



COMMISSIONER FOR HUMAN RIGHTS

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Judge Ksenija Turković
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Written comments of the Commissioner for Human Rights of the Republic of Poland
in the case *Zuchniewicz* against Poland
(application no. 57759/19)

Acting pursuant to Rule 44 § 3 (a), § 5 and § 6 of the Rules of the European Court of Human Rights (ECHR) and on the basis of the leave granted by the President of the First Section, the Commissioner for Human Rights of the Republic of Poland (CHR) wishes to submit the following written observations related to the present case.

I. General observations.

The purpose of this intervention is to address, from the Commissioner for Human Rights perspective, the key legal issues arising from the Andrzej Zuchniewicz case which is now pending before the ECHR. The Commissioner for Human Rights acts as the National Preventive Mechanism in Poland, as well as he deals with a few thousand of complaints from prisoners every year. Therefore, the written observations brought below are based on the everyday experience arising from handling individual complaints as well as the analyses of legal issues.

It is of great importance to assess to what extent States are obliged, under the European Convention on Human Rights, to respect the principles of the European protection of the right to private life (article 8 of the Convention) and the right to effective remedy in the domestic legal system (article 13 of the Convention). The answer to this question will be important not only for the individual applicant, but also for other persons deprived of liberty in Polish prisons and pre-trial detention centers. At the moment there are approximately 70.000 people detained in penitentiary units in Poland so the impact of the ECHR ruling in the present case will be broad.

II. Systemic context of the present case.

1. The case brought by the applicant concerns the strip searches that were conducted without any evident reason when he was returning to prison from work. The Commissioner for Human Rights wishes to point out that although the present case examined by the ECHR was brought on the basis of an individual complaint by a specific inmate alleging that he has been a victim of a violation of the Convention rights, it is an exemplification of a more general concern.

2. Firstly, the primary issue raised in the complaint concerns not only the individual applicant but all the prisoners in Poland. Every day multiple body searches are conducted in Polish prisons preventively and without any concrete reason. The legal bases for conducting them is the article 116 § 2 of the Code of Execution of Criminal Sentences (later: the Code), which stipulates that “in cases justified by reasons of order or security, a convicted person is under an obligation to undergo body search”. The article 116 § 3 of the Code defines a body search as „an inspection of the body and the checking of clothes, underwear and footwear as well as [other] objects in a [prisoner’s] possession. The inspection of the body and the checking of clothes and footwear shall be carried out in a separate room, without the presence of third parties and persons of the opposite sex and shall be performed by persons of the same sex”. This provision of the Code was not changed since 1 September 2003.

Moreover, § 68 of the Minister of Justice Regulation of 17 October 2016 on the means of the protection of organizational units of the Prison Service also refers to that issue. It provides that the strip search is carried out as follows:

- 1) the inmate empties his/her pockets, takes off shoes, clothes and underwear;
- 2) footwear, clothing and underwear are inspected;
- 3) the officer inspects the mouth, nose, ears, hair and body;
- 4) visual inspection of the body may also consist of bending down or squatting to check the area around the anus and genitals;
- 5) during the inspection, the inmate should be partially dressed; the officer first checks part of the clothing, and before the inspection of the next part the inmate may dress;

6) during the inspection, the officer should not touch the inmate.

3. The above provision wasn't changed since 2 January 2017 and the government of Poland used it submitting that Milka against Poland was implemented. It underlined that the § 68 of the Minister of Justice Regulation describes precisely how strip searches should be conducted.

Monitoring this issue is always an element of NPM's preventive visits. The Commissioner would like to indicate, that the legal regulations described in § 68 of the Minister of Justice Regulation are used in practice (in the cases checked during preventive visits). Nevertheless it does not lead to decrease in number of preventive body searches.

4. Secondly, there is no judicial control of the body searches. The government stated that the act of carrying out a personal inspection of an inmate is performed directly on the basis of the Code of Execution of Criminal Sentences and does not require the form of a decision of the head of the penitentiary unit (according to the article 7 of the Code the decision of the prison's director can be appealed to the penitentiary court). In the government's view, the absence of this requirement does not mean that this activity is without any control, as it is subjected to the supervision of a penitentiary judge as well as service supervision within the organizational structure of the prison system¹.

The government's report emphasized that the presidents of all district courts were asked to disseminate information among penitentiary judges about the need to examine, as part of penitentiary supervision, the existence of real and important reasons why inmates should be qualified for strip searches.

5. The Commissioner must comment the above information regarding penitentiary judges and penitentiary supervision conducted by them which is a totally separate institution to the penitentiary court and its activity on the base of article 7 of the Code.

The article 7 § 1 of the Code of Execution of Criminal Sentences states that the prisoner may file a complaint for the decision of the authority mentioned in article 2 points 3-6 and 10 of the Code (among others: the head of the penitentiary unit) due to its inconsistency with the law, unless the law provides otherwise. According to article 7 § 3 of the Code, a complaint against the decision referred to in § 1 is entitled to the prisoner within 7 days from the date of publication or delivering of the decision; the decision is announced or delivered together with the justification and instruction on the rights of the convicted person, the date and manner of lodging a complaint. The complaint shall be lodged to the authority which issued the contested decision. If the authority which issued the contested decision does not accede to the complaint, it shall immediately forward it together with the case files to the penitentiary court.

¹ Report on the implementation of the judgment of Milka against Poland, submitted on October 31, 2017.

The penitentiary supervision is conducted by penitentiary judges but when we talk about penitentiary supervision we do not combine it with the courts' control. Article 32 of the Code says that supervision over the legality and correctness of the execution of the penalty of deprivation of liberty, substitute imprisonment, military detention, imprisonment or substitute detention, order penalty, temporary arrest, detention, a measure of restraint resulting in deprivation of liberty and a precautionary measure related to placement in a psychiatric institution is performed by a penitentiary judge. Article 33 of the Code adds that a penitentiary judge visits prisons, pre-trial detention centers and other places where people are deprived of their liberty. He has the right to enter these establishments, arrests and places and to move around their premises at any time, without restrictions, to view documents and demand explanations from the administration of these units. A penitentiary judge has the right to interview persons deprived of liberty in the absence of other persons and to examine their motions, complaints and requests.

In practice penitentiary judges visit prisons very rarely and their activities within penitentiary units have been criticized for many years. That's why it's impossible to assume that government's information can be treated as solution to the problem of multiple preventive strip searches that are conducted daily in Polish prisons.

6. In its annual reports the National Preventive Mechanism in Poland emphasizes that it is important that the legitimacy and manner of body searches of prisoners be subjected to external verification. The possibility of judicial review has a preventive value and may act as a deterrent towards prison officers who want to reach for it unnecessarily².

7. On July 10, 2019, the revised report of the government on the execution of the judgments of Milka against Poland and Dejneka against Poland was submitted to the Council of Europe. It was emphasized that due to the fact that the body search constitutes an interference with the prisoner's right to private life, control activities may be carried out only when the factual circumstances indicate that there are considerations of order and security. It was presented that the above judgments of the Tribunal could be implemented by submitting recommendations to the relevant organizational units of the Prison Service during official information meetings and training sessions. It was also found that the adopted measures of a general nature are sufficient to conclude that Poland has fulfilled its obligations under article 46 sec. 1 of the Convention.

8. Unfortunately, the Commissioner cannot agree with the above opinion of the Polish government. On the basis of the complaints that the CHR receives, the Commissioner observes that in practice strip searches are still conducted preventively in cases when e.g.: prisoners return to their

² https://bip.brpo.gov.pl/sites/default/files/%2FRaport_RPO_z_dzialalnosci_KMPT_2019.pdf - the annual report of activities of the National Preventive Mechanism in Poland in 2019, page 80.

cells after work, before and after face-to-face visits with members of their families or even when the visit did not allow for direct contact, before and after the meeting with prison director, coming back to the cell from school or practices. Sometimes it takes place a few times a day. Even if the information meeting or trainings for prison officers took place, the CHR still receives complaints that show wrong practice. The strip searches are conducted preventively to all prisoners while they should be conducted only when it's necessary in a specific situation and because the information regarding particular inmate justified it.

9. In the opinion of the Commissioner, the earlier Court's judgements related to body searches, especially in the cases of *Dejnek against Poland* (no. 9635/13) and *Milka against Poland* (no. 14322/12), have not been implemented. Trainings for the prison officers as well the distribution of the ECHR's judgements is not enough to change the practice regarding the strip searches of prisoners. It's because the regulations are so broad that they are used too often and preventively. The CHR is aware of the fact that the Prison Service underlines that the aim of strip searches is mainly to prevent the penetration and spread of psychoactive substances on the prisons premises. Nevertheless, there is no possibility to file a complaint for the act of body control to the penitentiary court and that is the Commissioner's concern.

In the official letter sent on 9 July 2020 to the Minister of Justice³, the CHR underlined that the cases *Milka against Poland* and *Dejnek against Poland* were not implemented as neither legal provisions nor practice in prisons were changed. The Commissioner pointed out that persons against whom it was decided to subject them to body search should be able to appeal against this decision pursuant to article 7 of the Code. The legislator granted such a possibility with regard to the control of objects or control through monitoring (Article 116 (6) of the Code), ignoring the personal control in this respect, which constitutes a significant interference in the sphere of privacy and dignity of the controlled person.

10. Furthermore, on 21 January 2016 the CHR brought a motion before the Constitutional Court⁴ contesting the absence of the obligation under the Polish law to issue a formal decision to conduct a prisoner's strip search, which leads to the lack of grounds for contesting it in the penitentiary court. General rule of article 116 of the Code of Execution of Criminal Sentences is the only existing base to conduct strip searches. There is no decision of the director so it cannot be undergone of penitentiary court's control pursuant to article 7 of the Code. Moreover, District Director or General Director of the Prison Service (Article 78 § 2 of the Code), as well as a penitentiary judge (Article 34 § 1 of the Code) cannot assess the decision on body search and its

³ Ref. IX.517.1307.2015.JP, <https://www.rpo.gov.pl/sprawny-generalne/pdf/2020/7/IX.517.1307.2015/2144185.pdf>

⁴ Ref. KMP.571.83.2014.MMa.

possible revocation as illegal, because the act of subjecting personal inspection in the light of the Code is not the decision that you can contest according to the provisions of Code.

The Sejm (the lower chamber of the Polish Parliament) as well as the General Prosecutor, both presented opinions in this case and underlined that the prisoner has the right to file a complaint to a penitentiary judge (according to penitentiary supervision – articles 32-36 of the Code). Moreover, the prisoner has the right to submit a notification of suspicion of committing a crime by the prison officer or file in a civil trial property claims for damage suffered as a result of a body search.

Unfortunately, the Constitutional Court discontinued the proceeding on 26 November 2019⁵ indicating that the Commissioner's motion was too laconic and cannot be considered by the Tribunal. However, as stated - in a dissenting opinion by judge of the Constitutional Tribunal Piotr Pszczolkowski - the essence of the Commissioner's request was not the mere imposition on the director of a prison to issue a decision administering body control, but it was opening the way to judicial verification of the legality of personal inspection as a legal consequence of adopting the form of a decision. The judge indicated that the lack of a decision by the director of the penitentiary unit to conduct a personal inspection meant that the court proceedings could not be launched.

11. In 2019 there has been a project to change the existing law regarding the rules of carrying out checks on convicts and remand prisoners. It must be strongly underlined that the new law was drafted, but not adopted. Still it was heavily criticized by the CHR and in spite of the fact that it wasn't adopted (because of the discontinuation of parliamentary legislative process) it shows in what direction the government intended to go. That's why it's worth describing here to give broader context to the issue of the present case pending before the ECHR.

On April 12, 2019, the Sejm of the Republic of Poland received a government's bill amending the Act - Penal Code (form no. 3386), and then, on July 2, 2019, a self-amendment to this draft (form no. 3386-A) - Code of the Execution of Penalties. The self-amendment provided for, inter alia, adding chapter XXa to the Code of the Execution of Penalties, regulating the rules of carrying out strip searches of convicts and remand prisoners. As is clear from the justification, the proposed changes were intended, in particular, to ensure the coherence of the legal system in connection with the judgment of the Constitutional Tribunal of 14 December 2017 (file number K 17/14) issued in a case initiated by the CHR's application. The Tribunal then stated that the provisions of the acts regulating the personal inspection by the uniformed services are inconsistent with the Constitution to the extent that they do not define the limits of this inspection and do not provide for the possibility of appealing against it to the court. The judgment of the Constitutional Tribunal in this case did not directly concern

⁵ Number of the case in the Constitutional Tribunal: K 5/16, the resolution of all the members of the Tribunal to discontinue the processing with one separate opinion.

personal inspections carried out by the Prison Service, but it set a pattern for changing the provisions regulating this matter.

According to the solutions contained in the self-amendment no 3386-A, if the inspection must be carried out immediately, in particular due to circumstances that may pose a threat to human life and health or property, it would be possible to carry out a body search by a person of a different sex than the controlled person, as well as to refrain from carrying out the strip search in a place inaccessible to unauthorized persons. It would also be possible to control intimates manually, but no justification for the need for this legal change was indicated. Moreover, the controlled person would be entitled to complain to the penitentiary judge, within 7 days from the date of the personal inspection, in order to verify the legitimacy, legality and correctness of the body search. If it was found that it was groundless, illegal or incorrect, the penitentiary judge was to notify the prosecutor and the competent district director of the Prison Service about it.

The Commissioner criticized it heavily and it was not finally adopted because of the discontinuation of legislative process in Polish Parliament. Unfortunately it shows what the plan was in the context of strip searches. It was not intended to create broader guarantees, taking into account the ECHR's standards, but was to lead to the enactment of regulations violating international standards regarding the right to privacy. It did not also correctly solve the problem of the detainees not having the right to complain to the court, as the regulation said that the organ entitled to handle the complaint would be the penitentiary judge not the penitentiary court and those are two separate institutions in the Polish legal system.

III. Conclusions.

12. The Commissioner for Human Rights submits that the regulations of the Code may lead to preventive strip searches that are conducted frequently in all penitentiary institutions. They can be based on the specific information that prison officers have about the prisoner but they can be also based on general meaning of article 116 of the Code. It is so broad that in practice everyone can be undergone a body search in all circumstances. In the opinion of the Commissioner, there is no doubt that the legal status in force in the field of personal control of persons deprived of liberty requires changes to take into account international standards of human rights protection. In practice, strip searches are carried out preventively, without sufficient justification, and without issuing a decision and the possibility of appealing against it. It is necessary to amend article 116 of the Code, as a result of which it will be necessary to indicate detailed justification for the performance of a personal control. It is also essential to ensure an effective mechanism of judicial review of the legitimacy, legality and regularity of performing strip searches.

13. The CHR states that the government of the Republic of Poland hasn't yet implemented the following ECHR judgements: Milka against Poland and Dejneka against Poland. Therefore, it is the firm conviction of the Commissioner that the present case offers the European Court of Human Rights an opportunity to enhance the standard of effective remedy and the right to private life in the context of inmates body searches.

Yours faithfully,

Adam Bodnar

Commissioner for Human Rights

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