Chapter 9

Selected problems of diplomatic and consular immunities and functions in the case law of the European Court of Human Rights, from a Central European perspective

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Abstract

The intensive development of human rights is increasingly affecting cross-border issues – including diplomatic and consular traffic. Although these areas are classic branches of international law, their development is increasingly influenced by the perception of the dignity of the human person and the proliferation of human rights norms. The following text examines the interplay of human rights and the issue of immunities to ensure the proper functioning of diplomatic missions and consular offices. This is a contentious matter. Attention is also given to consular functions, the task of which may also be to ensure the protection and dignity of the human person. A special place in this catalogue is occupied by the tasks of the foreign service in the field of diplomatic and consular protection. A special legal construction, which can be seen as being in line with due process standards, is the access to the consul of a person deprived of liberty. In this regard, international law has produced a rich jurisprudence. Finally, the text also devotes attention to the issue of consular functions regarding external voting – in this regard, an established standard of legal and human guarantees has not yet formed.

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1. Introduction

Diplomatic and consular relations appear to be quite distant from the issue of human rights protection. International immunity protects both members of a foreign service mission and the premises occupied by a consular post or diplomatic mission. This makes the impact of human rights protections in force in the receiving state very weak compared to those of the sending state. Gross human rights violations by diplomats[1] of the sending state end up declared *persona non grata*.[2] In contrast, there is rarely a judicial encounter between the human rights protection system and international diplomatic and consular traffic. Few cases of this type have emerged in the European human rights protection system[3] – but they are quite limited in nature, and the reference to diplomatic or consular law is essentially secondary. Interestingly, the key case on the immunity of missions in the field of labour law took place based on the experience of Central European countries (Poland and Lithuania). Even in this case, however, it is difficult to speak of the creation of a customary regulation weakening the immunity of a state in the case of human rights violations by its diplomat. Immunities from jurisdiction are especially difficult to justify in light of the growing role and status of international human rights. Immunities are created to secure the harmonious performance of functions, and not to protect diplomats or consuls as human rights violators. Also, diplomatic or consular functions themselves performed by persons protected by immunities (such as consular protection, conducting elections abroad) can lead to human rights violations. Immunity does not protect against the jurisdiction of the sending state for whose citizens the consul or diplomat performs

1 Such as the brutal murder on 2 October 2018 of Arab opposition activist Jamal Ahmad Khashoggi at the Saudi Arabian Consulate in Istanbul. Khashoggi had gone to the Saudi consulate to obtain the necessary documents regarding his marital status. Despite assurances regarding his safety, he was murdered and his body was dissolved in hydrochloric acid.

2 The institution of recognition as *persona non grata* has a dual role in international law. On the one hand, it is a form of punishment for a diplomat who cannot be brought before a court (due to immunity). The offender must expect to be declared *persona non grata* and thus to have to leave the receiving state before the end of their mandate. See: Salmon, 1994, pp. 490–492; see also: Denza, 2016, p. 72. On the other hand, this institution is used by states as a retaliatory mechanism. See: Combacau and Sur, 1997, p. 209. States consider their diplomats *persona non grata* in situations of deterioration of mutual relations. It is more political and not legal in nature. See: Conforti, 1995, p. 362.

3 The system is primarily performed on the basis of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950 (European Convention on Human Rights), ETS No. 005.

functions. This means the potential possibility of evaluating these activities through the prism of human rights protection.

2. Immunities versus human rights

Analysing selected problems of diplomatic or consular intercourse in European Court of Human Rights (ECtHR) judgements, attention should first be paid to the issue of state immunity. Immunities in cross-border relations can be divided into those enjoyed by diplomats or consuls, and those enjoyed by the diplomatic mission – i.e. *de jure* enjoyed by the state. Only some of the immunities of the state can be considered directly regulated by the provisions of the Vienna Convention on Diplomatic Relations.[4]

A quite clear line of jurisprudence on state immunity in labour cases is forming in the ECtHR and in the jurisprudence of national courts. This line has developed with respect to labour law cases. Before it, in 1979 the United Nations International Law Commission (ILC) was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of states and their property. It produced a number of drafts that were submitted to states for comment.[5] On this basis, in 2005 the United Nations Convention on Jurisdictional Immunities of States and Their Property was signed (it has not entered into force). The 1972 European Convention on State Immunity ('the Basel Convention')[6] was adopted – Art. 5 of which reads that a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state, if the proceedings relate to a contract of employment between the state and an individual where the work has to be performed on the territory of the state of the forum. But according to Art. 32, "Nothing in the Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them." As an aside, this convention is not popular in Central Europe: neither Poland nor Hungary are parties to the treaty.

4 UNTS 1964, vol. 500, No. 7310. A number of solutions contained in the Vienna Convention on Diplomatic Relations safeguard the inviolability of the sending state's diplomatic mission (Article 22) and the mission's archives and documents at all times and places (Article 24). It also guarantees numerous privileges of the mission as such (e.g., use of the emblem and flag – Article 20, tax privileges – Articles 23 and 28, freedom of communication – Article, 27, customs privileges – Article 36(1)(a), etc.). Since the diplomatic mission has no legal personality, these are privileges and immunities of the sending state (referring to tax privileges, the Vienna Convention explicitly provides for exemptions of the sending state in this regard).

5 Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991, Yearbook of the International Law Commission, 1991, vol. II, Part Two, p. 51.

6 ETS No. 74, UNTS 1988, vol. 1495, no. 25699. It came into force in 1976.

The jurisprudence of the ECtHR is not very rich, but it is relevant in this regard. Created on the basis of the Fogarty[7] and Cudak[8] cases, the standard of the ECtHR assumes that the immunity of the state is not granted in *de jure gestionis* cases – which have an essentially civil (commercial) dimension. It is, though, granted in *de jure imperii* cases – that is, those that relate to the interest of the state. Transferring this to the field of labour cases, the ECtHR took the position that immunity does not apply to labour cases of persons from the receiving state employed by the sending state in the embassy of that state and performing labour tasks that do not affect international activity. The exception in this regard, however, is for recruitment issues - a point made explicitly in the Fogarty case. It should be noted, however, that the standard for treating labour matters as falling outside the scope of state immunity is essentially *in statu nascendi*, and it is difficult to assume the formation of such a uniform practice of states in reality as assumed by the ECtHR. In particular, it is difficult to relate it unequivocally to Central European practice.

For example, in light of Polish immunity laws (the Polish Code of Civil Procedure[9] has always had (i.e. for 60 years) strongly specified provisions in this regard), it is impossible to file a lawsuit against the embassy of a foreign state.[10] The embassy has no legal subjectivity and the qualification of it as a branch of a company, which is permissible under the jurisprudence of the Court of Justice of the European Union,[11] is impossible under Polish law without the foreign state expressly granting such a possibility.[12] Which naturally, in procedural practice, will not occur – as this state, in principle, is definitely not interested in the settlement. The only few labour cases relating to foreign embassies resolved before Polish courts in favour of the employees[13] were resolved in this way solely due to the court's error in ignoring the provisions relating to legal capacity in labour cases. It should be considered that the *Cudak* case (against Lithuania for labour rights violations – harassment by the Polish Embassy in

7 *Fogarty v. The United Kingdom (*Application no. 37112/97*),* Judgment 21 November 2001.

8 *Cudak v. Lithuania* (Application no. 15869/02) Judgment 23 March 2010.

9 Law of November 17, 1964. – Code of civil procedure - Dz. U. (Polish official journal of legal acts) 1964, vol. 43, no. 296, updated text: Dz. U. 2023, no. 1550.

10 And for comparison, Lithuania had no laws on the question.

11 Judgment of the Court (Grand Chamber) 19 July 2012 in case C-154/11 *Ahmed Mahamdia v. People's Democratic Republic of Algeria* (ECLI:EU: C 2012, p. 491).

12 See Art. 1111 § 1 point 4 and Art. 460 § 1 of the Polish Code of Civil Procedure. However, these provisions must be interpreted taking into account the content of Article 1117 of the Code of Civil Procedure and Art 17 para 3 point 4 of the Law of February 4 2011 on Private International Law (Dz. U. 2011, vol. 80, no. 432, updated text: Dz. U. 2023, no. 503).

13 See: Order of the Supreme Court of the Republic of Poland of December 18 2018 r., II PK 296/17, see also: Order of the Supreme Court of the Republic of Poland of January 11 2000 r., I PKN 562/99. But *cf.* Order of the Supreme Court of the Republic of Poland of March 18 1998 r., I PKN 26/98, *cf.* also: Judgement of the Supreme Court of Republic of Poland, December 15 2022, I NSNc 23/22.

Vilnius) was severely stretched in its factual premises, which must have contributed to its perception, which is very weak in practice.[14]

Issues related to the ownership of buildings by a foreign state are more problematic when the owner is an individual and resists it. In Poland, there are more than a dozen such cases, which have only been partially resolved in recent years (through judicial, administrative and diplomatic negotiations). The most important case involved the buildings of the Serbian Embassy in Warsaw.[15] The situation is complicated by a number of international agreements concluded during the communist era, providing for the transfer of real estate for diplomatic use. In the 1990s, properties formally recovered by pre-war owners meanwhile remain in the possession of a foreign state.

In the future, with the development of the human rights system, a potential source of conflict that may arise may concern violations of the convention right to property through the application not so much of state immunity (for this has already been partially resolved under the convention), but of diplomats' immunity. This is because diplomats' immunity is in principle a full immunity,[16] while the exceptions to it – in terms of civil or administrative law, which may affect the violation of the right to property – are very narrowly framed. In practice, there are situations in which there are significant violations of the law involving the ownership of property used by diplomats.[17] In view of full diplomatic immunity, failure to regulate, for example, the rent of privately owned real estate used for diplomats' purposes may involve a violation of the right to a court. However, the ECtHR's ability to rule in this regard appears to be severely truncated. In view of the evident deficit in the protection of the right to property in the face of restrictions on the right to a court (whose rationale is immunity), a practical solution would be insurance mechanisms used by the receiving state to protect persons entering into civil law relations with diplomats of the sending state. It could be very practical for real estates' owners or commercial merchants trading with diplomats.

14 Ms. Cudak sued Lithuania before the ECtHR, claiming that it was severely restricted for her to assert her labour rights against the Polish State in a Polish court - when at the same time she was already residing in Poland and her interests in Strasbourg were represented by a Polish lawyer running a law firm in Wroclaw.

15 Judgment of the Supreme Court of the Republic of Poland of June 19 2018, I CSK 45/18. The judgement explicitly addressed the issue of the state's immunity from jurisdiction, and was the quintessence of a number of preceding court rulings (including those issued by the Supreme Administrative Court of Poland and the Supreme Court, and relating to various aspects of the acquisition of real estate by a foreign state for a diplomatic mission). In its implementation, the Court of Appeals issued a judgment finally regulating the fate of the property (see the judgment of the Court of Appeals in Warsaw of July 10 2019, VI ACa 572/18). For the history of the litigation over the Serbian embassy building in Warsaw, see: www.dzp.pl/en/deals-corner/231-dzp-win-end-of-real-estate-dispute-with-serbia

16 See: Salmon, 1994, pp. 281–358, Denza, 2016, pp. 232–260.

17 On the jurisdiction of the sending state as a potential remedy see: Denza, 2016, pp. 266–273.

3. Consular care and access to consular activities

A separate issue that naturally coincides with human rights protection is the performance of diplomatic and consular functions, in particular concerning diplomatic protection and consular care.

One can mention cases related to access to consular premises, and the issue of anti-terrorist protection of consulates. Such a situation occurred in El Morsli v. France[18] – in which the applicant, refusing to remove her burqa, was not admitted to the consulate and therefore did not receive a visa. The court did not recognise the religious freedom arguments in this case.

Diplomatic or consular assistance and care alone in Strasbourg jurisprudence has not earned the name of a conventionally protected right. The theme of diplomatic or consular activity has already appeared in older rulings still issued by the Commission on Human Rights – but it was marginal and concerned the problem of extraterritoriality in the application of the convention.

Noteworthy here is the citation of several cases before the commission, in which it was deemed unacceptable to guarantee the right of an individual to diplomatic protection. Thus the first, somewhat curiously factual case of the Bertrand Russell Peace Foundation[19] established, firstly, the absence of any obligation on the part of the state to intervene in acts committed by another state not party to the convention; and secondly, in that case there was an explicit rejection of the presumption of the existence under the European Convention of any guarantees with respect to diplomatic protection. Actually, analogous conclusions are drawn from the cases Kapas,[20] Jasinskij[21] and Abraini Leschi[22] – as in the Bertrand Russell Peace Foundation case, complaints were also declared inadmissible. This does not mean, however, a categorical refusal to recognise diplomatic care as a human right, but only a rejection of the convention guarantees in this regard. It also explicitly stipulates that it is incorrect to make any presumption in this regard.[23] While it must be acknowledged that the manner in which the references to diplomatic protection are phrased quite broadly,[24] it leaves no illusion that the commission did not view this right not only

18 Judgment 15585/06, 4 March 2008

19 *Bertrand Russell Peace Foundation Ltd. v. the United Kingdom*, app. No. 7597/76, dec. of 2.05.1978, Decisions and Reports, vol. 14, pp. 117–132.

20 *Kapas v. United Kingdom*, app. No. 12822/87, dec. 9.12.1987, Decisions and Reports, vol. 54, pp. 203–206.

21 *Jasinskij v. Lithuania*, app. No. 38985/97, dec. 9.09.1998, Decisions and Reports, vol. 94-B, pp. 147–150.

22 *Abraini Leschi et autres c. la France*, app. No. 37505/97, dec. 22.04.1998, pp. 1–8.

23 ("(...) *Aucun droit de ce genre ne peut être déduit de l'article 1 de la Convention*" (quotation from cases: *Bertrand Russell Peace Foundation*..., p. 131; *Kapas*, p. 205)).

24 "(…) *la Commission rappelle la jurisprudence selon laquelle la Convention ne garantit aucun droit à la protection diplomatique ou autre mesure de ce genre que devrait prendre une Haute Partie Contractante en faveur de toute personne relevant de sa jurisdiction*." (Quotation from *Bertrand Russell Peace Foundation*…).

as a convention-guaranteed right, and did not view this right as a right in general. Which, by the way, is not surprising – the influence of British legal thought (understanding the right to diplomatic custody as solely a right of the state) in the Strasbourg bodies was and is clearly evident, and the two oldest of the cases mentioned above – which set the standard for the commission's view of these issues – involved a failure to act on the part of the United Kingdom precisely. The UK opposed any individual rights conceptions concerning diplomatic and consular protection (it was clearly seen in the time of negotiating directive rules of European consular protection in the EU in 2007). The Strasbourg interpretation of the issue is not clear-cut, however. Already in the Bertrand Russell Peace Foundation case the commission, despite its general refusal to recognise an individual's right to diplomatic care, recognised that failure to intervene – which is the essence of diplomatic care in a case – can affect the protection of rights guaranteed to the individual by the convention. The commission took a negative view of the granting of conventional protection for activities for which the state party to the convention is not responsible. Thus, the convention cannot oblige intervention in third countries. Thus, it is possible that the resulting line of jurisprudence evolved in the indicated direction not because of the court's general view of diplomatic and consular protection in the system of human rights protection, but due to the insignificance of the cases presented. However, it is more likely that this position reflects the actual development of international law, in which we are not dealing with a formed human right to diplomatic protection. By all means, given the difficulty of determining the potential scope of such custody, this solution remains quite convenient. From a classical international legal point of view there is the right to citizens' diplomatic protection, and there is any state's duty of such protection. The only one obliged is the state of the territory – obliged to enable the state of nationality to provide such care. So from the point of view of the state granting protection abroad, there is only free right to grant protection, but no duty to grant it. From the point of view of the individual, there is no right to be protected in any situation.

On the other hand, one has to wonder whether the indicated line of jurisprudence in terms of only classical, limited consular care or assistance (and not diplomatic care in the broad sense) would be identical. Consular activity is, to a significant degree, a concretised activity, not subject to such a significant margin of discretion as diplomatic care. Hence, in situations where its exercise involves concrete, often clearly normatively specified factual activities, their violation (potentially also through inactivity) by external organs of the state could be seen as a violation of human rights subject to possible assessment by the Strasbourg Court. If one looks at consular activity solely as the consul's performance of specific functions in the framework of assistance (disregarding the strictly 'care' aspect, constituting a reaction to a violation of the law by the receiving state) one risks a change in perception of the problem outlined above. The lack of territorial limitation in the application of the ECHR,

confirmed by the court's jurisprudence in some cases[25] – for example, the Banković[26] or Ilascu case[27] – makes it possible to view the improper performance or non-performance of consular functions by a consul of a state of nationality party to the convention, even residing in a third country, as a violation of human rights.

Cases involving violations of human rights through the action of a consul, or failure to perform functions, have also been reflected upon by the former European Commission of Human Rights. It is worth citing the complaint against Germany,[28] related to the violation of a citizen's rights through the improper action or inaction of the consul of the country of his nationality in a third country (Morocco) – as a result of which the citizen suffered significant damage with his expulsion from the third country. The commission declared the case inadmissible, however only due to the fact that the party was unable to prove its allegations. It made clear, however, that foreign missions are obliged to carry out their functions abroad, and failure to do so may lead to future liability under the ECHR.[29] Even more interesting in this context is a later case based on a complaint against the United Kingdom.[30] The party's allegation concerned the lack of sufficient assistance from the consular office in a third country in the search for the daughter of 'Citizen X' – who had been kidnapped by her father (a citizen of a third country, namely Jordan). The commission not only raised and developed in light of the Cyprus v. Turkey case [31] the conclusions formulated above, but also assessed the sufficiency of the action taken by the consul. In view of the fact that in this case, in the commission's view, the British consul in Amman took all the expected reasonable actions (contacted the mother with a lawyer, went to the place where the child was being held, saw first-hand the child's condition, spoke with the child's family, and entered the child in the mother's passport), the complaint was considered manifestly ill-founded. The commission, moreover, did not limit itself to assessing the actions of a diplomatic post or consular office of a state obliged to perform actions for an individual because of their citizenship of that state. Such a case was W.M. v. Denmark.[32] Here the complainant (a German citizen) complained to Denmark about its refusal to grant him diplomatic asylum, instead surrendering him to East German authorities in 1988, when he entered the Danish embassy in East Berlin. The case was considered inadmissible (without links, however, to the activity of diplomatic personnel), but the liability of the state was not excluded if the

25 See: Jankowska-Gilberg, 2008, p. 15.

26 *Banković et al. v. Belgium and 16 NATO States*, app. no. 52207/99, Rep. 2001-XII.

27 *Ilascu et al. v. Moldova and Russian Federation*, app. no. 48787/99, Judgment of 4.06.2001.

28 *X. v. Germany*, app. No. 1611/62, dec. 25.09.1965

29 "*Whereas in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make the country liable in respect of the Convention*." (Quotation from *X. v. Germany*).

30 *X v. UK*, app. No. 7547/76, dec. 15.12.1977.

31 *Cyprus v. Turkey*, app. No. 6780/74, 6950/75, dec. 26.05.1975

32 *W.M. v. Denmark*, app. No. 17392/90, dec. 14.10.1992, pp. 1–11.

diplomatic representative by his actions violated human rights, including those of a non-citizen of the receiving state.[33]

It is possible to consider applying the concept of positive obligations of the state to future cases of this type pending before the ECtHR - and thus resolving consular cases in favour of the applicant, in particular for refusal to take consular custody. Although the right to exercise consular care in the classical doctrine of international law is considered a power of the state, in the light of the human rights protection system, there are slowly outlining tendencies to consider this right not only *de facto*, but also *de jure* as its obligation. An important problem undoubtedly remains the assessment of what is a reasonable state action in this regard, considered as the fulfilment of consular care. Another issue is whether we can establish such a scope irrefutably at all, or whether it will vary each time, and whether we are indeed dealing with consular care or merely consular assistance – i.e. the performance of activities for the benefit of an individual, within the limits set by law, and under conditions in which there has been no violation of the law by the receiving state. It should be noted that in the *X v. UK* case cited above, this was an issue raised in part (the commission's assessment of the fulfilment of legitimate activities was not very restrictive, after all). However, the inclusion of the jurisdiction (as to the assessment of the sufficiency of the measures taken) of the law of the sending state completely skews the uniform standard of protection. Besides, it should be emphasised that consular assistance remains the discretionary decision of the sending state, and it can be far from easy to assess its positive obligations in this regard as well. This is particularly true with regard to the effects of the right of access to the consul – for this right, although it does not link the consul's activity to a violation of the law by the receiving state, is viewed according to the same mechanisms left at the discretion of the sending state as consular care.

In the future, one cannot exclude the possibility that a state may be challenged before the ECtHR in the event of the inactivity of its consular service in connection with the failure to perform its positive duty under Article 8 of the convention, and in extreme situations even a violation by the state of Article 3, by failing to take diplomatic and consular action to stop the inhuman and degrading treatment by the state of residence applied to a person entitled to consular protection of state of nationality.

33 "(...) *a State party to the Convention may be held responsible either directly or indirectly for acts committed by its diplomatic agents*" (quotation from *W.M. v. Denmark*).

4. The right of access to the consul

The framing of the right of access to the consul as part of a foreigner's right to a fair trial[34] has not yet been analysed in the legal and human rights context at the ECtHR. This is an issue already settled, in the context of Article 36 of the Vienna Convention on Consular Relations,[35] in several judgments of the International Court of Justice.[36] The right of access to the consul was also, as an individual right, the subject of analysis in an advisory opinion of the Inter-American Court of Human Rights.[37] These judgments and opinion composed in international law something like grounds for international Miranda rights.[38] Their basis was Article 36 para. 1. point "b" of the Vienna Convention, which provides[39] for so-called facultative notification of the right of access to the consul. The transmission of information about deprivation of liberty to the consul is carried out if the citizen consents to it.[40] In many bilateral consular conventions (for example the Polish-Hungarian Consular Convention signed June 5 1973[41]) we have obligatory notification on detention. The will of the citizen is not important. This article is *lex specialis* to Art. 36 of the Vienna Convention (also according to Art. 73 of the Vienna Convention, bilateral convention rules have priority in usage[42]).

The reason that this issue has not yet become the subject of the ECtHR's juridical decision is due to the lack of significant issues in dispute. The laws of the member states correctly implement consular powers regarding foreigners deprived of liberty. The best example of this is the Polish criminal process – under Polish code regulations

34 *Cf.* Stephens, 2002.

35 UNTS 1967, vol. 596, no, 8638.

36 In 5 proceedings so far, the International Court of Justice has dealt with various aspects of the right of access to the consul. These are: 1. *Breard, Case concerning the Vienna Convention on Consular Relations* (Paraguay v. United States of America), Order of Provisional Measures, 9 April 1998 (application waived); 2. *LaGrand Case* (Germany v. USA) – Judgment, 27 June 2001, General List No. 104; 3. *Case Concerning Avena and Other Mexican Nationals* (Mexico v. USA) – Judgment, 31 March 2004, General List No. 128; 4. *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgement of 30 November 2010, General List No. 103; 5. *Jadhav Case* (India v. Pakistan), Judgement, 17 July 2019, General List No. 168.

37 Inter-American Court of Human Rights Advisory Opinion OC-16/99 of October 1 1999, Requested by the United Mexican States: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see: – http://corteidh-oea.nu.or.cr.).

38 See: Woodman, 2001; Phillabaum, 2001.

39 Art. 36 para 1 point b: "*if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph*".

40 D.W. Williams, *Consular Access to Detained Persons*, International and Comparative Law Quarterly 1980, vol. 29, s. 240.

41 Dz. U. 1974, vol. 5, no. 28.

42 *Cf*: Kho, 1995, pp. 275–276.

it is simply impossible to violate the right of access to the consul.[43] The consul is notified at all stages – the arrest, detention and conviction of a foreigner – by both the prosecutor's office (and in practice, previously the police) and the criminal court.

Hence, in a classic criminal trial it is difficult to imagine a violation of such procedural rights of a foreigner. Naturally, a complaint to the ECtHR will not be able to directly concern individual extra-conventional rights (arising from the 1963 Vienna Convention or bilateral conventions), but will have to indicate a violation of the right to a fair trial. Procedurally, this may be tricky – because the European Convention does not provide for specific rights for foreigners.

More likely will be a possible finding of a violation in the case of the refugee detention procedure. This will be possible if there is a transfer of information to the consul of the nationality of the person applying for protection. Such an obligation may arise from a bilateral consular convention between the state of nationality and the state granting protection. The Protocol to the European Convention on Consular Functions[44] blocks such a transfer of information, but the convention is only binding on 5 European countries (it entered into force in 2011). Such a transfer can be considered a threat to the right to life under the ECHR. Given that cases of this type do occur (for example, in Polish practice under the Polish-Chinese bilateral consular convention, signed July 14,1984[45] – not in the case of administrative detention of a refugee, but in the case of criminal detention) it is not excluded. Poland at the statutory level excludes notification without consent of a refugee seeking protection in Poland in administrative proceedings.[46] However, in criminal proceedings, as well as in any type of detention in the case of a refugee who seeks protection outside Poland, there may be notification to the consul of the country from which they fled. Thus, such cases in the future are not excluded.[47] There is also a problem of how to treat a refugee who asks for the protection of a consular officer of their own country of nationality. According to the Geneva Convention,[48] in such a situation a refugee may lose their status.[49] In fact there is no practice in this area so far.

43 See: Czubik, 2011, p. 563–602.

44 Convention signed in Paris, December 11 1967 (ETS No. 061, UNTS 2011, vol. 2757, no. 48642).

45 Dz. U. 1985, vol. 8, no. 24.

46 Although in essence the law violates treaty obligations providing for mandatory consular notification. Poland has c.a. 40 such conventions.

47 *Cf.* Lee and Quigley, 2008, p. 191–194.

48 Convention Relating to the Status of Refugees of 28 July 1951, Geneva, (UNTS 1954, vol. 189, no. 2545) with consideration of the contents of the 5. Protocol relating to the Status of Refugees. New York, January 31 1967 (UNTS 1967, vol. 606, no. 8791).

49 Art. 1C (1) of the Geneva Convention provides: "*This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality*".

5. Consular functions on external voting

The last issue worth paying some attention to is the problem of elections abroad (so-called external voting rights). In order to understand the potential scope of the possible impact by most consular functions on the sphere of human rights, it should be noted that consular activities in their essence are not homogeneous activities. They are divided into those guaranteed by international law and those resulting from the acquiescence of the receiving state. The non-performance of the latter does not depend on the sending state and its consul, but on the acquiescence of the state of the territory – hence directing a claim against an entity innocent of their non-performance is groundless. The consul's electoral activities are not guaranteed by international law – unlike, for example, its ability to perform consular protection activities, to which the receiving state cannot object. The performance of election activities abroad depends on the consent of the specific receiving state. Elections abroad, carried out as a result of the activity of the diplomatic and consular service of a state, thus constitute another, seemingly closed, aspect of the impact of the law of the European Convention. The case law of the ECtHR has indicated the absence of a human right to vote abroad[50] even when there is a constitutional obligation of the state to conduct elections abroad. It is all the more difficult to recognise the existence of such a right when the state has no obligation to hold elections abroad.

Naturally, in view of the existence of various practices of states regarding voting abroad, there are claims by individuals expressed before national courts deciding on the validity of elections as to violations of the alleged human right to vote abroad. The creation, moreover, of such an obligation in light of constitutional provisions is irrational. This is because the source of restrictions on the exercise of electoral rights abroad is the state of the territory, which, for various reasons, does not allow consuls of a foreign state to conduct elections in the consular districts concerned.[51] In the case of the 2020 presidential elections in Poland, we had such complaints regarding, for example, the failure to hold elections in Chile (which the country banned from holding elections due to Covid)[52] or Sudan (where it was impossible to conduct election procedures due to the terrorist threat). At present, the line of jurisprudence of the Polish Supreme Court emphasises the impossibility of effectively raising electoral complaints about the fact that elections were not held in a particular

50 See: Judgement of March 15 2012 *Sitaropoulos & Giakoumopoulos v. Greece,* app. 42202/07.

51 See: Fabrowska, 2020.

52 See: Order of the Supreme Court of Republic of Poland of July 30, 2020, I NSW 219/20. *Cf.* P. Bucoń *Brak obwodu do głosowania w okręgu konsularnym jako podstawa protestu wyborczego – uwagi na tle postanowienia Sądu Najwyższego z dnia 30 lipca 2020 r., I NSW 219/20* (*No voting district in a consular district as grounds for an election protest – comments in the context of the Decision of the Supreme Court of 30 July 2020, I NSW 219/20*), Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2021, vol. 19, pp. 283–292.

consular district.[53] The aforementioned Greek case is cited in this jurisprudence.[54] It is doubtful to create a different standard in the reality of the ECtHR. After all, it should be noted that EU countries provide for various restrictions on elections abroad, while in terms of broad European law there is a noticeable retreat from the liaison of citizenship, in favour of the liaison of domicile. The fact, meanwhile, of external voting in national elections is a consequence of having citizenship of the country of origin.

6. Conclusions

In summary, it should be noted that diplomatic and consular turnover, given the existing immunity guarantees for its application, is not of particular interest to human rights jurisprudence. The evaluation of many events simply cannot take place, also taking into account the usually hidden nature of many state foreign policy functions from the public and other states.

Hence, only in the field of part of the problems of diplomatic and consular law is there interaction with human rights mechanisms. Undoubtedly the scope is gradually increasing. However, given both the limitations of the European system of human rights protection itself, as well as the above-mentioned specific character of the norms of diplomatic and consular law (and the exercise of them in the highly heterogeneous jurisdiction of a foreign state), it is difficult to assume a fundamental and rapid change in this regard.

53 As an aside, the Supreme Court jurisprudence points to a strong constitutional-legal argument against the constitutional right to vote abroad: "*Article 37 of the Constitution stipulates that he who is under the authority of the Republic of Poland enjoys the freedoms and rights provided by the Constitution. The authority of the Republic of Poland can only be equated, in light of this provision, with full territorial authority, and not, for example, the performance of limited legal and factual acts on the territory of a foreign state, with its consent. The only constitutional provisions adopted for their application outside the borders of the Republic of Poland are Article 6, paragraph 2 (this provision, as not applicable to citizens but to ethnic Polonia, is completely irrelevant to electoral issues) and Article 36 – the right to guardianship of a citizen abroad (which is a positive reflection only of the power of the state of nationality guaranteed by international law to exercise such guardianship and thus, a kind of break in the jurisdiction of the state of the territory). Voting rights only under the authority of the Republic are constitutionally guaranteed. Thus, there is no constitutional obligation of the state to ensure voting abroad. The silence of the Constitution of the Republic of Poland on the subject of elections abroad, should be seen as fully justified in connection with the content of its Article 37. Thus, Article 62 provides for the right and political freedom only under the conditions of Article 37, and thus only in the situation of territorial authority exercised by the Republic of Poland with which we never have outside its borders*." (Quotation from the order of Supreme Court of Republic of Poland, November 7 2023, I NSW 73/23).

54 See: Order of the Supreme Court of Republic of Poland of July 27 2020 r., I NSW 1098/20; Order of the Supreme Court of Republic of Poland of July 29 2020 r., I NSW 2786/20.

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