribunal deciding on a case should be impartial from both a subjective and objective point of view (*Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 73; *Warsicka v. Poland*, §§ 34-37, no. 2065/03*,* 16 January 2007*).*

100. However, in the present case the Court considers that in the assessment of the case it cannot disregard the strong personal opinions publicly expressed by the Mayor on issues directly relevant for the decisions regarding the exercise of the freedom of assembly. It observes that the decisions concerned were given by the municipal authorities acting on the Mayor's behalf after he had made known to the public his opinions regarding the exercise of the freedom of assembly and "propaganda of homosexuality" (see paragraph 27 above). It is further noted that the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities. The Court is of the view that it may be reasonably surmised that his opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."

101. Having regard to the circumstances of the case seen as a whole, the Court is of the view that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

103. The applicants did not claim any compensation for damage in connection with the violation of the Convention.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;

2. *Holds* that there has been a violation of Article 11 of the Convention;

3. *Holds* that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. *Holds* that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

Done in English, and notified in writing on 3 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T. L. EARLY
Registrar

Nicolas BRATZA
President