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The European Court of Human Rights Addresses the Issue of Gay Rights in Poland

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Introduction

On 2 March 2010 the European Court of Human Rights (ECHR) rendered a judgment concerning the question of whether in Poland a homosexual has the same right as a heterosexual spouse to succeed to a tenancy in property after the death of his partner.¹ The applicant, Mr. Piotr Kozak, brought the case to the ECHR alleging that Poland had discriminated against him on the ground of his homosexual orientation in violation of the European Human Rights Convention.

Background

The undisputed facts of the case are as follows. In 1989 the applicant moved into a council flat at K. street, rented by T.B., the applicant's partner, with whom he had lived in a homosexual relationship. Earlier, in 1986 or 1987, they had lived together in a flat rented by T.B. on N. street. The applicant and T.B. shared the expenses for the flat. On 28 May 1989 the applicant was registered as a permanent resident of the flat in the residents' register kept by the Szczecin Municipality. On 1 April 1998 T.B. died. Subsequently, the applicant applied to the Mayor of Szczecin, asking him to conclude a lease agreement with him, replacing thereby the agreement with the late T.B. He was informed by one of the municipality's clerks that he should first pay arrears in rent since otherwise a fresh agreement would not be effected. The applicant paid the arrears, which amounted to 4,671.28 Polish zlotys (PLN) and also renovated the flat, paying PLN 5,662 for the work.

However, on 19 June 1998 the Szczecin Town Office's Department for Municipal Buildings and Dwellings sent a letter to the applicant, informing him that his application could not be granted because he did not meet the relevant criteria. Later, the Municipality ordered his eviction.

The Polish Courts and Relevant Polish Law

Both the District Court and the Szczecin Regional Court upheld the eviction order. The Regional Court held that under Lease of Dwellings and Housing Allowances Act of 2 July 1994 ("the 1994 Act") "a person can take over a tenancy if he or she has fulfilled jointly the four following conditions: (1) was in a close relationship with the late tenant by blood relations, adoption or *de facto* marital cohabitation; (2) resided permanently with the tenant until his or her death; (3) had not relinquished this right to the landlord and (4) upon the death of the tenant had no title to another flat." The court added that, "All of the above-mentioned four requirements ... must be fulfilled jointly; non-fulfilment of even one of them makes it redundant to examine compliance with the remaining ones."

In response to Kozak's claim that he had lived in *de facto* marital cohabitation with T.B., the court stated that his and T.B.'s cohabitation "could not be regarded as such, because a *de facto* marital relationship is not a legalised substitute for a marriage. Pursuant to Polish law, Article 1 §1 of the Family and Custody Code, a marriage can be contracted only between a woman and a man." Consequently, Polish law recognizes only *de facto* relationships of different-sex persons.

Kozak then appealed, asking the Szczecin Regional Court, to refer to the Supreme Court the following legal question: "Does the term 'a person who has lived with a tenant in *de facto* marital cohabitation' used in section 8(1) of the 1994 Act also concern a person who has lived in a homosexual cohabitation with a tenant, or only a person living in a heterosexual cohabitation?"

Kozak alleged a breach of the substantive civil law consisting in an erroneous interpretation of the term "a person who ha[d] lived with a tenant in *de facto* marital cohabitation" as relating solely to cohabitation of a man and a woman.

On 1 June 2001 the Szczecin Regional Court heard, and dismissed the appeal, stating that "According to an opinion commonly accepted in our legal writing and case-law ..., *de facto* marital cohabitation takes place only if a woman and a man cohabit together. ...Indeed, Article 18 of the [Polish] Constitution ... clearly states that "marriage, being a union of a man and a woman, as well as the family ... shall be placed under the protection and care of the Republic of Poland".

The ECHR Accepts the Case

Kozak submitted his complaint to the ECHR under Article 14 taken in conjunction with Article 8 of the European Human Rights Convention, alleging that the Polish courts, by denying him the right to succeed to a tenancy after the death of his partner, had discriminated against him on the ground of his homosexual orientation. Article 14 of the Convention states:

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.

Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

Kozak submitted that his homosexual orientation had been the single ground on which he had been denied the right to succeed to the tenancy of the flat in which he had lived with the late T.B. The Polish government denied that 8(1) of the 1994 Act was illegally discriminatory and submitted that the 1994 Act promotes the legitimate aim of protecting the Polish family as defined in the Polish Constitution. The ECHR responded:

In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations... . Not every difference in treatment will amount to a violation of this provision; thus, Contracting States enjoy a margin of appreciation [i.e., a degree of discretion] in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. For the purposes of Article 14, it must be established that there is no objective and reasonable justification for the impugned distinction, which means that it does not pursue a 'legitimate aim' or that there is no reasonable proportionality between the means employed and the aim sought to be realised.

The ECHR continued:

Sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the [ECHR to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention...

It remained for the ECHR to determine whether the Polish authorities presented "objective and reasonable justification" for the impugned distinction in law in respect of same- and different-sex

partners, that is to say whether this measure pursued a “legitimate aim” and maintained “reasonable proportionality between the means employed and the aim sought to be realised”.

According to the judgment of the Polish Regional Court, the essential objective of the difference in treatment was to ensure the protection of the family founded on a “union of a man and a woman”, as stipulated in Article 18 of the Polish Constitution. The ECHR acknowledged that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason that might justify a difference in treatment. The ECHR further reasoned that:

given that the Convention is a living instrument, to be interpreted in the light of present-day conditions, the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one’s family or private life. Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition. Nevertheless, having regard to the State’s narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation, a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the [ECHR] as necessary for the protection of the family viewed in its traditional sense. Nor have any convincing or compelling reasons been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time.

In view of the foregoing, the ECHR concluded that the Polish authorities, by rejecting the applicant’s claim because of his homosexual relationship with T.B. failed to maintain a reasonable relationship of proportionality between the aim sought and the means employed. The impugned distinction was not, therefore, compatible with the standards under the Convention. The ECHR accordingly rejected the Government’s position and held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

Consequences of the ECHR Ruling

Poland, as a member of the Council of Europe, recognizes the jurisdiction of the ECHR and the right of individuals within its borders to petition the ECHR if they believe their human rights under the European Human Rights Convention have been violated and they have exhausted local legal remedies. As a party to the ECHR’s statute, Poland promises to respect and implement the ECHR’s rulings. Consequently, Kozak should be able to succeed to the tenancy of his partner. Furthermore, Polish courts will most probably interpret the Lease of Dwellings and Housing Allowances Act of 2 July 1994 to apply equally to homosexual as well as heterosexual couples. Whether the Polish authorities will apply this ruling to other discriminatory laws and regulations of a similar nature remains to be seen. As the ECHR noted in its *Kozak* judgment, Poland has a legitimate interest in protecting the traditional family. However, it must strike a balance between the protection of the traditional family and the Convention rights of sexual minorities.

Note

1. The full text of the case, *Kozak v. Poland* (Application no. 13102/02, can be found at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863748&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA39864>

Unless otherwise noted, all quotations in this article are taken from this case.