



# Access to Justice and the Role of Courts Between the Duty of Cooperation and Ex Officio Powers from a Polish perspective

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# Four remarks on Article 47

- The crisis of judiciary system in Poland
- Meaning of administrative justice
- Visa refusal
- Acces to classified evidence

## Access to justice = access the independent judge

- The election to and composition of the National Council of the Judiciary,
- the establishment of the Disciplinary Chamber and Extraordinary Appeals Chamber at the Supreme Court,
- the involvement of the executive in the internal organisation of the Supreme Court,
- appointments and dismissals of court presidents and vice-presidents, and disciplinary proceedings against judges



**significantly weakened the judiciary's independence**

In precedent-setting judgments, the Supreme Administrative Court undermined the validity of the selection of the new Supreme Court judges. It ruled that the recruitment to the Supreme Court was defective from the outset, while the new NCJ, which gave the nominations, was dependent on the politicians.

# COURT SYSTEM OF THE REPUBLIC OF POLAND

## ORDINARY COURTS

### SUPREME COURT

*(Sąd Najwyższy)*

Court of Cassation  
2<sup>nd</sup> and final instance

## ADMINISTRATIVE COURTS

### SUPREME ADMINISTRATIVE COURT

*(Naczelny Sąd Administracyjny)*

Court of Cassation  
2<sup>nd</sup> and final instance

### CONSTITUTIONAL TRIBUNAL

*(Trybunał Konstytucyjny)*

A posteriori and a priori  
abstract control of normative  
acts, constitutional complaints,  
adjudication of competence  
disputes between central  
constitutional State bodies,  
deciding on the conformity  
with the Constitution  
of the purposes or activities  
of political parties, recognizing  
the temporary incapacity  
of the President to perform  
his/her office.



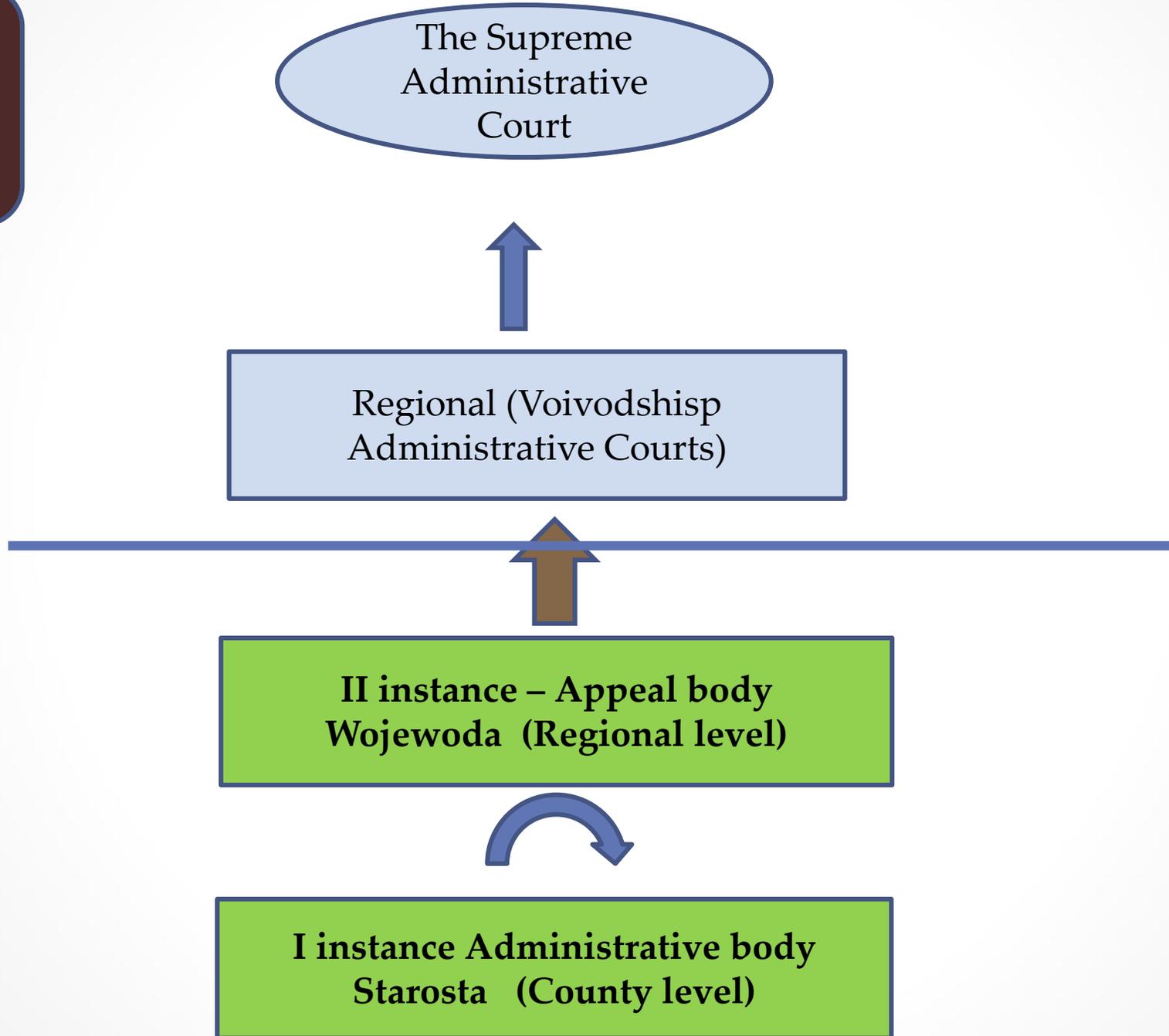
# The Role of Administrative Justice?

The complaint as effective remedy ?

# the power to review the legality of an administrative immigration decision and without the possibility of the replacing

In principle, an administrative court is a court of cassation which investigates the compliance with the provisions of law of an act or deed by an administrative body. If the court decides that the act or deed does not comply with the law, it rescinds it or declares it void.

**2 + 2  
SYSTEM**



# Drawbacks

- 2 plus 2 system - delays in achieving legal stability
- The factual and the legal situation that existed at the time of the final decision
- No suspensive effect of the appeal
- The RAC has no power to modify the decision
- Mediation not used

# Refusal of visas

...

Article 76(1) of the Law on Foreign Nationals of reads: ‘Refusal of a Schengen visa ... by: (1) a consul — may be challenged by a request for a review of the case by that authority;

Article 5 of the Law on proceedings before the administrative courts of states: ‘The administrative courts shall not have jurisdiction in cases concerning: ... (4) visas issued by consuls, with the exception to the visa refusals to foreign spouses of nationals of other Member States of the European Union.

# Facts

Mr El Hassani submitted an application for a Schengen visa to the Consul in Rabat in order to visit his wife and son who are Polish nationals.

That application was refused by the consul

Mr El Hassani submitted a request for review to the same consul who, again refused to grant that application on the ground of the lack of certainty as to his intention to leave Poland before the visa expired.

# The RAC decision

the RAC dismissed the appeal holding that actions brought against a decision to refuse a Schengen visa by the consul does not fall within the jurisdiction of the administrative court. Furthermore, that court refused to refer a question to the Court of Justice for a preliminary ruling.

## **El Hassani – referral for a preliminary ruling by SAC**

Must Article 32(3) of the Visa Code, having regard to recital 29 thereof and the first paragraph of Article 47 of the Charter, be interpreted as requiring the Member States to guarantee an effective remedy (appeal) before a court of law?’

# 2017, Soufiane El Hassani, C-403/16, ECLI:EU:2017:960

The EU Visa Code read in the light of Article 47 of the Charter, must be interpreted as meaning that it requires Member States to provide for a judicial appeal against decisions refusing visas

# The result

## **2019 Amendment ACT**

**The amendment introduces a judicial control of consuls' decisions in cases of refusal to issue, annulment or withdrawal of Schengen visas. The voivodship administrative court with jurisdiction over the office of the Minister of Foreign Affairs is competent to hear the complaint about the consul's activity.**

# The current wording of Article 5 LoPBAC

The administrative courts shall not have jurisdiction in cases concerning:

...

- (4) visas issued by consuls, other than visas:
  - (a) referred to in Article 2(2) to (5) of [the Visa Code],
  - (b) issued to a foreign national who is a member of the family of a citizen of a Member State of the European Union, a Member State of the European Free Trade Association party to the Agreement on the European Economic Area [(EEA)], or the Swiss Confederation, within the meaning of Article 2(4) of the Law on the entry into, residence in and departure from the Republic of Poland of citizens of the Member States of the European Union and the members of their families of 14 July 2006 (Dz. U. of 2017, item 900, and of 2018, item 650)

JUDGMENT OF THE COURT OF JUSTICE (First Chamber) 10 March 2021 case C-949/19

a long-stay visa for the purpose of studies

EU law, in particular Article 34(5) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it requires the Member States to provide for an appeal procedure against decisions refusing a visa for the purpose of studies, within the meaning of that directive, the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal. It is for the referring court to establish whether the application for a national long-term visa for the purpose of studies that is at issue in the main proceedings falls within the scope of that directive.

## The SAC judgment 13/4/2021 II OSK 1160/20

Taking into account the interpretation of EU law provided by the Court of Justice of the European Union in the judgment of 10 March 2021, in case C-949/19, it should be stated that in the scope specified in point 2 of this judgment, Art. 5 point 4 p.p.s.a. is inconsistent with Art. 47 of the Charter of Fundamental Rights of the European Union in conjunction with Art. 34 sec. 5 of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, study, training, volunteering, youth exchange programs or educational projects and work as an au pair (hereinafter Directive 2016/801). The complainant attached a number of documents to his application for a national visa, including a certificate of [...] June 2018 on admission to studies (page 6 of the administrative files). This circumstance may indicate that the submitted application for a long-stay visa for the purpose of study, filed in the case under examination, falls within the scope of Directive 2016/801. **Consequently, it should be stated that the dismissal of the action brought for the reasons indicated by the Court of first instance was premature, as the reasoning of the contested decision fails to assess whether the applicant's application for a long-stay visa for the purpose of study falls within the scope of the aforementioned Directive (EU) 2016 / 801. Determination of the competence of the administrative court to hear the complaint will be subject to the obligation of substantive examination by the Court of first instance.**

# Access to classified evidence

*In Poland neither the foreigner nor his lawyer may see relevant documents that are covered by protection of state secrets or are excluded on account of the best interests of the state*

Denial of access to administrative case file is justified under Article 74(1) of the Code of Administrative Procedure on the grounds of protection of classified information or important interest of the state.

# SAC judgment of 29 June 2016,

## II OSK 2586/14

The right to read the evidence in the case file is an element of the right to active participation in proceedings before administrative authorities and the right to a court. As a result of the exclusion of the possibility to read the secret part of the files, these rights are limited, but this does not result in their exclusion.

The provision of Art. 45 sec. 1 of the Polish Constitution states that everyone has the right to a fair and public hearing of a case without undue delay by a competent, independent, impartial and independent court. Restricting the possibility of getting acquainted with the secret part of the case files, although it is limited by the law, does not infringe the essence of this right.

# Example

information that has been classified "secret" due to the need to protect public order and state security may not be made available to unauthorized persons. For this reason which constitute classified information (Internal Security Agency materials), which indicate that the applicant's stay in Poland constitutes a threat to public order or state security, could not be presented in the justification of the expulsion decision.

# The Article written by Prof. Chlebny in 2014

## „Denial of access to administrative case file”

The proposal of specific amendments to procedural laws aimed at striking a fair balance between the conflicting interests in the course of administrative proceedings and court proceedings. Allowing the case file to be seen by lawyers with security clearance issued under the Act of 5 August 2010 on Protection of Classified Information would create a substitute legal mechanism that could protect classified documents, on the one hand, and strengthen procedural guarantees by ensuring some form of adversarial character of proceedings in relation to classified documents, on the other.

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● **DYSKUSJA NAD REFORMĄ  
POSTĘPOWANIA ADMINISTRACYJNEGO**

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JACEK CHLEBNY

### Odmowa dostępu do akt w sprawie administracyjnej\*

1. *Uwagi wstępne.* Prawo stron lub ich pełnomocników do pełnego wglądu w akta administracyjne stanowi jedną z najważniejszych gwarancji procesowych. Nie znając zebranego materiału dowodowego, strona nie może się do niego odnieść, zakwestionować i w konsekwencji zgłosić dowodów, by dowieść swych racji. Obowiązek udostępnienia akt sprawy został zawarty już w art. 51 ust. 3 Konstytucji RP. Przepis ten przyznaje każdemu prawo dostępu do dotyczących go urzędowych dokumentów i zbiorów danych. Na etapie postępowania przed sądem administracyjnym prawo do zapoznania się z aktami sprawy znajduje swoje źródło w prawie do sądu (art. 45 ust. 1 Konstytucji RP)<sup>1</sup>. W orzecznictwie Naczelnego Sądu Administracyjnego (NSA) nie zakwestionowano regulacji kodeksowej, która pozwala na odmowę udostępnienia stronie pełnego materiału dowodowego, który stanowił podstawę ustaleń faktycznych w jej sprawie<sup>2</sup>.  
Odmowa wglądu w akta sprawy administracyjnej następuje na podstawie

# Towards a special representative who has obtained security clearance

Classified information may be made available only to the person giving the warranty of secrecy and only to the extent necessary for the performance of his or her work or service in his post or for the performance of outsourced activities, including activities in administrative and judicial proceedings of a representative appointed to participate in a case whose files contain classified information classified as "secret" or "top secret" , or in which access to the file by a public authority has been excluded for reasons of important public interest