

# The Right to a Fair Trial Under Article 6 ECHR during the COVID-19 Pandemic: The Case of the Polish Administrative Judiciary System

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## ABSTRACT

**Purpose:** The aim of the study is to analyse the possibility of modifying procedural law in the context of the legislative measures taken in connection with the COVID-19 pandemic on the example of the Polish administrative judiciary system.

**Design/Methodology/Approach:** The study employs the dogmatic-legal method, analysing the provisions of the ECHR and examples of the regulation of administrative court proceedings in Poland. The interpretation of the provisions is carried out taking into account the jurisprudence of the courts, in particular the jurisprudence of the ECtHR.

**Findings:** The study shows that no regulation taking away the right to have the case heard in public is compliant with the ECHR. Public hearing is in fact a crucial aspect of the right to a fair trial. However, in order to mitigate the effects of a pandemic, states may introduce such solutions which – within the limits of art. 6 sec. 1 ECHR – modify the law.

**Academic contribution to the field:** The study suggests theoretical and general solutions to the problem that arose during the COVID-19 pandemic: whether and how certain aspects of the right to a fair trial can be limited without violating its essence. The issue is analysed from the perspective of the administrative judiciary and legal solutions adopted in Poland, but the conclusions may also apply to the regulations of other European countries and even to the civil or criminal judiciary.

**Practical Implications:** The paper presents the requirements provided in art. 6 sec. 1 ECHR in the context of restrictions of public hearing implemented to counteract the spread of the COVID-19 pandemic. It may be a basis for further studies of the problem or for assessing the solutions adopted in the member states of the Council of Europe.

**Originality/Value:** Publications concerning modifications to procedural law in the context of the COVID-19 pandemic are not numerous in scientific literature. Due to the lack of analyses, the paper will contribute to the development of literature.

*Keywords:* administration, administrative court proceedings, administrative courts, fair trial, right to a fair trial

*JEL:* K38, K41

## 1 Introduction

The COVID-19 pandemic has had an unprecedented impact across the globe. First of all, its scope was significant: it is the first pandemic that mankind is experiencing on a global scale. Its short-term effects were multi-faceted in scope. Immediately after the outbreak, its significant impact on the economy, international relations and social life was visible (Znojek et al., 2020; Saladino et al., 2020). The symbolic example of this was the postponement of the Summer Olympic Games scheduled for 2020 (Joint Statement from the International Olympic Committee and the Tokyo Organising Committee, 2020) and the cancellation of many of the cultural events planned for 2020 – including festivals and film premieres. Undoubtedly, the rate of increase in subsequent infections was also surprising: the first cases in central China were reported in December 2019 (WHO, 2020), and three months later, in March 2020, the World Health Organization recognized Europe as the epicentre of the epidemic (A statement of WHO Director-General, 2020).

The global scope and speed of the pandemic made it necessary to immediately take measures to counteract the increase in the number of infected. Lockdowns have become the basic instrument of the battle. In these conditions, however, it was necessary to ensure the proper functioning of the economy – primarily by maintaining the efficient functioning of state institutions, including courts. In 2020, many countries introduced solutions ensuring the intended continuity of the functioning of the judiciary. However, some of them limited the parties' right to direct contact with the trial judge or slowed down the document workflow, sometimes significantly affecting the settlement of the case within a reasonable time. This also applied to court and administrative cases, in which the correctness and legality of imposing a given obligation on an individual or granting the individual a specific right is examined. Hence, the question of the compliance of these special solutions with the right to a fair trial (which is one of the fundamental human rights already included in the ECHR) should be considered.

The study seeks an answer to the following question: should the slowdown in the examination of court cases resulting from the pandemic, or the restriction of party's participation in the hearing, be considered as possible violation of art. 6 sec. 1 ECHR? The indicated issue is important in the context of proceedings before administrative courts. They decide on the legality of burdening an

individual with a specific obligation or granting them a specific right. Therefore, their role is particularly important: they control state bodies and thus verify the admissibility of a specific state action against an individual. Efficient administrative courts are therefore the foundation for protecting citizens against illegal state activities.

Thus, a positive answer to above question leads to the conclusion that the COVID-19 pandemic may result in an increase in the number of complaints to the ECtHR regarding violation of art. 6 sec. 1 ECHR and in the number of remedies awarded by courts. On the other hand, a negative answer leads to the conclusion that the specific measures adopted to maintain the efficient administration of justice constitute a limitation of the right to a fair trial under the ECHR. The question arises whether the pandemic can be treated as a kind of “state of greater necessity”, suspending the full compliance with art. 6 sec. 1 ECHR. The problem of measures introduced during the pandemic is therefore of great importance for the protection of human rights.

The problem will be discussed with the example of Poland. The legislature of the country, beginning in March 2020, attempted to adjust the multifaceted counter the spread of pandemic COVID-19, significantly reducing the possibility of citizens to travel, pursue economic activity, and participate in court proceedings. At times, individuals were even relieved of certain procedural obligations during court procedures and the administrative court cases were heard in closed sessions. The Polish example should therefore be considered particularly interesting in the context of the legality of such activities in the light of art. 6 sec. 1 ECHR.

## **2 Methods**

As indicated above, the presented research problem concerns the analysis of the ECHR. For this reason, the Convention will be the main legal act examined in this study. The analysis will be carried out using not only a linguistic interpretation of the indicated legal text, but also a functional interpretation, including an analysis of the ECtHR jurisprudence, to a significant extent developing the key to the problem in art. 6 sec. 1 ECHR (Guide, 2020, pp. 6–13; Edel, 2007, pp. 7–11). Due to the fact that the discussed issue will be presented through the example of the Polish legal system, the provisions constituting the Polish administrative judiciary system will also be analysed, including the Polish Constitution, the law on proceedings before administrative courts and those normative acts under which the Polish legislator introduced special instruments during the pandemic, which were supposed to maintain the efficiency of the judiciary in terms of applying the principles resulting from art. 6 sec. 1 ECHR. It should be emphasized that, to a necessary extent, the views of the doctrine are also referred to. However, due to the new nature of the described legal measures and – as a consequence – the negligible number of works published after their introduction, the views of the doctrine cited above relate primarily to systemic issues. Thus, the study is based on the dogmatic and comparative law methods.

The structure of the study is as follows: first, art. 6 sec. 1 ECHR is analysed, in order to determine whether the requirements provided therein also apply to administrative judiciary in general, and if so – how the concepts of “reasonable time” for settling an administrative court case and the “public” hearing of a case should be understood. Subsequently, the assumptions of the Polish model of administrative judiciary and the normative content of the solutions adopted in this country in 2020 to counter the pandemic are examined. In that part of an article statistics are also presented. After the research carried out in this way, conclusions are drawn as to the scope of the regulations conformable with art. 6 sec. 1 ECHR, and the legality of Polish solutions is assessed.

### 3 Results

#### 3.1 The right to a fair trial

The provision of art. 6 sec. 1 ECHR states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

It should be noted that the provision of art. 6 sec. 1 ECHR relates not only to a civil or criminal court trial. According to the jurisprudence of the ECtHR, it also applies to proceedings in the field of administrative court cases (Guide, 2020, pp. 6–13; Edel, 2007, pp. 7–11). The ECtHR assumes that the subject of such cases is, in fact, the rights or obligations of private entities. For this reason, the ECtHR includes them in the category of civil matters (Guide, 2020, pp. 11–12; Edel, 2007, pp. 8–9; Aldo and Jean-Baptiste Zanatta v. France, 28 March 2000, § 22–26, Allan Jacobsson v. Sweden, 25 October 1989, § 72–74, Skärby v. Sweden, 28 June 1990, § 26–30, Tre Traktörer Aktiebolag v. Sweden, 7 July 1989, § 43–44). The proceedings before administrative courts shall be organised in such a way that two conditions are met: the reasonable time of hearing a case and openness of the proceedings.

Moving on to the question of “reasonable time” of hearing a case, it has to be highlighted that ECHR does not define this term. The ECtHR states that it means the examination of a case in which the activities of the proceedings are undertaken continuously, i.e. there are only necessary and justified breaks between individual activities (Beaumartin v. France, 24 November 1994, § 33). “Hearing a case within a reasonable time” means hearing with no delay that would threaten the effectiveness and credibility of the proceedings (Guide, 2020, p. 82; H. v. France, 24 October 1989, § 58; Katte Klitsche de la Grange v. Italy, 27 October 1994, § 61; Keaney v. Ireland, § 86, 30 April 2020; Scordino v. Italy, 29 March 2006, § 224; Martins Moreira v. Portugal, 26 October 1988,

§ 44). The problem of a reasonable time for hearing a case should therefore refer not to a calendar-based approach, but to the aspects such as: factual or legal complexity, the multiplicity of entities, conscientious fulfilment of procedural obligations by a complainant, regional or local conditions or the length of the pre-court proceedings (Guide, 2020, p. 82; Hadobás v. Hungary, 10 December 2020, § 6; Comingersoll S.A. v. Portugal, 6 April 2000, § 19; Keane v. Ireland, 30 April 2020, § 85, 89, 90, König v. Germany, 28 June 1978, § 98, Fabri and Langbroek, 2003, Edel 2007, p. 19).

The question of the length of the court proceedings is highlighted not only in the ECHR but also in EU law. In art. 47 of the Charter of Fundamental Rights of the European Union (Official Journal of EU "C" 2012, 326/02) it is stipulated that everyone is entitled to a fair and public hearing "within a reasonable time". Therefore, a reasonable time of court proceedings has to be considered as one of the grounds of effective court proceedings (Piątek, 2019, p. 170).

The problem of openness of the proceedings is also addressed in ECHR. The provision of art. 6 sec. 1 ECHR addresses this issue, stating that everyone has the right to a public hearing of his case. The jurisprudence of the ECtHR assumes that the public hearing of a case should be understood as such a structure of a court process in which social control of its course is guaranteed by its participants (parties) or third persons (Guide, 2020, p. 57; Diennet v. France, 26 September 1995, § 33; Martinie v. France, 12 April 2006, § 39; Fazliyski v. Bulgaria, 16 April 2013, § 69).

A special aspect of the public hearing of the case is the party's right to be heard (Fredin v. Sweden (No. 2), 23 February 1994, §§ 21–22; Allan Jacobsson v. Sweden (No. 2), 19 February 1998, § 46; Göc v. Turkey, 11 July 2002, § 47; Guide, 2020, p. 57). In its case law, the ECtHR deems it necessary to form a judicial procedure in which a party has the right to be heard in at least one instance (Guide, 2020, p. 58). However, it is significant that the obligation to include the guarantee of hearing a party in at least one instance is not absolute. The case law of the ECtHR provides for the possibility of departing from it in certain exceptional cases, such as when the case can be resolved based on the collected written materials, the subject matter of the case only covers legal issues or the specific nature of the case does not require a hearing, e.g. consideration of the case in the second or subsequent instance (Guide, 2020, p. 57–58; Miller v. Sweden, 8 February 2005, § 30; Allan Jacobsson v. Sweden (No. 2), 19 February 1998, § 48–49; Valová et al. v. Slovakia, 1 June 2004, § 65–68, Döry v. Sweden, 12 November 2002, § 37; Saccoccia v. Austria, 18 December 2008, § 73).

However, it should be remembered that court proceedings conducted without the possibility of applying for a public hearing are generally a violation of art. 6 sec. 1 ECHR. As the ECtHR stated, except in some situations, the parties to the dispute must at least be allowed to request a public hearing, although the court may reject such a request by holding a closed hearing due to the circumstances of the case, for legitimate reasons (Guide, 2020, p. 58; Martinie v. France, 12 April 2006, § 42). It should be noted that the jurisprudence pointed out that in relation to such cases, the reason for examining cases in writing or in camera

is potentially faster decision making (Guide, 2020, p. 58; Schuler-Zgraggen v. Switzerland, 24 June 1993, § 58; Döry v. Sweden, 12 November 2002, § 41).

Summing up, according to art. 6 sec. 1 ECHR, there are two grounds of a fair trial: hearing a case within reasonable time and openness of the proceedings. It has to be highlighted that both of them are of equal importance. Fast proceedings without active participation of parties may cause some difficulties in establishing the essence of the claim, false factual findings or judge's bias. On the other hand, in some circumstances the openness of the proceedings may slow down the trial and diminish the effectiveness of the adjudication. Therefore, the fair trial has to be based on the balance of those two grounds. From the perspective of the ECHR signatory states, the above-mentioned balance may be disturbed in a case where special circumstances (e.g. pandemic) occur. That creates a need to take some measures to maintain that balance. However, the ECHR does not specify a nature of those measures: it depends on the legal system concerned and the nature of the specific circumstances. In this sense, the legal norm contained in art. 6 sec. 1 ECHR require a continuous shaping of balance between the openness of and the timeframes of court proceedings, depending on the circumstances.

### 3.2 The Polish model

Moving on to the analysis of the Polish legal solutions, it should first be noted that in the Polish legal system the administrative courts are among a small number of bodies – alongside the Supreme Court, common courts and military courts – which exercise justice (art. 175 sec. 1 of the Polish Constitution). As a consequence, they are subject to the requirement to structure the court procedure in such a way that the court case is heard publicly and without undue delay. This obligation, which is particularly important, is regulated at the constitutional level (art. 45 sec. 1 of the Polish Constitution). The issue of public and quick hearing of a court case is therefore treated as the foundation not only of the Polish judiciary, but of the Polish legal system in general (Sawczyn, 2016, p. 83).

The proceedings of administrative courts in Poland were regulated in the Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws of Poland 2019, item 2325 as amended, further named “PPSA”). The adopted model of administrative justice provides that they are two-instance proceedings and court cases are heard publicly (art. 10 and art. 90 para. 1 PPSA; Tarno, 2016, p. 217). However, in some cases it takes place at a cabinet meeting, namely:

- 1) when the public examination of the case would pose a threat to morality, state security or public order, or when circumstances constituting classified information could be revealed, as well as at the party's request, due to an important private interest (art. 96 PPSA); in this situation, the party, its statutory representative or attorney, prosecutor and persons of trust, two on each side, have access to the meeting at which the case is examined,

however, the announcement of the ruling ending the proceedings in the case is public and other persons may be present during it (art. 97 PPSA),  
2) in the cases considered within the simplified procedure (art. 120 PPSA), incidental issues, for instance, in the application for the suspension of the contested decision, and in the case of an appeal against a decision of a court of first instance (an appeal or a complaint); however, the parties or other persons do not have the right to enter the meeting in these cases, unless explicitly summoned, which is exceptional and very rare.

Hence, examination of a case with the limitation or exclusion of the public applies to special cases. However, in the latter situation the case is excluded from the public examination. This is dictated by the lack of a need to hear the parties, resulting either from the simple and obvious nature of the allegations, or by the parties' clear declaration of waiving the hearing. Importantly, even when the case is examined in closed session, a party and other entities may learn of the content of the decision made at the meeting, because it is delivered to them *ex officio*, and also made available at the court registry (art.139, para. 4–5 PPSA).

As for the issue of examining an administrative court case without undue delay, it should be emphasized that this procedure does not have a predetermined duration (Tarno, 2016, p. 215). However, in cases where a party alleges that the court is inactive or that a procedure is excessive, it is possible to bring a specific complaint in these matters. This is possible under the Act of 17 June 2004 on a complaint for violation of a party's right to hear a case in preparatory proceedings conducted or supervised by the prosecutor and in court proceedings without undue delay (Journal of Laws of Poland, No. 179, item 1843 as amended). In the case of administrative court cases, such a complaint is heard by the Supreme Administrative Court (art. 4 sec. 3 of above-mentioned act).

The described solutions are therefore in line with the model formulated in art. 6 sec. 1 ECHR. They guarantee the public hearing of the case and enable intervention both in supervision and in the case of complaints and compensation in the event of delays in hearing the case. At the same time, the system of the Polish administrative judiciary also provided for a kind of balance between public guarantees and quick hearing of the case: in some cases, a faster procedure was foreseen, expressed in the limitation of public proceedings, dictated by the simple nature of the case or the express consent of the parties.

The above model has undergone a significant transformation due to the COVID-19 pandemic. First of all, there was the adoption of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them (Journal of Laws of Poland, 2020, item 374). This act introduced regulations on many issues of social life in Poland, such as the wide admissibility of remote working, additional social assistance benefits, special rules of security control at airports, rules for the construction of temporary facilities to counteract a pandemic, settlements between the parties in the event of withdrawal from contracts for tourist benefits, quarantining citizens and forced hospitaliza-

tion, closure of schools. It should be noted that the aim of the regulations was to prevent the increase in the number of infections and cases of COVID-19 (Draft of the Act of 2 March 2020, p. 24). It was therefore about preventing the development of a pandemic. The aforementioned act has been amended many times since it entered into force, i.e. from 8 March 2020, which has been justified by the dynamic epidemic situation and the necessity to introduce further remedial measures, with the simultaneous need to repeal those previously introduced (Draft amendment to the Act of 26 October 2020).

As for court proceedings – including proceedings before administrative courts – the Act did not contain any provisions concerning this issue in its original wording. The proceedings were therefore conducted according to the general regulation. However, it should be noted that in the first half of March, most presidents of courts in Poland cancelled the hearings scheduled for that month. The reason for the above-mentioned action was to stop the increasing number of COVID-19 infections in Poland: as of 31 March 2020, the number of infected was 2,311 people, of which 33 died (Government Report, 31 March 2020).

Later on the amendment the Act of 31 March 2020 (Journal of Laws of Poland, 2020, item 568) introducing two instruments was brought in. The first measure suspended the time limits for taking procedural steps, both those arising from the statutes and those imposed by the courts during the hearings (art. 15zzu sec. 1 p. 1 and 15zzs sec. 1 p. 1). Thus, for example, if – in accordance with the general regulations of the procedure – the complainant was obliged to supplement the lack of a formal letter submitted to the court within seven days (art. 49 para. 1 in connection with art. 58 para. 1 p. 3 of the PPSA), then when the said amendment entered into force, he did not have to observe this deadline. This means that he could make up for this deficiency after the expiry of that period, or refrain from supplementing it at all until the legislator resumed the time limits due to a decrease in the level of epidemic risk. Similarly, a complainant wishing to lodge an appeal could do so within the period of 30 days from receiving the judgment and justification, however, an appeal could be lodged at a later date. Obviously, the described instrument was of an ad hoc nature and – although it was not explicitly mentioned in the draft act – it was aimed at the immediate limiting contact between the public in connection with the necessity to submit documents. Contact between citizens was to be limited, for example in post offices or in law offices.

Secondly, the holding of hearings and other open sessions, except for urgent cases, were suspended until further notice (art. 15zzs sec. 1 point 6). Hearings scheduled for dates after the entry into force of the law were to be cancelled. Importantly, in the discussed cases, the possibility of lodging complaints about the excessive length of proceedings under the Act of 17 June 2004 was excluded (art. 15zzs sec. 11).

Further solutions were introduced by the amendment to the Act of 15 May 2020 (Journal of Laws of Poland 2020, item 875), which repealed the above-mentioned art. 15zzs providing for the suspension of deadlines and the top-down cancellation of hearings. The result of the above was, firstly,



the resumption of time limits for the performance of procedural steps and, secondly, commencing examination of the complaints already lodged. In this respect, however, a certain threat related to people gathering, e.g. in court buildings, which in practice could lead to an increase in the number of infections, was noticed. Hence, undoubtedly the most important change in the field of special measures was adopted: the new, extensive regulation of the forum where court cases were to be heard. The courts gained the possibility to hear cases in closed cabinet sessions without the participation of the parties to a greater extent than before.

In art. 15zszs<sup>4</sup> sec. 1 and 3 of the Act, the principle of hearing administrative court cases in closed sessions was established. It was a reversal of the rule from the general model of administrative court proceedings, in which – as indicated above – the examination of the case at a cabinet session (in camera) was an exception, applicable only in exhaustively listed cases. Therefore, voivodeship administrative courts obtained the possibility to hear cases in closed sessions also because of the excessive threat to the life or health of the people participating in this trial, when a trial is necessary, but it is not possible to do so at a distance, with the simultaneous direct transmission of the image and sound. On the other hand, in the case of the Supreme Administrative Court, it became possible to hear a case in closed session also when the parties, by submitting the appeal, did not renounce the hearing or after receiving notification that the case would be heard in closed session, did not demand a public hearing.

The Polish legislator, adopting the above-discussed solution, tried to adapt the procedural regulations to the new reality. If the amendment had not been introduced, it would have entailed that cases would have been heard in public, which would probably have caused an increase in the number of COVID-19 infections. On the other hand, the further long-term suspension of the proceedings would have resulted in court cases being prolonged, the number of which – in view of the continued influx of court cases – would have increased.

The data indicate that the discussed regulation had an impact on administrative court proceedings. First of all, it resulted in an increase in the number of cases examined in closed sessions. In 2020, at such sessions, 33,384 complaints against a total of 53,820 were examined by voivodeship administrative courts. In comparison, in 2019 a number of 19,032 cases were heard in camera, for a total of 58,348 complaints, in 2018 - 21,580 for a total of 62,217 cases, and in 2017 – 22,640 for a total of 71,327 complaints. The data are presented in the table below:

**Table 1. Number of cases heard in camera by voivodeship administrative courts**

Year	Total number of cases heard	Cases heard in camera
2017	71327	22640 (31.74%)
2018	62217	21580 (34.68%)
2019	58348	19032 (32.61%)
2020	53820	33384 (62.02%)

Source: Supreme Administrative Court, 2018, p. 17; Supreme Administrative Court, 2019, p. 15; Supreme Administrative Court, 2020, p. 13; Supreme Administrative Court, 2021, p. 13.

The introduced regulation had a similar impact on the number of cases heard in camera before Supreme Administrative Court. In 2020 total number of cases heard by this court was 12,581 and 67,18% of them (8,452 cases) were heard in camera. In comparison, in previous years the percentage of cases heard before Supreme Administrative Court was lower (24,06% in 2019, 35,03% in 2018 and 22,83% in 2017). The data are presented in the table below:

**Table 2. Number of cases held in camera by Supreme Administrative Court**

Year	Total number of cases heard	Cases heard in camera (%)
2017	19,192	4,381 (22.82%)
2018	18,897	6,619 (35.02%)
2019	16,375	3,940 (24.06%)
2020	12,581	8,452 (67,18%)

Source: Supreme Administrative Court, 2018, p. 21; Supreme Administrative Court, 2019, p. 19; Supreme Administrative Court, 2020, p. 17; Supreme Administrative Court, 2021, p. 17.

Secondly, it should be considered whether the increase in the number of cases heard in camera had an impact on the pace of the proceedings. It should be noted that the time of proceedings before voivodeship administrative courts has not significantly accelerated, but the pace of litigation from pre-pandemic period has been maintained. Data indicate that in 2020 those courts settled 39.94% of all complaints within 3 months and 73.71% of complaints within 6 months. In 2019, these were respectively 44.01% of all complaints within 3 months and 81.28% of all complaints within 6 months. In 2018, these figures were 44.85% and 76.74%, respectively, and in 2017, 41.92% were settled within 3 months and 73.20% within 6 months. The data are presented in the table below:

**Table 3. Percentage of cases settled by voivodeship administrative courts settled within 3 and 6 months**

Year	Cases settled within 3 months	Cases settled within 6 months
2017	41.92%	73.20%
2018	44.85%	76.74%
2019	44.01%	81.28%
2020	39.94%	73.71%

Source: Supreme Administrative Court, 2018, p. 18; Supreme Administrative Court, 2019, p. 16; Supreme Administrative Court, 2020, p. 14; Supreme Administrative Court, 2021, p. 14.

A similar conclusion can be drawn for the analysis of data on the percentage of cases heard by the Supreme Administrative Court. In 2020, the percentage of cassation complaints settled within 12 months of their receipt was 44.06%. This is significant compared to the previous years, when the numbers were 23.54% (2019), 36.45% (2018) and 27.96% (2017). Moreover, in the case of the Supreme Administrative Court, it can be concluded that not only has the current pace of examining cases been maintained, but it has also accelerated (Supreme Administrative Court, 2018, p. 22; Supreme Administrative Court, 2019, p. 19; Supreme Administrative Court, 2020, p. 18; Supreme Administrative Court, 2021, p. 18).

Importantly, the Polish legislator did not decide to adopt solutions that would enable, for example, the full digitization of court proceedings, i.e. online hearings, the digitization of court files or the introduction of e-service. It seems that – although such solutions are assessed positively, and efforts are made in Polish law to implement them as widely as possible – it would be extremely difficult due to the low level of digitization in Poland (Gutowski and Kardas, 2020). As a consequence, digitization could introduce additional confusion instead of streamlining the work of courts, which would limit the right of active participation of the parties in the proceedings and hinder the timely hearing of cases.

## **4 Discussion**

The research leads to the conclusion that neither the slowdown in court cases resulting from the pandemic nor limiting the parties' access to their case being heard in public cannot in themselves be considered violations of art. 6 sec. 1 ECHR. There are two reasons for this conclusion. First, both the timeframe and circumstances of the case should be considered. The latter concept covers such aspects of the case as: factual and legal complexity, behaviour of individuals during the proceedings (including, in particular, the fulfilment of procedural obligations), actions necessary to be taken, and the importance of the case. The estimation of the reasonable time should also include the circumstances coexisting with the ongoing process. In this context, the fact that the case is heard during a pandemic should also be considered.

Secondly, although art. 6 sec. 1 ECHR stated that cases should be heard in public, the jurisprudence of the ECtHR indicates that this obligation is not absolute and does not have to be fulfilled in a situation where a case may be resolved on the basis of the materials collected in writing, if only legal issues or an appeal are examined, and if the party had the opportunity to be heard at an earlier stage of the case. This remark is important primarily in the context of administrative court cases, the subject of which is the control of the correctness or legality of actions taken by public administration.

Regarding the latter, however, it should be emphasized that it is of primary importance in terms of the speed of the process. The importance of the public examination of the case, resulting from its social and control aspect, is the factor that impacts on the opinion of an individual on the effectiveness of the justice system. Moreover, the public nature of the hearing may be important for the adjudications in complex cases. Hence, it should be assumed that the public hearing is a particularly protected value, and for this reason, although the introduction of certain restrictions (especially in the field of direct contact between an individual party and a judge) seems necessary, it should not be absolute and without exceptions.

The comparison of the model provided for in the ECHR with the Polish regulation leads to the conclusion that the model resulting from art. 6 sec. 1 ECHR is maintained. The Polish administrative courts supervise public administration in the field of the legality of its action (art. 3 § 2 PPSA). Consequently, in the Polish administrative court proceedings no evidence proceedings are carried out, and the arguments of the parties need to prove the violation of the law by the authority whose act or the action has been contested (art. 145-150 PPSA and art. 174 PPSA). As indicated above, ECtHR in such cases allows the case to be examined at a cabinet meeting or *in camera*. However, it should be noted that even taking into account the above factors, the exclusion from the obligation to hold a hearing should not be absolute. The need to obtain some additional explanations from the party may always occur and in such a situation, the court should be able to adjudicate the case after it has been publicly heard at the hearing.

However, in the context of the Polish model of solutions adopted during the pandemic, the regulation from the spring of 2020, suspending time limits, should be assessed negatively. This regulation in fact stopped the course of court proceedings and, as a consequence, led to delays in the settlement of a cases. A certain justification for such regulation was, of course, the need to quickly stop the increase in the number of infections, however, it seems that this particular regulation did not have a major impact on this effect and after the resumption of the ordinary course of proceedings, time limits in all court cases applied again, which entailed people gathered to a greater extent than would have been the case if time limits had not been suspended (on a marginal note, it should be mentioned that due to the unclear wording of the provisions, it was not clear from when the deadlines apply – see Rojek-Socha, 2020). I therefore believe that this measure should not be recommended for the future.

In the context of the research, the question whether the threat of a pandemic can be regarded as the basis for law incompatible with art. 6 sec. 1 ECHR is of extreme importance. In other words: may the rights of individuals under art. 6 sec. 1 ECHR be suspended during a pandemic? Based on the analysis carried out, I believe that none of the provisions of the Convention grants such a possibility. Consequently, any amendments to court procedures must take into account the requirements set out in art. 6 sec. 1 ECHR even during a pandemic. Importantly, however, the parties' guarantees provided for in the provisions of procedures (including administrative court procedures) may be subject to a specific modification. For example, the catalogue of cases in which the court may hear cases in closed session could be increased, or an electronic communication forum could be used when holding hearings.

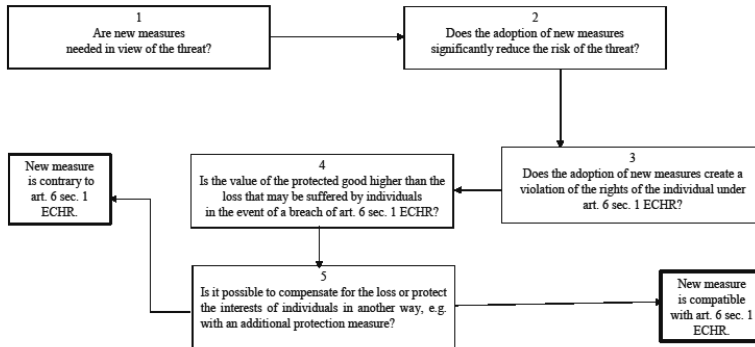
In my opinion, however, when assessing the admissibility of certain modifications of court proceedings necessary during a pandemic, the state should subject the draft amendments to a specific test with the questions presented below. This test is of a broader nature than just the COVID-19 pandemic. I believe that it can be applied to any extraordinary circumstance that may have a long-lasting effect on the efficiency of court proceedings. Projects accepted in such cases should be subject to the following analysis:

- 1) are new measures needed in view of the threat (e.g. a pandemic)?
- 2) does the adoption of new measures significantly reduce the risk of the threat?
- 3) does the adoption of new measures create a violation of the rights of the individual under art. 6 sec. 1 ECHR?
- 4) is the value of the protected good higher than the loss that may be suffered by individuals in the event of a breach of art. 6 sec. 1 ECHR?
- 5) is it possible to compensate for the loss, or to protect the interests of individuals in another way, e.g. with an additional protection measure?

Questions 1) and 2) relate to the general need to amend the provisions on court proceedings. Question 3) refers to the potential threat of violation of art. 6 sec. 1 ECHR. If the answer is affirmative, questions 4) and 5) allow for supplementing the proposed amendment with solutions that will ensure the rights of individuals in the new reality. The test may be presented graphically as below:

Graph 1. A graphic presentation of the above-mentioned test

THE ARTICLE 6 SEC. 1 ECHR TEST



Source: author’s own study.

Apart from “hard” legislation, there is also a need to introduce soft measures that will allow for quick familiarization with the essence of the solutions adopted, the resulting potential threats to the right to a fair trial and the measures introduced to compensate for possible violations. The importance of general communication between the government and society should also be emphasized, an element of which should be simple and precise information about the measures taken and the consequences of violations. This problem is important especially in the context of Poland. Difficulties in clearly communicating the introduced restrictions has led to different interpretations, not only by citizens, but also by administrative bodies. For instance, on the night of 31 December 2020 a curfew was introduced, which the Prime Minister of Poland interpreted as a “recommendation to citizens”, not an order – while the Police authorities interpreted it otherwise (Polish Press Agency, 2020).

Moreover, there is also another important point to consider. Namely, since referring the case to a closed session in cases where no factual findings are made, or where the subject is solely a legal issue, is permissible from the perspective of art. 6 sec. 1 ECHR, should not consideration be given to applying the general form of a closed session to a greater extent than before? This will undoubtedly contribute to timely proceedings. Although the public hearing of the case is part of the elementary canon, it should be assumed that in certain categories of cases, due to their specificity or complexity, the right of the party to be heard during the trial takes only an illusory form. For this reason, I believe that in such cases it should be implemented, for example, in the form of written statements relating to specific issues of the case.

This applies in particular to administrative court cases, where the subject of the case is the legality of public administration’s actions. In my opinion, the use of cabinet hearings in those cases does not limit the party’s right to a public hearing, but gives the party the opportunity to present its statements and claims in a more comprehensive manner in writing. It also gives the judge the

opportunity to consider the submitted statements, assess the correctness of the arguments and provide a broad interpretation of legal provisions. I believe that while maintaining the discretionary power of the judge to refer the case to a hearing, the forum for a closed session will not constitute a violation of art. 6 sec. 1 ECHR.

It should also be highlighted that the problem of the forum is also important in the context of the speed of the proceedings. The informal nature of the cabinet meeting and the possibility of holding it anywhere (based on scans of the documentation left in the original in court) undoubtedly mean that the cases will be dealt with faster. Court proceedings in such cases are also independent of any external circumstances, such as the parties' failure to appear, or notification errors resulting in the need to adjourn the meeting, logistical difficulties at the court (e.g. a limited number of courtrooms), or limitations or effects resulting from a pandemic. Therefore, in my opinion, the form of a closed cabinet session is more favourable for a party, as it has the possibility of obtaining a decision on its case faster than in the event of a hearing. This is important above all for obvious, simple cases where there is no need to make far-reaching arrangements with the party.

## **5 Conclusion**

In conclusion, the COVID-19 pandemic undoubtedly significantly and unexpectedly affected the world in 2020. However, it should not be considered as a ground for lowering the speed of court trials nor a ground for restrictions in public hearings of a case in a higher extent than necessary. The right to hear a case within a reasonable time and the right to a public hearing are guaranteed under art. 6 sec. 1 ECHR. In the event of extraordinary circumstances (e.g. pandemic) countries shall adopt some extraordinary solutions in the aim of securing fair trial. In this context and to counteract the spread of the coronavirus, certain shortcomings of the regulations have become apparent, which are worth discussing. That includes hearing cases in camera when it is sufficient due to the nature of the dispute, e.g. when it can be resolved based on the collected written materials, the subject matter of the case only covers legal issues or the case is considered in the second or subsequent instance.

The latter circumstance relates especially to the proceedings before Polish administrative courts. In Poland, this division of the judiciary deals mainly with the control of the legality of public administration actions. Therefore, the need for active participation of the parties in the examination of the case is less than in the case of, for example, civil or criminal cases. The regulations in the field of lowering the speed of court proceedings or restricting openness of case hearing should be considered only in the context of granting a protection of the right to a fair trial arising from ECHR though.

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