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Constitutional Right of Access to Public Service in the Judicature of the Constitutional Tribunal

Keywords: Constitutional Tribunal, access to public service, principles of proportionality, equality before the law, public function
Słowa kluczowe: Trybunał Konstytucyjny, dostęp do służby publicznej, zasady proporcjonalności, równość wobec prawa, funkcja publiczna

Abstract

The purpose of the article is to draw attention to the jurisprudence of the Constitutional Tribunal in the context of the issue related to the same principles of access to public service, which are guaranteed by the Art. 60 of the Polish Constitution.The analysis of the Court's judgments makes it possible to relate the interpretation of this provision to the principle of proportionality and equality before the law. Both in the jurisprudence of the Tribunal and the Supreme Court, attention is paid to the transparency and openness of the rules used to determine the requirements related to taking up public office functions.

Streszczenie

Konstytucyjne prawo dostępu do służby publicznej w orzecznictwie Trybunału Konstytucyjnego

Celem artykułu jest zwrócenie uwagi na orzecznictwo Trybunału Konstytucyjnego w kontekście problematyki związanej z tymi samymi zasadami dostępu do służby pu-

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blicznej, które gwarantuje art. 60 Konstytucji RP. Analiza orzeczeń Trybunału umożliwia także odniesienie wykładni tego przepisu do zasady proporcjonalności i równości wszystkich wobec prawa. Zarówno w orzecznictwie Trybunału, jak i Sądu Najwyższego zwraca się uwagę na przejrzystość i jawność zasad określania wymagań związanych z pełnieniem funkcji publicznych.

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The notion of public service has already appeared in the first legal acts of the reborn Polish state. The Art. 19 of the Regency Council decree of January 3, 1918 on the temporary organization of the Supreme Authorities in the Kingdom of Poland[2] stated that individual ministers in the public service areas entrusted to them were the supreme ruling authorities. In the March Constitution of 1921[3] the term "state service" was used, indicating in Art. 17 a "deputy who included a paid state service, loses his mandate", and in Art. 96 it was stipulated that public offices were equally available to everyone under the conditions prescribed by law. The Constitution of April 23, 1935 on the other hand, defined the public service as state service, consisting of government administration, local government and economic self-government. The Constitution of 1952 and the so-called The Small Constitution of 1992[4] did not include the concept of public service.

In the Constitution of the Republic of Poland of April 2, 1997, in Chapter II entitled "Freedoms, rights and obligations of man and citizen", in the part concerning "Freedom and political rights", the right to public service was granted. Pursuant to Art. 60, Polish citizens exercising full public rights have the right to access public service on equal terms. The Constitutional Tribunal often interpreted this right, which was also justified by the fact that there is no definition of a legal concept of public service. The term should be sought on the basis of doctrinal considerations in the field of con-

[2] Dz.U. No. 1, item 1.

[3] Constitution of March 17, 1921 (Dz.U. No. 44, item 267).

[4] The Constitutional Act of October 17, 1992 on mutual relations between the legislative and executive authority of the Republic of Poland and on local government (Dz.U. No. 84, item 426 as amended).

stitutional and administrative law, as well as the jurisprudence of the Constitutional Tribunal.

According to W. Sokolewicz, public service understood in a broad sense includes the permanent performance of all activities related to the implementation of public authority tasks, fulfilling public functions, satisfying public needs or acting in the public interest[5]. Similarly, P. Winczorek associates the notion of public service with all positions in public authorities and institutions performing public functions[6]. M. Zdyb defines public service differently. The author goes beyond the presented definitions and combines public service with all human activity directed at the good of other people, regardless of place in the social hierarchy or roles (functions) implemented in the structure of the state, an obligation toward these people and the will to act for them[7]. Hence, the author acknowledges that in addition to public officials and persons performing public functions, one should also mention the category of public persons who do not exercise any public authority, but because of their achievements have a very large opportunity to influence the imagination of citizens. In this group, it indicates athletes, scholars and artists[8].

Without making a deeper analysis of M. Zdyb's views, a narrower understanding of this service and referring it to persons performing public tasks and performing public functions will be adopted to assess the constitutional right to access to public service.

Analyzing the notion of public service, one should also mention the term ‚service' in law, which means employment in specialized formations performing public functions, also called uniformed services. This term is a designation of the concept of "uniformed formations". An example of service in this sense is service in the Police. As the administrative court em-

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[5] W. Sokolewicz, *Komentarz do art. 60,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Warsaw 2005, pp. 14–15.

[6] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warsaw 2008, p. 144.

[7] M. Zdyb, *Służba publiczna,* [in:] *Prawość i godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego,* eds. S. Fundowicz, F. Rymarz, A. Gomułowicz, Lublin 2003, pp. 349–350.

[8] Ibidem, p. 132.

phasizes, this service is a special type of public service subject to specific rigors and restrictions[9].

In colloquial language, however, service in administration means any employment in public administration structures. Regardless of the place of performance of these functions (state apparatus (government) or local government), this service has the character of a public service, carried out in the public interest with the possibility of using imperious means[10].

The concept of public service also includes the concept of "public authority", but they are not fully identical. The concept of "public authority" was used in the Art. 77 (1) of the Constitution, according to which "Everyone has the right to compensation for damage caused to him by the unlawful operation of a public authority". The interpretation of the concept of public authority used here was made by the Constitutional Tribunal in the justification of the decision of 4 December 2001[11] stating that it encompasses all authorities in the constitutional sense – legislative, executive and judicial, but this concept is not the same as the concept of a state organ. The concept of "public authority" also includes institutions other than state or local government, provided that they perform the functions of public authority as a result of entrusting or delegating these functions to them by a state or local government authority. The term 'public service' used in the Art. 60 of the Constitution therefore covers all positions in public authorities, including in local government organs elected. There is therefore no doubt that the same rules for access to public service also apply to access to the position of head of a commune, mayor and city president[12].

Public service was formulated in the Art. 60 of the Constitution on the basis of equal access to it. This does not mean that this access is absolute, because two conditions are listed here: citizenship (Polish citizens) and exercising full public rights. At the same time, the content of this article means that no other restrictions on the right of access can be applied. In the light of

[9] For example, the judgment of the Provincial Administrative Court in Warsaw of 13 February 2007, II SA/Wa 2239/06, LEX No. 318269.

[10] E. Ura, *Prawo urzędnicze*, Warsaw 2011, p. 19.

[11] SK 18/00, OTK 2001, No. 18, item 256.

[12] Judgment of the Constitutional Tribunal of January 23, 2014, K 51/12, OTK-A 2014, No. 1, item 4.

Art. 60 of the Constitution, the expression "equal rules for access to public service" means an order to specify the same for all candidates who meet the requirements set out in this provision, rules for access not to public service at all but to specific types of posts[13]. In addition, the term 'access' means the possibility of applying for admission to the public service and not the obligation to work in it. Access can be made under certain conditions, with knowledge, qualifications and experience as the decisive factors[14]. W. Sokolewicz emphasized that: "The constitutional order to apply" equal principles "should distinguish two aspects: subjective and objective. In the first aspect, this order requires a directive to apply the same selection rules to all persons, provided that they are covered by Art. 60 by the right of equal access, meeting certain positive conditions and are not excluded from the operation of the guarantee as a result of fulfilling certain negative conditions. (…) In this aspect, the order to apply "equal principles" boils down to the directive on equal treatment of candidates applying for the same public office (function)"[15]. It is important here, as the Constitutional Tribunal notes, "the transparency and openness of the rules used in determining the requirements related to taking up public service functions"[16], because "the purpose of constitutional regulation, and at the same time the essence of the law specified in Art. 60 is to guarantee to everyone who meets the two mentioned criteria that he will be treated on equal terms, i.e., taking into account the same procedure or more generally – the same rules of qualifying procedure"[17]. A similar position was taken by the Supreme Court, emphasizing that the subject of protection under Art. 60 of the Constitution is primarily the formal aspect of access to public service, i.e. related to compliance with uniform criteria and procedures, and not the mere assessment of a person's qualifications or credibility from a point of view view of the criteria used in the proceedings[18].

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[13] Judgment of the Constitutional Tribunal of April 8, 2002, SK 18/01, OTK ZU 2002, No. 2, item 16.

[14] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2007, p. 58.

[15] W. Sokolewicz, *Komentarz do art. 60,* [in:] *Konstytucja …*, pp. 7–8.

[16] Judgment of the Constitutional Tribunal of 27 May 2008, SK 57/06, OTK ZU 2008, No. 4A, item 63.

[17] Judgment of the Constitutional Tribunal of 10 May 2000, K 21/99, OTK ZU 2000, No. 4, item 109.

[18] Judgment of the the Supreme Court of 17 May 2016, III KRS 6/16, LEX No. 2288959/16.

It should also be noted that the Constitutional Tribunal's position changed as regards the scope of monitoring compliance with Art. 60 of the Constitution. While the Court in its decision of 11 May 2009 stated that this article is an adequate benchmark of control only with respect to such legal regulation that concerns the stage of admission to the public service and not subsequent stages of employment in this service (i.e. it does not apply to employees already in this service)[19], in the judgment of January 23, 2014 the Tribunal emphasized that access to public service includes not only the stage of joining it, but also the stage of remaining in this service until leaving it. The same principles referred in the Art. 60 of the Constitution should therefore apply to both: person who is applying for admission to the public service and this one who is remaining in that service. If, in the opinion of the Tribunal, it was assumed that the Art. 60 of the Constitution did not apply to the latter people, it should be concluded that the right of access to public service is illusory[20]. This position was based on the arguments that the content of this article implies the requirement to establish not only transparent and clear rules for admission to the public service, but also the same rules applicable when dismissing. Therefore, the legislator should regulate in the same way for all citizens both the criteria for dismissal from the public service and the procedure for making decisions in this respect, and the exemption applies to persons who have been admitted to this service[21].

The transparency and openness of the rules used to define the requirements for taking up public office functions are protected by the Constitution. At the same time, the Constitutional Tribunal points out that the right of access to public service specified in the Constitution is only a formal guarantee and cannot be the basis for pursuing a claim before a court for admission to work or performing a specific function in public service. It is emphasized that the right to occupy an office, position or mandate in public authorities does not constitute an acquired right within the meaning of civil, administrative or social security law, and prohibitions and orders relating to these ar-

[19] SK 35/07, OTK-ZU 2009, No. 5A, item 74.

[20] Judgment of the Constitutional Tribunal of 23 January 2014, K 51/12, OTK-A 2014, No. 1, item 4.

[21] For example: Judgment of the Constitutional Tribunal of 14 December 1999, SK 14/98, OTK ZU No. 7/1999, item 163; of 10 April 2002, K 26/00, OTK ZU No. 2/A/2002, item 18.

eas cannot be used mechanically. The legislator's freedom to interfere in the legal situation of public officials is much greater because it results from the public law nature of their functions[22].

Shaping the content and nature of the conditions for access to public service is left to the legislator, which, however, must consider the principles and values set out in other constitutional provisions, including the principle of justice, the principle of equal treatment and the prohibition of discrimination on any grounds in political, social or economic life[23]. The Constitutional Tribunal points out that "public authority is entitled to set specific conditions of access to a specific service, and thus to select recruitment for public service. However, it is necessary to create appropriate guarantees of the rule of law regarding access to public service, so as to exclude any arbitrary action by public authorities"[24]. So, the legislator is entitled to formulate additional conditions, making them obtain specific positions in public service, considering their type and nature. In addition, public authorities must specify the number of posts filled in line with the needs of the state. In democratic systems, the principle is the selective nature of recruitment for public service. The act should also specify the criteria for dismissal from service and the procedure for making decisions in this respect, so as to exclude any arbitrary action by public authorities"[25].

The Tribunal points out that the Constitution guarantees neither admission to the public service nor remaining in it regardless of any circumstances, but only the right to apply for admission to this service and the right to remain in it on the same terms for all. Access rules may include both material criteria (e.g. possession of appropriate professional qualifications, experience, no criminal record so far) as well as procedural criteria (e.g. submission of a bid in the competition, submission of documents required by the authority, preparatory service). These rules can be formulated by the legislator both

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[22] For example: Judgment of the Constitutional Tribunal of 23 April 1996, K 29/95, OTK 1996, No. 2, item 10, of 3 November 1999, K 13/99, OTK 1999, No. 7, item 155.

[23] Judgment of the Constitutional Tribunal of 10 May 2000, K 21/99, OTK ZU 2000, No. 4, item109.

[24] Judgment of the Constitutional Tribunal of 9 June 1998, K. 28/97, OTK ZU No. 4/1998, item 50.

[25] Ibidem.

in a positive way as conditions that should be met by a person applying for a given position in the public service or remaining in that position, as well as in a negative way as conditions which existence excludes access to it[26].

Specifying in the provisions of the act additional requirements for candidates for certain positions in the public service and making the obtaining of appropriate positions in this service conditional on the fulfillment of the condition of the requirement of no criminal record, may not be – in the opinion of the Constitutional Tribunal – a restriction of access to the service which is incompatible with the Art. 60 of the Constitution public. Such a contradiction would occur only if the additional conditions introduced in the relevant acts were not the same for all candidates, i.e. the principle of equal opportunities for all candidates would not be respected, or – for any reason – discrimination of specific candidates would be assumed[27]. In this context, as also pointed out by the Supreme Court, the Art. 60 of the Constitution provides for equal opportunities for people seeking to perform public service functions. This provision requires the legislator, on the one hand, to establish substantive legal regulations defining transparent criteria for the selection of candidates and filling individual positions in the public service, on the other – it requires the creation of appropriate procedural guarantees ensuring the verifiability of decisions on recruitment[28]. Hence, as M. Wiącek notes, the Art. 60 of the Constitution is aimed not only at the private interest of citizens interested in public service, but also has a protective role against the public interest, expressed in the pursuit of ensuring the professionalism of staff performing tasks in public authority structures. Such normalization is to ensure the reliability and efficiency of public institutions, which is possible when people employed in public institutions are recruited based on substantive qualifications, as part of transparent competition procedures, constructed in a way that eliminates any discrimination[29].

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[26] Judgment of the Constitutional Tribunal of 23 January 2014, K 51/12, OTK-A 2014, No. 1, item 4.

[27] Judgment of the Constitutional Tribunal of 21 December 2004, SK 19/03, OTK ZU 2004, No. 11, item 118; of 13 February 2007, K 46/05, OTK 2007, No. 2, item 10.

[28] Judgment of the Supreme Court of 9 June 2010, III KRS 4/10, LEX No. 611831.

[29] M. Wiącek, *Glosa do wyroku TK z 27 maja 2008 r., sygn. SK 57/06*, "Przegląd Sejmowy" 2009, No. 1, p. 191.

It should also be emphasized that the Constitutional Tribunal links the Art. 60 of the Constitution with Art. 31 (3) and the resulting principle of proportionality. This provision states that: "Restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morality, or freedom and rights of others. These limitations shall not violate the essence of freedoms and rights"[30].

As an example of establishing by the legislator equal criteria for access to the service in public administration, the provisions of the Act of 21 November 2008 on the civil service can be mentioned[31]. The legislator makes a distinction in the civil service corps for employees and officials of this service. The employment relationship of the first group is established on the basis of an employment contract, after prior announcement of an open and competitive recruitment (Art. 6, Art. 26), organized by the Director General of the Office, while civil servants are employed by appointment, the appointment preceded by is a qualification procedure conducted by the National School of Public Administration (Art. 41 ff). The qualification procedure is one of the stages in the civil servant's career. The stages designated by law are: employment contract for a definite period, preparatory service, exam, a contract for an indefinite period, the qualification procedure, appointment and after reaching the opportunity to apply for higher positions[32].

An example of determining the same rules for open recruitment for a diplomatic and consular application and requirements for candidates for such an application is the Act of 27 July 2001 on foreign service[33]. In addition, all laws containing provisions of the so-called service (employee) pragmatics in public administration indicate the requirements included in personal characteristics, e.g. documented knowledge of foreign languages, no criminal record. Personal characteristics are also indicated by the laws on

[30] Judgment of the Constitutional Tribunal of 23 January 2014, K 51/12, OTK-A 2014, No. 1, item 4.

[31] Consolidated text Dz.U. 2018, item 1559.

[32] T. Wydra, *Kariera (urzędnika) jako czynnik profesjonalizacji,* [in:] *Profesjonalizm w administracji publicznej*, eds. A. Dębicka, M. Dmochowski, B. Kudrycka, Białystok 2004, p. 115.

[33] Consolidated text Dz.U. 2018, item 2040.

so-called specialized (uniformed) services, for example, the Art. 25 (1) of the Police Act.

Summing up the issue of the right of access to public service guaranteed by the Art. 60 of the Constitution, it should be noted that the legislator may impose restrictions on this access, without, however, violating the constitutional right of access contained in the Art. 60 of the Constitution. These restrictions depend on the nature of the positions and functions in this service. In addition, a change in the position of the Constitutional Tribunal and extension of the constitutional guarantee also to changes made during this service cannot be overlooked.

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