

DECISION

19 April 2019

District Court in Nowy Sącz, 1st (I) Civil Division
sitting in the following panel:

Presiding judge Dorota Podskalna-Baum, District Court

Judge

Recording clerk Monika Wnęk, Court Secretary

having heard, on 19 April 2019 at Nowy Sącz,
a matter brought on appeal by XXXX XXXXXXXX,
who complained against the decision of the Mayor of the City of Nowy Sącz of 28
March 2019, ref. WSO.5010.46.2019 to deny a complaint against an omission in the
voters' register maintained by the Municipality of Nowy Sącz,
with the participation of the Helsinki Foundation for Human Rights,

decides:

to amend the decision of the Mayor of the City of Nowy Sącz of 28 March 2019, ref.
WSO.XXXX.XX.2019, by ordering to enter XXXX XXXXXXXX in the voters' register
maintained by the Municipality of Nowy Sącz.

Case No. I Ns 376/19

Statement of reasons for the decision of 19 April 2019

On 22 March 2019, **XXXX XXXXXXXX (“Complainant”)** filed a complaint about not being entered in the voters' register kept by the City of Nowy Sącz. As he explained in the statement of reasons [included in his complaint], he was a citizen of the European Union and wanted to take part in the then-upcoming elections to the European Parliament, which took place on 26 May 2019. He indicated that he was partially incapacitated (*ubezwłasnowolniony częściowo*) under Polish law and therefore was not entered in the voters' register of the municipality of Nowy Sącz and could not exercise his right. He argued that the automatic deprivation of his electoral rights under Article 10(2)(3) of the Polish Electoral Code (“EC”) resulting from his partial incapacitation is incompatible with international and EU law, in particular with the Charter of Fundamental Rights of the European Union (“CFR”) and Article 2 of the Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). He stated that he had been suffering from XXXXXXXX since 1979, collected a disability pension and satisfied the criteria for being legally recognised as a disabled person. For these reasons, [in the Complainant's view,] Article 10(2)(3) EC is inconsistent with Article 29 of the Convention on the Rights of Persons with Disabilities (“CRPD”), depriving him of the right to exercise public rights and participate in political and public life on an equal basis with others, as guaranteed by the CRPD.

He complained that the elections to the European Parliament did not fall within the scope of the Constitution of the Republic of Poland, invoking the line of reasoning of the Constitutional Tribunal presented in case no. K 9/11. He inferred from this fact that the restrictions stemming from Article 62(2) of the Constitution of the Republic of Poland were not applicable to elections to the European Parliament and that the sole legal basis for such a prohibition is a statutory provision, i.e. Article 10(2)(3) EC.

He also referred to Article 91(2) of the Constitution of the Republic of Poland and the resulting principle of the priority of ratified international law over [domestic] statutory law, indicating that norms of international law such as the ECHR and the

CRPD should take precedence over the EC. He also argued that Article 14(3) of the Treaty on European Union ensured that the election of members of the European Parliament was universal and that EU law did not provide for any qualifications of a voter's eligibility to take part in the election. Consequently, the restriction of those rights in his case can be regarded as discrimination on the basis of a disability, which is prohibited by the CFR. He submits that his situation should be governed by EU law in accordance with the principles of primacy and direct effect.

In the decision of 28 March 2019 (ref. WSO.XXXX.XX), the Mayor of the City of Nowy Sącz, acting under Article 22 of the Electoral Code of 5 January 2011, denied the complaint.

In the statement of reasons [for the decision], the Mayor noted that the Complainant had been a registered resident of Nowy Sącz since 9 December 2014. He was removed from the voters' register in consequence of his partial incapacitation declared in a decision of the Regional Court in Nowy Sącz issued in case no. I Ns XX/XX/XX. Article 10(2) EC was given as a legal basis for the decision, which led to the argument that the act [Complainant's removal from the voters' register] was in conformity with the applicable law and that any assessment of the applicant's intellectual fitness was outside the legal authority of the administrative body [the Mayor].

XXXXX XXXXXXXX challenged the above decision within the legal time-limit, alleging that it infringed Article 39(2) of the Charter of Fundamental Rights of the European Union (OJ EU (2007) No. C 303, p. 1, as amended) read in connection with Article 21(1) and Article 26 CFR and Article 14(3) of the Treaty on European Union (Journal of Laws of 2004 No. 90, item 864/30, as amended) and Article 1(3) of the Act concerning the election of the members of the European Parliament by direct universal suffrage (Journal of Laws of 2004, No. 90, item 864/10, as amended), and that the decision also infringed Article 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris on 20 March 1952 (Journal of Laws of 1995, No. 36, item 175/1, as amended) and Article 29 of the Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal of Laws of 2012, item 1169, as amended), due to a failure to apply the above provisions with precedence over Article 10(2)(3) of the Electoral Code of 5 January 2011 (Journal of Laws of 2018, item 754, as amended), which led to the dismissal of his complaint.

He requested that the decision be amended by granting the complaint and entering him in the voters' register kept by the City of Nowy Sącz or, in the alternative, by referring a question, phrased as specified in the notice of appeal, to the Court of Justice of the European Union for a preliminary ruling.

In the statement of reasons, he extensively elaborated on the arguments already put forward in the complaint. He further argued that the automatic disenfranchisement of incapacitated persons was incompatible with international law, in particular the ECHR, referring to the extensive case-law of the [European] Court of Human Rights. The Complainant pointed out that the ECtHR considered such disenfranchisement as a disproportionate restriction on the participation of certain social groups in public life, emphasising that possible restrictions should depend on the individual mental capabilities of the person concerned. Since the group of people with reduced intellectual capability is particularly vulnerable to human rights violations, any restriction of their rights by public authorities must have a particularly convincing justification.

Alleging that Article 10(2)(3) EC is incompatible with EU law, the Complainant broadly emphasised that the provisions of national law infringed the principle of universal suffrage in elections to the European Parliament and the prohibition of discrimination laid down in Article 21(1) CFR read in conjunction with Article 26 CFR which recognises the rights of persons with a disability to benefit from measures designed to ensure their social integration and participation in the life of the community, including participation in public life.

He pointed out that the Member States had limited their sovereign rights in favour of a new legal order framed by the EU and that the measures provided for in the Electoral Code should therefore serve as far as possible to exercise the electoral rights applicable to the European Parliament elections. Since Article 91(3) of the Constitution of the Republic of Poland allows primary EU law to be applied directly and with precedence, the Complainant argues that the national court, noting a conflict between the national law and EU law, should refuse to apply the provisions of the EC and should instead apply the relevant provisions of EU law.

In the course of the proceedings, the Warsaw-based Helsinki Human Rights Organisation [Helsinki Foundation for Human Rights] intervened in the matter (page 69 of the bundle), supporting the Complainant's case.

It is undisputed that XXXXXX XXXXX is a person suffering from XXXXXXXX and has therefore been partially incapacitated.

The Court has ruled as follows:

The appeal should be granted.

Pursuant to Article 62(1) of the Constitution of the Republic of Poland of 2 April 1997, a Polish citizen has the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as members of the Sejm and Senate and representatives to local government bodies if, no later than on the day of vote, the citizen has attained 18 years of age. As per Article 62(2) of the Constitution, the right in question is *not* conferred upon persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights.

The Constitution does not define the grounds for partial incapacitation, and this area is governed by the substantive law, i.e. the Civil Code of 23 April 1964.

The norms set out in the Constitution do not apply to elections to the European Parliament. The provisions of the Constitution set out the principles of governance in the territory of the Republic of Poland. They regulate the elections and operations of constitutional bodies such as the President, the Sejm and the Senate. The above results directly from the literal reading of Article 62(1) of the Constitution of the Republic of Poland.

The European Parliament is not a body listed in the Constitution because, at the time when the Constitution was drafted and adopted, Poland was not a member of the European Union. While developing the wording of this provision, the Constitutional Committee of the National Assembly created measures of the electoral

law which concerned the rights and limitations concerning solely the Polish bodies or elected offices.

Another argument [in support of the above conclusions] is that the European Parliament is not a national constitutional body of the Republic of Poland such as the President, the Sejm or the Senate, but an international body which represents the citizens of the [EU] Member States. The right of representation is therefore intrinsically linked to the possession of European citizenship. Moreover, the European Parliament plays a completely different institutional role than the constitutional bodies enumerated in the Constitution. In particular, its remit is essentially to formulate European policies and uphold respect for democratic principles at the EU level.

It is therefore indisputable that the limitations provided for in Article 62(2) of the Constitution were not originally drafted with the intention of being applicable to other, international bodies. This view is also reflected in the position expressed by the Constitutional Tribunal in the judgment of 31 May 2004, Case No. K 15/04 (OTK-A 2004, No. 5, item 47), in which the Tribunal held that the Constitution pertained to the exercise of political power in the Republic of Poland and that the constitutional principles of the exercise of public authority could not be transposed directly to govern the functioning of non-state structures used by the Republic of Poland to pursue its interests. The Constitutional Tribunal ruled in a similar fashion in case no. K 9/11.

In other words, the Constitution of the Republic of Poland does not regulate the right to vote in, or be elected to, the European Parliament and does not introduce any restrictions on the right to participate in these elections for persons who are partially incapacitated. Consequently, in view of the principle of the universality of these elections as laid down in Article 14 of the Treaty on European Union (Journal of Laws of 2004 No. 90, item 864/30, as amended) every Polish citizen who is also an EU citizen has the right to vote in elections to the European Parliament. This right is therefore also exercisable by the Complainant. The universality of elections means that the right to vote is vested in everyone and prohibits the establishment of any restrictions in this respect.

At present, the voting rights related to the European Parliament elections are regulated on the national level by the Electoral Code of 5 January 2011 (Journal of Laws of 2018, item 754, as amended), which echoes the rules laid down in the

Constitution and introduces additional provisions stemming from the directives that define the conditions for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the European Union residing in a Member State other than the country of their citizenship.

In this way, the Electoral Code, an act of statutory law, governs elections to the European Parliament at the national level as the eligibility of a European Union citizen who is also a Polish citizen to vote in the country of their citizenship is determined by the domestic law of their country of origin, in this case – by the Electoral Code applied in conjunction with the substantive law regulating the grounds for and procedure of incapacitation.

The Civil Code establishes two types of legal incapacitation: total and partial, defining different conditions and consequences of their adjudication. Since the lawmakers did not distinguish between the legal and electoral consequences of total and partial incapacitation, constitutional jurisprudence and scholarship have developed the view that the adjudication of either type of incapacitation leads to the loss of the active and passive election right.

Pursuant to Article 16 of the Civil Code, an adult may be declared partially incapacitated due to mental illness, intellectual underdevelopment or another mental disorder, in particular substance abuse, provided that the condition of the person concerned does not justify full incapacitation, but they need assistance in conducting their affairs. Incapacitation should serve a certain purpose, namely the provision of assistance to the incapacitated person in dealings with matters related to their personal or financial affairs and can only be established in the interest of the patient [incapacitated person], since the incapacitation order is not a penalty but a means to protect the person concerned.

The scholarship rightly concludes that the unequivocal and explicit restriction placed on incapacitated persons by the Electoral Code results from the so-called “doctrine of existing law”, which does not distinguish between the types of incapacitation, or between the spheres of civil-law and public rights of the individual. The restriction seems to be an element of qualification of a voter’s intellectual eligibility to take part in election, which aims to preventively protect *other* members of the public. There is no rationale for establishing civil law rules protecting the public and civic rights of a partially incapacitated person, not only because the nature of those rights is different, but also because of the different effects of their exercise. The

statutory protection afforded to a partially incapacitated person under civil law aims to safeguard their rights and property. This rationale is no longer valid if a partially incapacitated person wishes to exercise their right to vote because the exercise of such a civic right and the subsequent electoral decision do not constitute a source of obligation for the incapacitated person or not reduce the value of their property or impose any financial obligations on them. Furthermore, the discussed restrictions [set out in the Electoral Code] fail to take into account the change in the social approach to disability, in particular the attitude towards greater acceptance of persons with a disability and protecting them from being excluded from social and public life. The restrictions disregard the substantive grounds for disability, which are not only related to the mental state of the person, but also to their addictions. They are also not compatible with [laws governing] other areas of public life, which, for example, grant all incapacitated persons (also those fully incapacitated) the right to associate in political parties (Article 2(1) of the Political Parties Act). An incapacitated person may therefore participate in the affairs of a political party, support it financially or take part in [election] campaigns, but may not vote for a candidate of their choice in the European Parliament elections.

For the above reasons, the Electoral Code, in so far as it deprives partially incapacitated persons of the electoral rights related to the European Parliament elections, violates the primary law of the European Union, in particular Article 14(3) of the Treaty on European Union, according to which the members of the European Parliament are elected by universal suffrage. The Electoral Code also violates Articles 21 and 39 CFR, which introduce the principle of non-discrimination between EU citizens on the grounds of their disability and the principle of recognition of the right of persons with a disability to participate in social and public life. The Code provisions are also incompatible with Article 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris on 20 March 1952 (Journal of Laws of 1995, No. 36, item 175/1, as amended) whereas the fundamental rights enshrined in the Convention form part of the EU legal order as general principles of law.

The prohibition laid down in Article 10(2)(3) of the Electoral Code of 5 January 2011 (Journal of Laws of 2018, item 754, as amended) excludes certain members of the community from participation in elections to the European Parliament, which are an element of public life, but fails to create any control mechanism that would verify,

for example, whether partial incapacitation under civil law, designed to protect the best interest of the individual concerned, also has an impact on the public sphere. If the lawmakers wish to impose any restrictions, they should do so in a way that is consistent with the international legal order that forms part of domestic law, namely by introducing control mechanisms that would verify the individual's psychophysical abilities. For example, the lawmakers may freely divide incapacitation into two types and determine which of them results in the loss of electoral rights, make the vesting of these rights dependant on a certain psychophysical condition of an incapacitated individual or link the loss of these rights with the commitment of an individual to a closed medical facility.

The need to adapt national laws is demonstrated by the example of the Complainant who, despite his intellectual dysfunction leading to partial incapacitation, consciously and has consistently sought to exercise his civic rights. He has handwritten motions and letters to administrative bodies and phrased those documents in a way that has not given rise to any doubts as to the author's intentions.

This view is confirmed by the judgment of the European Court of Human Rights of 20 May 2010 in the case *Alojos Kiss v. Hungary* (application no. 38832/06), which related to a similar set of facts. In *Alojos Kiss*, the ECtHR held that the right to vote was not a privilege but rather that the presumption of the right to vote should operate in a democratic State and that the universal nature of the right to vote should play a fundamental role. Reiterating that electoral rights are not absolute, the ECtHR confirmed that the Contracting States should enjoy a wide margin of appreciation in introducing relevant restrictions, which nevertheless always should be particularly justified and subject to a review. Wholly unjustified discrimination against persons with a mental disorder is an excessive and disproportionate restriction. The fact that a person is declared partially incapacitated does not mean that the person concerned is unable to discern the political situation and to make a rational and conscious electoral decision and be aware of consequences of such a decision. The automatic extension of the impact of partial incapacitation on electoral rights is unacceptable unless is preceded by an assessment of the intellectual fitness of the incapacitated person.

The Treaty on European Union (Journal of Laws of 2004 No. 90, item 864/30, as amended), the Charter of Fundamental Rights of the European Union (OJ EU

(2007) No. C 303, p. 1, as amended), the Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal of Laws of 2012, item 1169, as amended), and the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris on 20 March 1952 (Journal of Laws of 1995, No. 36, item 175/1, as amended) are legal acts ratified by Poland and as such form part of the legal order of the Republic of Poland. Pursuant to Article 91 of the Constitution of the Republic of Poland, a ratified international agreement constitutes a part of the domestic legal order and must be applied directly and, should a conflict between the agreement and a statutory law arise, with precedence over the statutory law.

Considering the above, the court, applying the principle of directness and priority of ratified international law based on Article 39(2) of the Charter of Fundamental Rights of the European Union (OJ EU (2007) No. C 303, p. 1, as amended) read in connection with Article 21(1) and Article 26 CFR and Article 14(3) of the Treaty on European Union (Journal of Laws of 2004 No. 90, item 864/30, as amended) and Article 1(3) of the Act concerning the election of the members of the European Parliament by direct universal suffrage (Journal of Laws of 2004, No. 90, item 864/10, as amended), Article 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Paris on 20 March 1952 (Journal of Laws of 1995, No. 36, item 175/1, as amended) and Article 29 of the Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal of Laws of 2012, item 1169, as amended), and applying Article 91(3) of the Constitution of the Republic of Poland, rules as stated in the operative part of the decision.

Dorota Podskalna-Baum, District Court Judge