



Human Rights Committee

Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015

Information provided by the Commissioner for Human Rights of the Republic of Poland (*Rzecznik Praw Obywatelskich*) in accordance with the International Covenant on Civil and Political Rights in connection with the consideration of the seventh periodic report of the Republic of Poland covering the period from 15 October 2008 until 31 October 2015

6 October 2016

Contents

| | <i>Paragraphs</i> | <i>Page</i> |
|---|-------------------|-------------|
| Introduction..... | | 3 |
| General information..... | 1-3 | 4 |
| Articles 2, 3 and 26 | 4-7 | 5 |
| Articles 2, 7 and 9..... | 8-9 | 7 |
| Articles 2, para. 1, 20, 26 and 27..... | 10-12 | 8 |
| Articles 2, 3, 7 and 26..... | 13-16 | 10 |
| Article 6..... | 17-19 | 12 |
| Article 7..... | 20-22 | 13 |
| Article 8..... | 23 | 14 |
| Articles 9 and 10..... | 24-29 | 14 |
| Articles 7, 9, 10, 12 and 24..... | 30-34 | 17 |
| Articles 14 and 9..... | 35-37 | 19 |
| Article 17..... | 38 | 20 |
| Articles 19 and 21..... | 39-41 | 21 |
| Articles 9, 10 and 24..... | 42-45 | 21 |
| Articles 2, 25 and 26..... | 46 | 23 |

Content of the Information provided by the Commissioner for Human Rights of the Republic of Poland corresponds with the List of issues in relation to the seventh periodic report of Poland.

INTRODUCTION

The Commissioner for Human Rights is the constitutionally established authority responsible for protection of rights and freedoms guaranteed in the Constitution of the Republic of Poland, and in the ratified international human rights' treaties. In his activities, the Commissioner is independent from other state authorities.

The Commissioner acts pursuant to the Constitution of the Republic of Poland and the Commissioner for Human Rights Act of 15 July 1987. The Commissioner is appointed by the lower chamber of the Parliament (Sejm) and approved by the higher chamber of the Parliament (Senate) for a 5-year term of office.

The Commissioner for Human Rights safeguards human and civic freedoms and rights specified in the Constitution and other legal acts. In order to fulfill these tasks, the Commissioner investigates whether actions undertaken or abandoned by the entities, organizations or institutions obliged to observe and implement human rights have not led to infringement of the law or the principles of social coexistence and justice, and undertakes appropriate measures.

I. GENERAL INFORMATION

Financial and human resources of the Commissioner for Human Rights (2)¹

1. [budget for 2016] In 2016, the Commissioner for Human Rights was not granted the budget he applied for. Moreover, the budget was decreased. The budget of the Commissioner for Human Rights in 2015 was 38,602,000 PLN. The Commissioner applied for an increase in 2016 by 18% i.e. to 45,566,000 PLN. The Parliament, however, reduced the budget by 9,947,000 PLN, i.e. to 35,619,000 PLN which equals to the Commissioner's budget allocated in 2011. One of the reasons for decreasing the budget, as explained by the Members of the Polish Parliament, was the Commissioner's engagement in discrimination issues.

2. [financial resources] The financial resources provided by the Parliament are not sufficient for the effective fulfillment of all statutory obligations of the Commissioner and additional tasks assigned to the Commissioner in recent years with respect to the National Preventive Mechanism, monitoring of the implementation of the United Nations Convention on the Rights of Persons with Disabilities, and performance of tasks as so called "equality body" under the EU anti-discrimination directives. The problem of insufficient funding is particularly evident in the case of the National Preventive Mechanism. According to the Act on the Commissioner for Human Rights, the Commissioner shall perform the function of mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (National Preventive Mechanism) within the meaning of the Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment adopted by the United Nations General Assembly in New York on 18 December 2002 (hereinafter: OPCAT). The tasks of the National Preventive Mechanism include visiting prisons and pre-trial detention centers, juvenile detention centers and juvenile shelters, social care centers, psychiatric facilities etc. Those tasks are carried out by 11 professional members of the personnel. Currently, the Commissioner for Human Rights is able to control only 120 places of detention annually. Therefore, statistically one institution can be controlled every 18 years. The reduction in the budget of the Commissioner for Human Rights in 2016 also adversely affected the duration of the period

¹ Numbers in brackets indicate the paragraph from the List of issues in relation to the seventh periodic report of Poland, adopted by the Committee at its 111th session (7-25 July 2014).

for examining filed applications, including cassations (i.e. extraordinary appeal against final judgement) in criminal cases. In previous years, nearly 3,000 applications for cassation were submitted. They were handled by a specialized group of employees of the Criminal Law Team composed of 7 persons only.

3. [human resources] The Office of the Commissioner for Human Rights employs 292 people. Such number of employees is fully justified by the large number of cases filed with the Commissioner - in 2015 there were over 57,000 applications filed. Since 2009, the salaries of the Commissioner's Office employees have been frozen. The Commissioner was granted additional funds in 2012 and 2013, however, they were used solely for the establishment of new posts required for the performance of additional tasks mentioned above (especially National Preventive Mechanism).

II. ISSUES RELATING TO THE SPECIFIC PROVISIONS OF THE COVENANT

Constitutional and legal framework within which the Covenant is implemented - Articles 2, 3 and 26 (4)

4. [Equal Treatment Act - grounds for discrimination] According to Article 32 of the Constitution, all persons are equal before the law and have the right to equal treatment by public authorities. No one may be discriminated against in political, social or economic life for any reason. Despite the existence of the constitutional standard described above as well as adoption of the Act of 3 December 2010 on the implementation of certain European Union's provisions on equal treatment (hereinafter: the Equal Treatment Act), according to the Commissioner, the guarantees of equal and effective protection against discrimination have not been sufficiently ensured in Polish law. The Equal Treatment Act lays down a closed catalogue of grounds for prohibited discrimination including gender, race, ethnic origin, nationality, religion, denomination, belief, disability, age and sexual orientation. Further, the Equal Treatment Act also establishes limited protection from discrimination in different areas, taking into account only specific grounds. Unequal treatment in education and health care is only explicitly prohibited on the grounds of race, ethnic origin or nationality. Unequal treatment with regard to access to and the conditions of making use of social security, services, including residential services, objects and with regard to the acquisition of rights and energy, if they are offered publicly, is prohibited only on the

grounds of gender and race, ethnic origin or nationality. Victims of discrimination in the areas mentioned above, because of grounds not covered by the Equal Treatment Act, are not equally protected by the law. On the other hand, the Labour Code lays down an open catalogue of the grounds for prohibited discrimination in employment but it does not apply to employees working under civil law contracts. Additionally, discrimination is also prohibited in the Law on Broadcasting (Article 13b) which states that commercial message may not include any discrimination on grounds of race, gender, nationality, ethnic origin, religion or belief, disability, age or sexual orientation.

5. [Equal Treatment Act - prescribed measures] The Commissioner critically assesses the effectiveness of measures intended for protecting and counteracting discrimination. According to the Equal Treatment Act, a person against whom the principle of equal treatment has been violated, is entitled to pecuniary damages. Such remedy should also include compensation for harm.

6. [Equal Treatment Act - motion to the Constitutional Tribunal] The Equal Treatment Act was not amended although the Commissioner submitted numerous recommendations on that issue. For the reasons stated above, the Commissioner for Human Rights filed the motion to the Constitutional Tribunal with respect to the Equal Treatment Act. The Commissioner pointed out that the Equal Treatment Act does not cover certain social groups which unjustifiably differentiates the procedural situation of the discriminated persons and is contrary to the constitutional principle of equality, the right to a fair trial and the provisions of the Convention on the Rights of Persons with Disabilities².

7. [National Action Programme for Equal Treatment for 2013-2016] The Governmental National Action Programme for Equal Treatment for 2013-2016 might be considered as a significant instrument which could shape governmental policy on counteracting discrimination. In Commissioner's opinion the Programme had only limited impact on the real agenda. Currently, the Government Plenipotentiary for Civic Society and Equal Treatment coordinates the preparation of the final report on the Programme's execution. In compliance with the Equal Treatment Act the Plenipotentiary should also present to the

² The motion of the Commissioner to the Constitutional Tribunal as of 31 March 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Wniosek_do_Trybunalu_Konstytucyjnego_ws_zakresu_stosowania_ustawy_o_rownym_traktowaniu.pdf

Council of Ministers a new Programme for the coming years, but taking into consideration the Plenipotentiary's statements, it is still unclear whether such document will be prepared. Additionally, to the Commissioner's knowledge proper public consultations are not held yet.

Counter-terrorism measures - Articles 2, 7 and 9 (5)

8. [anti-terrorism legislation] The Commissioner critically assesses certain provisions of the new Act on counter-terrorism measures adopted on 10 June 2016 as to their compliance with fundamental rights enshrined in the Constitution. Drafting of the law was not subject to public consultations. The government to great extent ignored statements and critical comments of the Commissioner as well as of the civil society organizations. As a result, the Commissioner filed a motion to the Constitutional Tribunal and challenged several provisions of the Act, inter alia those referring to the foreigners, grounds for arrest and blocking of certain computer data as well as to the competences of the Head of the Internal Security Agency³. According to the Act, people who do not have Polish citizenship may be subject to surveillance and may be considered terrorist, solely because they are foreigners. They might be also subject to surveillance and phone tapping without court oversight and subject to fingerprinting and collecting of DNA samples at any time. The Act also allows police to arrest individuals based on a "probability" that they are going to commit or had committed a terrorist act. Individuals can be held for a period of 14 days before judicial review occurs. Moreover, the Act allows to block specific "computer data" as being affiliated with a terrorist event, or "telecommunication services" designed or used to cause the event of a terrorist nature, without providing a clear definition of such data and services, which could lead to malpractice. Finally, the Head of the Internal Security Agency is allowed to freely access the data and information stored in public registers, as well as to inspect any video recorders placed in public buildings, at public roads and other public places. The Head of the Internal Security Agency has also the task to keep a record of people who could be related to the "event of a terrorist nature".

³ The motion of the Commissioner to the Constitutional Tribunal as of 11 July 2016, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20w%20sprawie%20ustawy%20antyterrorystycznej%2011%20lipca%202016.pdf>

9. [rendition and detention programmes] The case of the secret CIA prison at Stare Kiejkuty has been under the review of the Commissioner since 2005, when media reported on foreigners suspected of terrorism, deprived of liberty on the territory of Poland. In 2007 the authorized employees of the Office of the Commissioner made a visit to the unit in Stare Kiejkuty and the airport in Szymany. Unfortunately, it was not possible to unequivocally confirm cases of transit through the territory of Poland and detention of terrorism suspects. Since 2009 the criminal proceedings regarding the illegal deprivation of liberty in Poland are conducted by the public prosecutor. In the recent months the prosecutor's office filed numerous requests for international legal assistance to the United States, the UK and the United Arab Emirates, as well as questioned further witnesses. The Prosecutor noted, however, that it is not possible to specify the deadline for completion of the investigation at this stage⁴. In 2014 the European Court of Human Rights issued two judgments in cases Al Nashiri against Poland⁵ and Abu Zubaydah against Poland⁶ in which it confirmed the human rights infringements.

Non-discrimination, incitement to national, racial or religious hatred, equality before the law and rights of persons belonging to minorities - Article 2, para. 1, 20, 26 and 27 (6-8)

10. [large scale of violence motivated by prejudice] According to a survey conducted in Poland in 2011 on a sample of 11,144 LGBT people, every eighth respondent experienced physical violence during two years prior to the survey, while almost every second - psychological violence, including hate speech⁷. Different forms of violence were experienced by more than 90% of respondents with intellectual disabilities. As many as 60% of respondents experienced physical violence, more than half of the respondents -

⁴ The current information about this case available in Polish at: <https://www.rpo.gov.pl/pl/content/prokuratura-informuje-rpo-co-dzieje-sie-w-sprawie-tajnych-wiezien-cia>

⁵ The ECHR judgement as of 24 July 2014, application no. 28761/11.

⁶ The ECHR judgement as of 24 July 2014, application no. 7511/13.

⁷ M. Abramowicz, The social situation of LGBT people. The analyze of the data from the survey [in:] The social situation of LGBT people. Report from the period 2010 – 2011, edited by M. Makuchowskiej i M. Pawłęgi. Campaign Against Homophobia 2012, page 29 and 37.

imprisonment and nearly one in three - sexual violence⁸. Due to the fact that violence against non-heterosexual people, transgender people, the elderly and people with disabilities is motivated by prejudice of the offender, cases of this kind require increased efforts to detect, investigate and punish. Firm response of the state to any manifestation of this type of violence is essential for protection of the rights and freedoms of victims of crimes motivated by prejudice. Unfortunately the Commissioner often observes lack of rapid and adequate response of the competent authorities to such acts.

11. [prosecution of hate crimes] The Commissioner underlines the need to amend the Criminal Code⁹ to more effectively combat discrimination. Currently, the hate crimes under Articles 119, 256 and 257 of the Criminal Code refer only to nationality, ethnic, racial and religious background. In Commissioner's view, hate crimes should also encompass such grounds as disability, age, sexual orientation and gender identity. Despite the letter of the Commissioner to the Minister of Justice¹⁰, underlining the need to amend the Criminal Code to include all crimes motivated by prejudice, the Minister of Justice does not currently work on this kind of amendment. Furthermore, it is essential to provide consistent and effective prosecution and punishment of perpetrators of hate crimes. In recent years the number of proceedings increased significantly - from 60 in 2006, 182 in 2010, 323 in 2011, 473 in 2012, 835 in 2013, 1365 in 2014 and 1548 in 2015. According to the Criminal Bureau of the Police Headquarter, in the first quarter of 2016, 172 preparatory proceedings were instituted in this respect. The Commissioner also points out the need to take measures aimed at promoting tolerance among the society and raising awareness with respect to hate crimes. Many victims do not make any notification on offence committed against them. Social acceptance and the lack of prompt and adequate response by the competent state bodies to incidents motivated by hatred result in building-up hostile attitudes in society.

12. [Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance] The Commissioner positively evaluated establishing of the Council for the

⁸ Violence against people with intellectual disabilities. The pilot survey. Polish Association for Persons with Intellectual Disability in Mazowieckie, the survey conducted on a sample of 90 respondents.

⁹ The statement of the Commissioner to the Minister of Justice as of 11 February 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/2/XI.816.10.2015/655531.pdf> and previously as of 22 October 2015, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-ms-ws-ochrony-ofiar-przestepstw-z-nienawisci>

¹⁰ The statement of the Commissioner to the Minister of Justice as of 11 February 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_ochrony_praw_osob_szczegolnie_narazonych_na_przemoc_motywowana_uprzedzeniami.pdf

Prevention of Racial Discrimination, Xenophobia and Related Intolerance, which was a forum for the exchange of information and cooperation between the government and other public institutions and non-governmental organizations in order to improve the situation of minorities. The Council operated between 2013 and April 2016. Although its potential was not fully used, the Commissioner criticized the decision of the Prime Minister to dissolve this institution¹¹.

Violence against women and equal rights of men and women - Articles 2, 3, 7 and 26 (9-10)

13. [gender gap in politics] The Commissioner acknowledges a relatively low level of women exercising their right to stand for election, as well as insufficient participation of women in the composition of public authorities. Striving for changes in this area, comprehensive initiatives in the field of education and promotion, in particular addressed to potential candidates, but also political parties and electoral committees, should be prepared and implemented in order to highlight the issues of gender equality in various dimensions of their activities. The Commissioner pointed out¹² that the application of appropriate legal mechanisms can significantly contribute to the real guarantee of the gender equality principle and the increase in the involvement of women in the electoral process. The quota system currently applicable to the proportional elections is characterized by a limited efficacy, which makes it necessary to supplement it with regulations envisaging the alternating placement of female and male candidates on electoral lists (the so-called zipping). Such approach was not shared by the Government Plenipotentiary for Civic Society and Equal Treatment¹³.

¹¹ The Council was dissolved by the decree of the Prime Minister of 27 April 2016 despite the statement of the Commissioner to the Minister of Internal Affairs and Administration and to the Minister of Digital Affairs as of 25 April 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Wystapienie_do_Ministra_Spraw_Wewnetrznych_i_Administracji_ws_przeciwdzialania_mowie_nienawisci_i_innym_aktom_nietolerancji.pdf; https://www.rpo.gov.pl/sites/default/files/Wystapienie_do_Ministra_Cyfryzacji_ws_przeciwdzialania_mowie_nienawisci_i_innym_aktom_nietolerancji.pdf

¹² The statement of the Commissioner to the Government Plenipotentiary for Civic Society and Equal Treatment as of 21 June 2016, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/WG.%20R%C3%B3wno%C5%9B%C4%87%20p%C5%82ci%20w%20prawie%20wyborczym.%2023.05.2016..pdf>

¹³ The summary of the answer of the Government Plenipotentiary for Equal Treatment and Civic Society as of 13 May 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=686915>

14. [gender gap in business] There is also low representation of women in decision-making bodies in business. The Commissioner recommended¹⁴ introducing legal provisions on the participation of women in the management and supervisory boards of public law companies. In the first place, such measures should be applied to State Treasury companies. In response, the Minister of Treasury shared the Commissioner's view and informed about "Good Practices in ensuring balanced participation of women and men in the companies owned by the State Treasury", published on the Ministry's website¹⁵. The Ministry aims at ensuring at least 30% participation of women in the supervisory boards whose members are appointed by the Minister of Treasury.

15. [violence against women] Assistance to victims of domestic violence, especially women, offered currently by the state is insufficient. Support for victims of gender and domestic violence is therefore also provided by specialized non-governmental organizations. In 2016, two organizations that help female victims of violence - Women's Rights Center in Warsaw and BABA Center for Women's Rights in Lubuskie Voivodship were refused subventions. In the opinion of the Minister of Justice, the support offered by these organizations is non-comprehensive because it focuses on women only and thus, such a subvention would discriminate male victims of domestic violence. However, according to the Commissioner, support granted for women's organizations is justified by the fact that women experience violence disproportionately more often than men¹⁶.

16. [domestic violence] Domestic violence is a significant problem in Poland. The regulations relating to domestic violence as well as the number of restraining orders issued in that respect are unsatisfactory. Polish law still does not provide for the restraining or protection orders that are available for immediate protection and are irrespective of other legal proceedings. This aim could be achieved by introducing Police protection orders. Still, a matter of concern is a small number of issued orders to vacate the apartment or other restraining orders, particularly bearing in mind the high number of suspended custodial sentences. Among 16,667 cases that were pending before the courts in 2015, the order to

¹⁴ The statement of the Commissioner to the Minister of Treasury as of 21 March 2013, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2012/09/712795/1710327.pdf>

¹⁵ The document is available in Polish at: <http://www.msp.gov.pl/pl/media/aktualnosci/25131,Dobre-praktyki-w-zakresie-zapewnienia-zrownowazonego-udzialu-kobiet-i-mezczyzn-w.html?search=3867>

¹⁶ More information regarding this issue available in Polish at: <https://www.rpo.gov.pl/pl/content/odmowa-przyznania-dotacji-centrum-praw-kobiet-lubuskiemu-centrum-praw-kobiet-baba-oraz-fundacji-dzieci-niczyje>

vacate the apartment was used in the criminal proceedings against 3,935 perpetrators only. The order to leave the premises jointly occupied with the victim was applied in 269 final judgements as a criminal measure, and in 455 - as a probation measure. That's less than 4%¹⁷. The Commissioner approves of signing the agreement on the functioning of the intervention-and-information hotline for people experiencing domestic abuse. However, a free 24-hour hotline for victims of domestic abuse and gender abuse will be launched no sooner than in 2017.

Right to life - Article 6 (11)

17. [conscience clause after the Constitutional Tribunal's ruling] On 7 October 2015, the Constitutional Tribunal ruled that the law obliging physicians, if they invoke the so-called conscience clause, to refer patients to an alternate facility, was unconstitutional. Such obligation should be vested in the state and not in individual doctors. Since the date of entry into force of the Constitutional Tribunal's decision, Polish legal system has been lacking a clearly defined entity which is obliged to instruct a patient about alternative medical service if a patient was denied the service by a physician who invoked the conscience clause. In the Commissioner's opinion, the lack of such mechanism poses a real threat that a patient doesn't obtain alternative medical treatment¹⁸.

18. [access to legal pregnancy termination] There are actual problems with access to legal pregnancy termination in Poland. According to the Commissioner's information, there are cases where doctors hinder the abortion by a refusal to grant a referral to a medical specialist or a refusal to conduct antenatal diagnostic procedures. Another issue is a situation where all doctors in a public health institution refer to the conscience clause. The Commissioner notes that the state is obliged to organize the provision of health services in such a way that the conscience clause, aimed at guaranteeing the freedom of conscience of doctors, does not prevent patients from obtaining health services to which they are entitled, in particular in cases where continuation of pregnancy constitutes a threat to life and health of the woman.

¹⁷ Data available at: http://ms.gov.pl/Data/Files/_public/ppwr/sprawozdanie-ms-z-kppwr-za-2015-rok.pdf

¹⁸ The statement of the Commissioner to the Chairman of the Parliamentary Committee on Health, President of the National Health Fund and the President of the Chief Medical Council as of 22 February 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-przewodniczacego-sejmowej-komisji-zdrowia-prezesa-nfz-prezesa-nrl-ws-prawa-pacjenta-do-uzyskania>

19. [access to legal pregnancy termination - Podkarpackie Voivodship] The problem related to the pregnancy termination refusal due to the conscience clause arose in Podkarpackie Voivodship in the southern Poland. According to media, there is no public hospital in the whole voivodship that performs an abortion in the circumstances allowed by law (e.g. when the woman's life and health is endangered by pregnancy). The Commissioner submitted official intervention to the Minister of Health asking about this problem¹⁹.

Prohibition of torture and other cruel, inhuman or degrading treatment or punishment - Article 7 (12-14)

20. [Definition of torture in the Polish Criminal Code] In Commissioner's view there is a need to provide definition and penalization of torture in the Polish Criminal Code as currently there is no regulation of torture as a separate crime²⁰. Inclusion of the definition of torture in the domestic criminal law would clearly outline the difference between acts of torture made by public officials and the acts of violence in the broad sense, committed by persons acting on behalf of the state. The lack of such regulation means that under certain circumstances the criminal liability can be evaded, as not all elements of the crime of torture are in fact currently criminalized by the Criminal Code²¹.

However, in the assessment of the Minister of Justice, the current penal regulations in this area are sufficient for the implementation of Poland's international commitments and introduction of the definition of torture would be of no significance for the protection of human rights in Poland .

21. [Istanbul Protocol] In Commissioner's opinion there is a need to extend the curriculum of medical studies and on-job training for physicians and medical staff employed in penitentiary institutions with guidelines specified in the so-called Istanbul Protocol²². There was a positive response from all the recipients.

¹⁹ The statement of the Commissioner to the Commissioner for Patients' Rights as of 11 July 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/7/VII.7010.1.2016/787131.pdf>

²⁰ The statement of the Commissioner to the Minister of Justice as of 27 October 2015, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_tortur_0.pdf

²¹ The statement of the Commissioner to the Minister of Justice as of 24 March 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_uregulowania_przestepstwa_tortur_w_kodeksie_karnym.pdf

²² The statement of the Commissioner to the Minister of Health, the President of the Supreme Medical Council and the General Director of the Prison Service as of 29 October 2015, available in Polish at: <https://www.rpo.gov.pl/pl/content/rpo-ws-wykorzystania-protokolu-stambulskiego-przez-lekarzy>

22. [investigations by an independent body - violence and excessive use of force by correctional facility personnel] Contrary to international recommendations, there is no independent body that would investigate violence and excessive use of force by correctional facility personnel alike prosecutor. Nonetheless, the Commissioner often undertakes actions in respect to such incidents. According to the agreement between the Commissioner and the Minister of Internal Affairs and Administration signed in 2009, since January 2010 the Commissioner has been receiving current information on incidents involving police officers such as: death (including suicide), injury, health disorder, severe health damages related to the acts or omissions of the police officers as well as in cases of violation of sexual freedom by officers. As the Commissioner examines only several selected cases per year, his review cannot be considered as thorough.

Elimination of slavery and servitude - Article 8 (15)

23. [definition of trafficking in the Polish Criminal Code] The Commissioner deals with the problem of slavery and human trafficking both in terms of general and individual cases. As a result of the Commissioner's actions, the definitions of trafficking have been introduced to the Criminal Code (Article 115 § 22 and § 23 of the Criminal Code) in September 2010. Moreover, while examining individual cases the Commissioner draws particular attention to the need to respect the rights and provide assistance to victims. However, there are just few such cases reported to the Commissioner regarding trafficking.

Right to liberty and security of persons and humane treatment of persons deprived of their liberty - Articles 9 and 10 (16-19)

24. [pre-trial detention – motion to the Constitutional Tribunal] Steps taken to ensure that pre-trial detention is not extended beyond the period prescribed by law are unsatisfactory, as there are still cases of the excessive pre-trial detention period²³. Provisions of the Criminal Procedure Code relating to applying and extending pre-trial detention do not provide for sufficient human rights protection and therefore, in Commissioner's opinion, are unconstitutional. In the motion to the Constitutional Tribunal, the Commissioner pointed out

²³ The example of Commissioner's activities in individual case regarding long-term of pre-trial detention, available in Polish at: <https://www.rpo.gov.pl/pl/content/rpo-i-sprawa-kibica-macieja-dobrowolskiego-rzecznik-podsumowuje-swoje-dzialania-w-tej-sprawie>

two main issues: firstly, the provision allowing the detention solely on the ground of the severity of the penalty, even when there is no risk that the suspect will obstruct the proceedings, and secondly, the possibility of prolonging pre-trial detention period without specifying the upper time limit or indicating specific reasons for continuation (case no K 3/16)²⁴. In the Commissioner's view, the maximum period of pre-trial detention should be defined in the Criminal Procedure Code with clear indication of specific conditions under which in exceptional cases the detention might be extended. Moreover, the new Act on counter-terrorism measures adopted on 10 June 2016 allows for a pre-trial detention based on evidence of committing, attempting or preparing to commit a terrorist offense. The court, at the request of the prosecutor, may impose pre-trial detention for a period not exceeding 14 days, which might be however extended. Such regulation, in Commissioner's opinion, provides the basis for a far-reaching interference in the sphere of rights and freedoms²⁵.

25. [overcrowding in prisons] In spite of lower number of prisoners as compared to previous years, the detention conditions are still far from satisfactory. According to the Criminal Executive Code, living space per prisoner is defined as 3 square meters. Such small living space may lead, along with other factors connected with prison conditions, to inhuman or degrading treatment. Commissioner suggested amending legislation in this respect by increasing the living space per prisoner from 3 to 4 square meters²⁶. Unfortunately, the Minister of Justice holds that the current legislation in this respect does not require any changes. Nevertheless the Commissioner is urging public authorities to broaden the living space per prisoner to 4 square meters at least in therapeutic units of prisons where inmates suffering from intellectual disabilities and mental disorders serve their sentences²⁷.

26. [quality of health service in prisons] Taking into account poor level of health services in prisons, especially problems with providing specialized health care, the Commissioner

²⁴ The motion of the Commissioner to the Constitutional Tribunal as of 8 January 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/wniosek-do-tk-ws-maksymalnego-okresu-tymczasowego-aresztowania>, case no K 3/16.

²⁵ The description of the Commissioner's opinion is available in Polish at: <https://www.rpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-skar%C5%BCy-ustaw%C4%99-antyterrorystyczn%C4%85-do-trybuna%C5%82u-konstytucyjnego>

²⁶ The statement of the Commissioner to the Minister of Justice as of 24 May 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/5/KMP.571.5.2016/745603.pdf>

²⁷ The statement of the Commissioner to the Minister of Justice as of 29 July 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/7/KMP.571.5.2016/805186.pdf>

proposed establishing a working group of external experts, who would discuss the current model of healthcare in penitentiary institutions in Poland, also in the context of solutions adopted in other countries²⁸. This proposal was accepted by the Minister of Health but rejected by the Minister of Justice. As a result, the working group was not formed.

27. [dangerous prisoners] Since the beginning of 2016 the European Court of Human Rights passed six judgments in cases against Poland relating to special regime for dangerous prisoners. In all cases the Court has decided that Poland breached Article 3 of the European Convention on Human Rights. In connection with those judgements the Commissioner sent several letters to the General Director of the Prison Service²⁹ asking for an urgent change of practice in Polish prisons, especially the necessity to provide precise justification for issuing “N” status, as well as extending it. Besides, prisons’ administration should resign from applying all elements of the regime provided for dangerous inmates if there is no reason for their usage (for example: isolation from other people, strip searches).

28. [post-penal isolation] The Act of 22 November 2013 on proceedings against persons with mental disorders posing a threat to life, health or sexual freedom of other persons entered into force on 22 January 2014. The Act allows preventive isolation of people who served the whole prison sentence but are considered by the court as dangerous for the society. In Commissioner’s opinion some provisions of that Act are unconstitutional, as well as inconsistent with human rights’ standards³⁰. Most importantly, the provisions of the Act are retroactive. They can be applied to any person who was serving the sentence of imprisonment in a therapeutic system and with respect to whom there is “high” or “very high” probability of committing the prohibited offence, specified in the Act. The motion indicating the unconstitutionality of some provisions of the Act was brought by the Commissioner to the Constitutional Tribunal; the hearing was scheduled for 10 November 2016.

²⁸ The statement of the Commissioner to the Minister of Justice, the Minister of Health and the General Director of the Prison Service as of 7 January 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-ms-mz-oraz-dgsw-ws-opieki-medycznej-dla-osob-pozbawionych-wolnosc>

²⁹ The statement of the Commissioner to the General Director of the Prison Service as of 20 January 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_DGSW_ws_realizacji_wyrokow_ETPC_dotyczacych_osadzonych_niebezpiecznych.pdf and as of 19 February 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/2/IX.517.1438.2015/663672.pdf>

³⁰ The motion of the Commissioner to the Constitutional Tribunal as of 16 May 2014, available in Polish at: https://www.rpo.gov.pl/sites/default/files/WG_TK_ustawa_o_postepowaniu_wobec_osob_z_zaburzeniami.pdf

29. [post-penal isolation - National Centre for the Prevention of Antisocial Behaviour in Gostynin] The National Centre in Gostynin is a medical facility where people are isolated under the Act on proceedings against persons with mental disorders posing a threat to life, health or sexual freedom of other persons (please see point 28 above), after serving the whole sentence because they were assessed by the court as dangerous for the society. In Commissioner's opinion, the constitutional rights of people deprived of liberty in the National Centre for the Prevention of Antisocial Behaviour in Gostynin are limited without a legal basis. Commissioner highlighted this issue both to the Minister of Health³¹ who supervises this medical facility, and the Minister of Justice³² who prepared a draft Act on proceedings against persons with mental disorders posing a threat to life, health or sexual freedom of other persons. As emphasized by the Commissioner, if a person deemed to pose a threat was deprived of his/her freedom for preventive reasons and was placed in the Centre for an indefinite period of time, it does not mean that such person may be simultaneously deprived of their constitutional rights without any legal basis.

Protection of aliens subject to deportation – Articles 7, 9, 10, 12 and 24 (20)

30. [Polish regulations] The new Aliens Act entered into force on 1 May 2014 (hereinafter referred to as “Aliens Act”). It significantly changed the existing procedures relating to the expulsion of foreigners from Poland. Decisions adjudicating the expulsion (deportation) of a foreigner have been replaced by decisions on return to their country of origin. Such decisions, as a rule, are made voluntarily, within the prescribed deadline. Only in exceptional cases decisions are subject to immediate enforcement (e.g. when the likelihood of escape is high or because of national defense or national security reasons). The Commissioner assessed positively such liberalization of procedures applicable to persons residing illegally in Poland.

31 [guarded centers for foreigners] The Aliens Act provides the possibility to detain a foreigner in a guarded center if there is a chance that a decision obliging the return to a

³¹ The statement of the Commissioner to the Minister of Health as of 1 July 2015, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-mz-ws-zasad-funkcjonowania-krajowego-osrodka-zapobiegania-zachowaniom-dyssocjalnym> and as of 18 February 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-mz-ws-funkcjonowania-krajowego-osrodka-zapobiegania-zachowaniom-dyssocjalnym>

³² The statement of the Commissioner to the Minister of Justice as of 30 July 2015, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-ms-ws-ograniczania-praw-osob-umieszczonych-w-krajowym-osrodku-zapobiegania-zachowaniom>

country of origin will be issued. On the basis of the Act on granting protection to foreigners on Polish territory, guarded centers for foreigners can also accommodate foreigners applying in Poland for international protection. Both acts provide for alternatives to detention measures, like the obligation to report to a designated authority on regular basis, to pay a deposit or to live in a designated area. Unfortunately, the alternative measures are not frequently used and in this respect, the practice of the Border Guard and the courts involving the placement of foreigners in guarded centers should be changed³³. Moreover, there are doubts whether the current system of social assistance to foreigners guarantees real support for the duration of asylum proceedings.

32. [migrant children in guarded centers] In Commissioner's opinion it is necessary to change law in order to ban placement of foreign minors and their custodians in the guarded centers³⁴. Despite positive changes in the functioning of such institutions and designation of three centers as ones dedicated to minors, the conditions there are still not suitable for children. Living in a detention center may be a traumatic experience for minors and may negatively affect their physical and psychological development. Moreover, school-age children staying at these facilities do not attend schools. Educational activities offered by a guarded centers do not cover minimum requirements of educational curriculum.

33. [internal rules of guarded centers] Since June 2013, guarded centers for foreigners apply harmonized internal rules. These documents softened the regime: increased freedom to move around the facilities, abolished the obligation to wear uniforms by some of the Border Guard officers working in the centers. Moreover, foreigners do not have to clean common areas such as toilets, corridors and common rooms. These changes should be the first step towards a complete alteration of guarded centers into semi-open establishments.

34. [situation at border crossing in Terespol] The representatives of the Commissioner made an unannounced visit to the railway border crossing with Belarus in Terespol³⁵. The visit was made in connection with information received by the Commissioner about a group of approximately 500 foreigners who have been trying for a long time to enter the territory of Poland to apply for international protection, without success. At the date of control 436

³³ The statement of the Commissioner to the Prime Minister as of 5 October 2015, available in Polish at: <https://www.rpo.gov.pl/pl/content/do-prezesa-rady-ministrow-ws-uchodzcow>

³⁴ As above.

³⁵ The information presenting the results of the visit conducted in Terespol on 11 August 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/komunikat-o-wizytacji-kolejowego-przejscia-granicznego-w-terespolu>

foreigners tried to enter Poland without visas or residence permits entitling to entry and stay on Polish territory. The officers of the Border Guard accepted only 7 applications for international protection, regarding 31 people (11 adults and 20 children). In Commissioner's view, it is doubtful whether the system for receiving complaints in Terespol operates effectively. The Border Guard officers accept complaints written in Polish only. Moreover, the building at the border crossing is not adapted to handling more than 400 people at the same time. The representatives of the Commissioner confirmed that there are cases when the Border Guard officers did not allow to apply for international protection even though foreigners declared their intention to apply for such protection or they informed about being persecuted in their country of origin.

Right to a fair trial and access to a lawyer - Articles 14 and 9 (21-22)

35. [delays in proceedings] The Commissioner urges³⁶ for legislative changes to the Act on complaints about a breach of the right to hear the case in preparatory proceedings conducted or supervised by the prosecutor and the judicial proceedings without undue delay, required in connection with the judgment of the European Court of Human Rights in case *Rutkowski and others against Poland*³⁷. At present the Minister of Justice is still working draft amendment.

36. [court experts] The current model of the court experts in Poland does not guarantee that persons who are appointed by the court deliver accurate and timely opinions. This has negative impact on the efficiency of judicial proceedings and therefore, infringes citizens' right to a fair trial within a reasonable time. The Commissioner on numerous occasions called for adopting a comprehensive regulation that would exhaustively regulate the work of court experts³⁸. Unfortunately, until now such a regulation has not been passed.

³⁶ The statement of the Commissioner to the Minister of Justice as of 9 June 2016, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/Wystapienie%20do%20Ministra%20Sprawiedliwosci%20ws%20przewleklosci%20postepowan%20sadowych%2009.06.2016.pdf>

³⁷ The ECHR judgement as of 7 July 2015, applications nos. 72287/10, 13927/11 and 46187/11.

³⁸ The statement of the Commissioner to the Minister of Justice as of 19 July 2016, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/Wyst%20C4%85pienie%20do%20Ministra%20Sprawiedliwo%20C5%9Bci%20w%20sprawie%20ustawy%20o%20bieg%20C5%82ych%20s%20C4%85dowych%20C%2019.07.2016.pdf> and more information on that topic available in Polish at: <https://www.rpo.gov.pl/pl/content/rpo-i-biegli-sadowi-co-sie-dzieje-z-projektem-ustawy-ktory-zapobiegaby-kopotom-ludzi-w-sadach>

37. [access to a lawyer in police custody] In Commissioner's opinion rules regulating access to a lawyer for all detainees should be uniform, clear and precise. Upon request, detainee should be immediately allowed to make contact with a lawyer, as well as to have a direct conversation. The legislation does not specify, however, whether detainees may contact a lawyer by telephone. In practice it does not happen. In Commissioner's opinion, as well as in the view of the Supreme Bar Council, it is necessary to clarify the provisions of the Criminal Procedure Code in this respect³⁹. The Minister of Justice agreed that mechanism for better implementation of the right to defense should be introduced.

Right to privacy - Article 17 (23)

38. [operational control] The new law amending the Act on Police and other acts, referring to the electronic surveillance, came into force on 7 February 2016. The Commissioner referred certain provisions thereof to the Constitutional Tribunal⁴⁰, especially in relation to the use of operational control and wiretaps as well as downloading telecommunication, postal and Internet data. Various issues provided for in the new law raise doubts, namely: no time limits or disproportionately long duration of operational control, restrictions on professional secrecy, unlimited downloading of Internet, telecommunication and postal data, lack of real control of retrievals (with subsequent judicial review only), no subsequent notification of a person whose data was checked or collected. On 28-29 April 2016, a delegation of the Venice Commission visited Warsaw to discuss the amendments to the Police Act and certain other laws, and delivered an opinion⁴¹ during its session of 10-11 June 2016. According to the opinion, procedural safeguards set out in the Act on Police and other acts. Act are insufficient to prevent its excessive use and unjustified interference with the privacy of individuals. The Commissioner fully supports the conclusions provided in the Venice Commission's opinion.

³⁹ The statement of the Commissioner to the Minister of Justice as of 29 April 2016, available in Polish at: and the statement of the Commissioner to the Plenipotentiary for the Protection of Human Rights of the Chief of Police as of 29 April 2016, available in Polish at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/4/II.5150.9.2014/724572.pdf>

⁴⁰ The motion of the Commissioner to the Constitutional Tribunal as of 18 February 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_kontrola_operacyjna.pdf

⁴¹ The opinion is available in English at: Poland - Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

Freedom of thought, conscience, freedom of opinion and expression, freedom of association and right of peaceful assembly - Articles 19 and 21 (24-25)

39. [press offences] Under the current wording of Article 212 of the Criminal Code imprisonment is provided for only in the case of defamation by means of mass communication. The Commissioner attempts to limit the application of Article 212 by legislative changes that would simplify the procedure for claiming infringement of personal rights in civil proceedings⁴².

40. [new Assemblies Act of 24 July 2015] The new Assemblies Act was passed in 2015 after the recognition as unconstitutional of several provisions of the previously applicable law (the Assemblies Act of 1990) by the Constitutional Tribunal⁴³. The introduction of spontaneous assemblies, possibility of appeal from negative decision and requirement to observe strict deadlines in considering the appeals meets the requirements raised by the Commissioner. The new law, however, did not abolish the prohibition of an assembly of persons lacking full legal capacity, i.e. minors and legally incapacitated persons. In Commissioner's view such legal solution is not proportionate and violates the essence of freedom of assembly. Unfortunately the Tribunal did not share this view (case no. K 44/12).

41. [events organized by LGBT organizations] In years 2008-2015 the Commissioner did not receive any claims regarding freedom of assembly of LGBT communities. According to the organizers of the pride parades, the protection of a peaceful assembly by police officers ensures the actual implementation of freedom of assembly. All organizers of pride parades positively assessed cooperation with police⁴⁴.

Protection of minors and rights of the child - Articles 9, 10 and 24 (26)

42. [lawyer for detained juvenile delinquents] The Commissioner draws attention to the access of a juvenile delinquent to a lawyer. Under current law juvenile delinquents may meet with an attorney after being granted a court permission or a permission of the head of

⁴² The statement of the Commissioner to the Minister of Justice as of 1 September 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>

⁴³ The motion of the Commissioner to the Constitutional Tribunal as of 4 March 2013, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_04032013.pdf

⁴⁴ The Statement of the Commissioner to the Chief of the Police as of 24 May 2016, available in Polish at: <https://www.rpo.gov.pl/pl/content/wystapienie-do-komendanta-glownego-policji-ws-zabezpieczenia-przebiegu-marszow-rownosci>

the police custody center for children or police officer responsible for the case⁴⁵. Minister of Internal Affairs and Administration agreed with the Commissioner that it is an unjustified restriction on the right of the juvenile delinquent to defense and announced the introduction of appropriate changes. Unfortunately, to this day the law has not been changed.

43. [period of detention in the police custody centers for children] In the Commissioner's opinion juvenile delinquents who committed a criminal offense under the influence of alcohol should be directed to a hospital because there are no legal grounds for placing them in a police detention center for children. Prolonged detention of juvenile delinquents results in a lack of compulsory schooling, as well as limited contact with family⁴⁶. Since the entry into force of the Chapter 1 of the Act on juvenile delinquency proceedings on 2 January 2014, a juvenile delinquent may be detained in the police custody center for the time necessary to forward him/her to an appropriate foster parents or to an appropriate medical institution, center or shelter, but no longer than for a 5 days.

44. [living conditions of the police custody centers for children] In June 2012 the Minister of Internal Affairs adopted a new regulation which, among others, refers to the living conditions in the police custody centers for children, as well as issues related with the video monitoring. It defines precisely where the monitoring can be installed, who can keep it, for how long and who can share the records. Although there are new regulations concerning detention centers' equipment, usually it is minimalistic – for example only a bed without a locker for personal belongings. The right to contact with the outside world is excessively constrained by the presence of an officer during the meetings and visits of parents. In June 2012 the National Preventive Mechanism (part of the Office of the Commissioner for Human Rights) issued a comprehensive report on the inspection of police custody centers for children. General impressions of the majority of the visited places were good, but some irregularities regarding the technical condition of buildings and equipment were also noticed⁴⁷.

⁴⁵ The statement of the Commissioner to the Minister of Internal Affairs and Administration as of 30 November 2015, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_MSWiA_ws_dostepu_do_adwokata_osob_nieletnic_h_umieszczonych_w_policyjnych_izbach_dziecka.pdf

⁴⁶ The statement of the Commissioner to the Minister of Justice as of 20 January 2012, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/1619585.pdf>

⁴⁷ The detailed report of the Commissioner from the visits of the police custody centres for children is available in Polish at: https://www.rpo.gov.pl/sites/default/files/RAPORT_PID.pdf

45. [juvenile shelters] On 6 July 2016 the Minister of Justice amended the Ordinance on juvenile long-term confinement facilities and remand facilities. Possibility of placing a juvenile delinquent in a temporary isolation room because of safety reasons and order was excluded⁴⁸. However, a temporary isolation room can still be used for the first 14 days after arrival to a long-term correctional facility in order to carry out appropriate medical examinations and for adjustment purposes. The Commissioner underlines⁴⁹ the need to implement the European Court of Human Rights' judgement in case Grabowski against Poland⁵⁰, which refers to extending stay in a juvenile shelter without court decision and without the possibility of reversing this measure.

Political participation - Articles 2, 25 and 26 (27)

46. [incapacitation - right to vote] According to Article 62 of the Constitution, the right to participate in a referendum and the right to vote is not granted to people who have been incapacitated as a result of a final court decision. As a result, people with intellectual disabilities who have been incapacitated (either completely or partially) do not have voting rights in Poland. The Commissioner submitted a request to the President of the Republic of Poland⁵¹ to initiate necessary legislative changes regarding voting rights of incapacitated persons, including the possibility to amend relevant provisions of the Constitution. There has not been any feedback to the intervention so far. Also, the 2011 and 2015 Republic of Poland Parliamentary Elections Reports of OSCE/ODIHR Election Assessment Mission recommended that the curtailment of the right to vote for people with mental disabilities and the deprivation of suffrage rights for partially incapacitated persons should be reviewed. It is estimated that there are currently approximately 87,000 people who are incapacitated in Poland. A vast majority of incapacitation decisions are issued with respect to people with intellectual or mental disabilities.

⁴⁸ The statement of the Commissioner to the Minister of Justice as of 11 February 2010, available in Polish at: <https://www.rpo.gov.pl/sites/default/files/1461037.pdf>

⁴⁹ The statement of the Commissioner to the Minister of Justice as of 20 January 2016, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_realizacji_wyroku_ETPC_dotyczacego_przebywania_w_schronisku_dla_nieletnich_bez_podstawy_prawnej.pdf

⁵⁰ The ECHR judgement as of 30 June 2015, application no. 57722/12.

⁵¹ The statement of the Commissioner to the President of the Republic of Poland as of 7 October 2015, available in Polish at: https://www.rpo.gov.pl/sites/default/files/Do_Prezydenta_RP_ws_praw_wyborczych_osob_ubezwlasnowolnionych.pdf