

EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **POLAND**

IN 2005

submitted to the Network by **Marek Antoni NOWICKI***

on 15 December 2005

Reference: CFR-CDF/PL/2005



The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union

* This report was prepared within the Helsinki Foundation for Human Rights, with the assistance of Magdalena Kmak

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moysse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

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The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moysse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.

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the Civil Code³ to the extent that it excludes an incapacitated individual from the circle of parties entitled to file a motion concerning the initiation of legal proceedings to overrule or change the incapacitation decision. According to the Ombudsman, these provisions contradict Articles 30 and 31 of the Constitution, which grant everyone the right to the protection of their personal dignity and freedom. As of 6 November, the Constitutional Tribunal has not delivered a judgment on this case.

The Ombudsman brought this matter also before the Codification Commission working on the amendments to the Civil Code⁴. In his reply, the Head of the Commission informed the Ombudsman that the Commission prepared a project of amendments to the Civil Code which includes the Ombudsman's propositions concerning the rights of incapacitated individuals⁵.

Reasons for concern

No possibility for an incapacitated individual to file a motion to initiate legal proceedings to overrule or change the incapacitation decision.

Article 2. Right to life

Euthanasia

During the period under scrutiny, no cases of euthanasia⁶ were reported.

Domestic violence

Legislative initiatives, national case law and practices of national authorities

Thanks to the Act on counteracting domestic violence⁷, passed by the Sejm (the lower chamber of the Parliament) it has been possible to regulate, among others, the principles of protecting the victims of domestic violence. According to this Act, in the case when the court applies a conditional discontinuation of proceedings and a conditional stay-of-execution of the prison sentence against the perpetrator of the violence, it may oblige him/her to refrain from contacting particular individuals, as well as to leave the premises occupied together with the victim. The court may also specify the manner in which the perpetrator is allowed to contact the victim, i.e. prohibit him/her from approaching the victim under given circumstances and order him/her to undergo treatment or to participate in educational and corrective programmes. The commune (*gmina*) and district (*powiat*) have an obligation to create their own programmes for counteracting domestic violence, as well as to conduct counselling and run support centres for the victims.

³Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny (Dz.U. z 1964 r. nr 16, poz. 93 z późn. zm. [The Act of 23 April 1964 - the Civil Code (The Official Journal of 1964, No. 16, item 93, with further amendments)]

⁴General Approach of the Ombudsman to the Head of the Codification Commission of 17 May 2005, No. RPO-418864-02-XI/GR

⁵Response of 13 September 2005, No. KKPC 136/04/01/2005

⁶Artykuły 149, 152, 153, 154 i 157a Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 nr 88, poz 553 z późniejszymi zmianami) [Articles 149, 152, 153, 154 and 157a of the Penal Code of 6 January 1997 (The Official Journal of 1997, No. 88, item 553, as amended)] Statistics: Police <http://www.kwp.gov.pl>

⁷Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie, (Dz.U. z 2005 r. nr 180, poz. 1493) [The Act of 29 July 2005 on counteracting domestic violence (The Official Journal of 2005, No. 180, item 1493)]

The possibility to carry out an eviction of an individual, who abuses his/her family, has been limited in the amended Article 1046 of the Civil Code⁸, which came into effect on 5 February 2005. This Act introduced a ban on the execution of an eviction judgment in a situation where the evicted individual is not entitled to a social or replacement premises. The debt collector responsible for executing the court's ruling must refrain from executing it until the moment when the commune authorities assign temporary premises for the evicted individual or this person finds a place to stay. In connection with these provisions, the Ombudsman, in his General Approach to the Minister of Justice⁹, moved to consider the possibility of taking legislative actions that would ensure complete and effective protection for the individuals who hold court judgments ordering the eviction of the party guilty of abusing family members. In the response to the Ombudsman's approach, the Secretary of State at the Ministry of Justice¹⁰ agreed with his reservations and confirmed that the proposed changes will be considered during the next amendments to the Code of Civil Procedure. However, as of 30 October 2005 such an amendment has not been introduced.

According to data received from the General Headquarters of the Police, in 2005 the Police noted 17894 crimes associated with domestic violence.

Positive aspects

The adoption by the Sejm of the Act on counteracting domestic violence.

Article 3. Right to the integrity of the person

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

The Sejm has amended the Act on mental health protection by introducing detailed principles of hospitalisation at psychiatric hospitals. The Act introduces, among others, the institution of the Spokesperson of Patients' Rights at every psychiatric hospital. In accordance with Article 10a of the amended Act, the hospital's patient, as well as his/her statutory representative and legal or actual guardian, is entitled to seek support in protecting his/her rights, which in particular consists in the opportunity to file an oral or written complaint to the Spokesperson of Patients' Rights, to meet with him/her, and to receive information on the decision concerning the issues raised. The Spokesperson of Patients' Rights has the right to inspect the hospital, make motions regarding the possibility to take actions in an aim to remove the cause of the complaint or the existing violations, and to review the medical documentation following the consent of the person who filed the complaint.

The Act also specifies the principles of admitting persons with mental disorders to psychiatric hospitals, as well as the principles of using direct coercion¹¹.

According to the Ombudsman's information, in 2004, the Ombudsman received 58 complaints against the violation of patients' rights at health-care institutions, including 33 against the violation of the rights of patients undergoing treatment at hospitals for persons suffering from nervous and mental illness. However, according to the Ombudsman, the results

⁸Ustawa z dnia 2 lipca 2004 r. o nowelizacji Kodeksu Postępowania Cywilnego i niektórych innych ustaw, (Dz.U. z 2004 r. nr 172, poz. 1804) [The Act of 2 July 2004 amending the Act – The Code of Civil Procedure and some other acts (The Official Journal of 2004, No. 172, item 1804)]

⁹General Approach to the Minister of Justice – General Prosecutor of 20 May 2005 No. RPO/502007/05/V

¹⁰Response of 8 June 2005

¹¹Ustawa z dnia 1 lipca 2005 r. o zmianie ustawy o ochronie zdrowia psychicznego (Dz.U. z 2005 r. nr 141, poz. 1182) [The Act of 1 July 2005 amending the Act on mental health protection (The Official Journal of 2005, No. 141, item 1182)]

of the performed inspections showed that in general the rights of patients at these institutions are being respected; they have access to information regarding their condition and to decisions concerning their consent or refusal to undergo specific medical procedures. No flagrant violations have been stated regarding the right to intimacy and dignity during the provision of medical services; the patients were given an opportunity to contact persons from the outside and benefited from pastoral care. According to the Ombudsman, there have been cases of interference with access to medical documentation, such as exceeding deadlines for issuing documents, charging excessive fees for preparing copies or transcripts of the requested documents, or even refusals to issue documents. In these matters, the Ombudsman intervened on a case by case basis¹².

In the period between 1 January and 31 October 2005, 5842 reports were submitted to the Patients' Rights Bureau working alongside the Ministry of Health concerning the violation of patients' rights¹³. The complaints mainly concerned hindrances in access to medical services (1557), problems in receiving medical documentation (232), corruption (13) and complaints against medical errors (182), organisational errors (9), infections (85), and issues associated with the death of a patient (75). The Spokesperson for Patients' Rights carried out five interventions, made explanations in 2 569 cases concerning the existing health-care system and other provisions, and 685 cases were directed back to the competent organs.

Positive aspects

The introduction in every psychiatric hospital of the institution of the Spokeperson for Patients's Rights.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Legislative initiatives, national case law and practices of national authorities

Conditions of detention and external supervision of the places of detention

According to the Central Management of the Prison Service, the number of prisoners in 2005, which amounts to 83 000, is the greatest in 17 years. At the same time the prison capacity is 70 000. Around 38 000 individuals await the execution of their sentence. There are 2.6 square meters of space for each prisoner and this is systematically decreasing. According to the Director of the Central Management of the Prison Service, the tightening of penal policies, which has been announced by the new Government, will not be possible without violating the prisoners' rights defined in the Penal Executive Code.¹⁴

According to the Ombudsman's information, the Ombudsman receives complaints from temporarily convicted and detained individuals concerning deteriorating sanitary conditions at prisons, as well as lack of access to medical specialists and problems with receiving medical services and appropriate medicine¹⁵. The prisoners complained about the manner in which they are treated by prison service officers, in particular about the circumstances surrounding the disciplinary punishment decisions made against them, the use of physical force and direct coercion measures, inclusion in prisoner groups considered as dangerous and requiring increased supervision and the application of disciplinary measures resulting from the

¹²Information from the Ombudsman, Prof. Andrzej Zoll for the year 2004, Ombudsman Information Bulletin No. 50, Warsaw 2005, p. 154 - 156

¹³Information received from the Patients' Rights Bureau, A letter to the Helsinki Foundation for Human Rights of 22 November 2005, No. BPP-1636-075-36/05/MB/05

¹⁴Central Management of the Prison Service, <http://www.czsw.gov.pl> Daily *Rzeczpospolita* of 14 October 2005 p. C2

¹⁵Information from the Ombudsman, Prof. Andrzej Zoll for the year 2004, Ombudsman Information Bulletin No. 50, Warsaw 2005, p. 186

inclusion in such groups, inappropriate treatment by wardens and custodians, difficulties in applying for education, presentation of unjust opinions, discrimination in the scope of employment, permits to leave the prison and applications for release on parole, inappropriate treatment of prisoners' deposits and packages, transgressions during cell inspections. In his approach, the Ombudsman directed attention to the number of complaints (unchanged for several years) submitted to the Ombudsman Office against the use of direct coercion measures by the Prison Service. The number of complaints is not decreasing despite numerous interventions carried out by the Ombudsman¹⁶.

The possibility for prisoners to perform work also remains an issue. Despite a twofold increase in prisoner employment with external contracting parties – from 412 in March 2004 to 860 in March 2005 - 30 000 prisoners capable of working still remain unemployed. There is a lack of appropriate provisions and no officers who would handle marketing¹⁷. The lack of satisfactory results in the scope of increasing the number of prisoners performing work was subject to criticism from the Ombudsman¹⁸.

Penal institutions and institutions for the detention of persons with a mental disability

In the period between 1 January and 31 October 2005, the Patients' Rights Bureau received 133 complaints regarding patients with mental disturbances, out of which 25 complaints concerned the living conditions at facilities for mentally ill individuals. The complaints mainly concerned inappropriate social care and the lack of assistance and understanding from medical personnel (mainly concerning the issues of walks, rehabilitation and manual occupations)¹⁹.

Positive aspects

An increase in the number of prisoners able to find work with external contracting parties.

Reasons for concern

- Considerable overcrowding of prisons and other detention places,
- Inadequate access of prisoners to appropriate medical care,
- Violations of the prisoners' rights by Prison Service officers, through the manner in which decisions are made against the prisoners concerning disciplinary punishment, the use of physical force and direct coercion measures, and a way of qualifying prisoners to groups considered as dangerous,
- Use of direct coercion measures, as well as discrimination in various domains of prison life.

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

The monitoring of the Polish deportation facilities and a guarded centre carried out in 2005 by the Halina Nie_ Human Rights Association shows that the living conditions at the detention facilities are decent and do not violate the principles of humanitarianism and prisoners' dignity. However, the inability to exercise the other rights of the individuals placed in such institutions can be considered as a serious problem. As the monitoring has shown, the fundamental problems of foreigners detained at these isolated institutions consist in the

¹⁶Information from the Ombudsman, Prof. Andrzej Zoll for the year 2004, Ombudsman Information Bulletin No. 50, Warsaw 2005, p. 289-290

¹⁷Daily *Rzeczpospolita* of 19-20 March 2005 p.C1

¹⁸Information from the Ombudsman, Prof. Andrzej Zoll for the year 2004, Ombudsman Information Bulletin No. 50, Warsaw 2005, p. 284

¹⁹Information received from the Patients' Rights Bureau, A letter to the Helsinki Foundation for Human Rights of 22 November 2005, No. BPP-1636-075-36/05/MB/05

detention facilities authorities' inability to guarantee the right to information (these charges were aimed at detention facilities run by the Police), the lack of access to legal assistance and interpreters, financial shortages resulting in serious problems in providing foreigners with such items as free clothing suited to the time of year or the inability to organise their free time in any way and to provide them with access to newspapers, books, sports equipment and facilities. It is necessary to immediately resolve the issue concerning access to medical services, in particular complementation of the current health care system with epidemiological diagnostics, assistance for persons requiring special treatment (psychological and post-traumatic) and appropriate nourishment more adequately suited to the foreigners' cultural habits and religious beliefs. Studies show that following the previous monitoring²⁰ there was an improvement in the living conditions of foreigners detained at isolated institutions, especially at deportation facilities run by the Border Guard²¹.

Positive aspects

Decent living conditions at deportation facilities and the guarded centre.

Good practices

Improvement of the state of observance of the rights of foreigners being held at deportation facilities run by the Border Guard, in particular the scope of improvement of living conditions and access to information.

Reasons for concern

Lack of sufficient financial means necessary to provide foreigners held at detention facilities in particular with appropriate medical care, access to legal assistance and interpreters.

Protection of the child against ill-treatments

Legislative initiatives, national case law and practices of national authorities

The Regulation of the Council of Ministers on the conditions and manner of using direct coercion measures against juveniles²² came into effect on 26 February 2005. According to this Regulation, the use of direct coercion measures cannot be aimed at degrading or humiliating a juvenile and may only be used when other actions turn out to be ineffective. The Regulation also defines the manner of applying physical force, which may only consist in swift, manual overpowering, and specifies the conditions that must be met by an isolation chamber, in which a juvenile is placed. According to paragraph 5 of the Regulation, this chamber must be soundproof, heated, illuminated and equipped with a table, chair and bed, which are fastened to the floor. A juvenile may be immobilized using a strait jacket or a restraining belt for a period no longer than two hours. Only the facility's director can administer the continued use of these measures and only after consultations with a doctor. A report is prepared following each such case. In accordance with the contents of this Regulation, a juvenile has the right to file a complaint against the application of a coercion measure against him, which is then considered by the judge responsible for supervising the facility or centre.

²⁰A Report: The Rights of Foreigners Being Held at Deportation Arrests and the Detention Centre, Helsinki Foundation for Human Rights, Warsaw 2004

²¹The Halina Nie_ Human Rights Association, Monitoring of the Polish Deportation Arrests and the Detention Centre, Final Report, No. 6/2005, Krakow 2005

²²Rozporz_dzenie Rady Ministrów z dnia 1 lutego 2005 r. w sprawie szczegó_owych warunków i sposobów u_ycia przymusu bezpo_redniego wobec nieletnich umieszczonych w zak_adach poprawczych, schroniskach dla nieletnich, m_odzie_owych o_rodkach wychowawczych oraz m_odzie_owych o_rodkach socjoterapii (Dz.U. z 2005 r. nr 25, poz. 203) [The regulation of the Council of Ministers of 1 February 2005 on the conditions and manner of using direct coercion measures against juveniles placed in correctional facilities, juvenile shelters, youth educational centres and youth socio-therapeutic centres, (The Official Journal of 2005, No. 25, item 203)]

Positive aspects

Appropriate legal provisions of the conditions and manner of using direct coercion measures against juveniles.

Article 5. Prohibition of slavery and forced laborFight against the prostitution of others*Legislative initiatives, national case law and practices of national authorities*

Data from the General Headquarters of the Police shows that during the period from January - October 2005 the Police noted 3696 cases of crimes against sexual freedom²³. At the end of 2004, the Police noted 46 cases of pimping²⁴

Trafficking in human beings*Legislative initiatives, national case law and practices of national authorities*

The amendment of the Act on aliens and granting protection to aliens on the territory of the Republic of Poland²⁵ came into effect on 1 October 2005 and introduced broader protection to aliens – victims of human trafficking. According to the contents of this Act, an alien, who is the victim of human trafficking, may be granted a visa with a defined time of stay, as well as permission to settle for a limited period. In accordance with Article 33 of the Act, an alien is granted a stay visa (permit), despite the existence of circumstances, based on which he/she should be refused one, if there is just cause to believe that this alien is a victim of human trafficking. According to the contents of Article 53, par. 1, point 15 of this Act, the alien is permitted to settle for a limited period under the condition that he/she has begun cooperation with organs of the penal prosecution responsible for combating human trafficking (the police, the public prosecutor's office, the border guard) and has broken all contact with the individuals suspected of committing a prohibited act associated with human trafficking. Permission to stay for a limited time is granted to such an alien for a period of six months. It is not possible to refuse granting permission to a victim of human trafficking, especially if an alien's stay on the territory of Poland is illegal.

Statistical data concerning human trafficking, prepared in 2004 by the Organized Crime Office at the Prosecutors Department of the Ministry of Justice²⁶ shows that public prosecutor offices conducted 25 pre-trial investigations on human trafficking, 18 of which resulted in bringing an indictment act before the court. Two such cases were discontinued because the perpetrator was not found and five because they lacked the characteristics of a crime. In these cases, 39 individuals were accused and 98 were among the victims. Two victims benefited from police protection and six from the support of the non-governmental organisation "La Strada". From among the victims, two were juveniles.

²³Information from the General Headquarters of the Police of 18 November 2005, No. WK-II-733/719/05

²⁴Data from the General Headquarters of the Police

²⁵Ustawa z dnia 22 kwietnia 2005 o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw, (Dz.U. z 2005 r. nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

²⁶<http://www.mswia.gov.pl/index.php?dzial=166&id=2001>

According to the report of the European Commission against Racism and Intolerance²⁷, Poland is a country from which the victims of human trafficking originate, but more frequently it is also becoming a transit country for human trafficking. This mainly concerns the trafficking of women for sexual purposes. In its report, the ECRI advised the Polish authorities to introduce additional measures that would constitute an answer to the problem of human trafficking, especially through preventive campaigns raising the awareness of all interested groups of citizens. In particular it encourages the Polish authorities to protect the victims of human trafficking, especially by providing them with assistance and guaranteeing their safety. It also recommends the application of efficient measures of punishing the traffickers.

Positive aspects

Strengthening of the rights of aliens – victims of human trafficking

Protection of the child

Legislative initiatives, national case law and practices of national authorities

On 27 July, the Sejm amended the following codes: Penal Code and Penal Executive Code, and increased the penalties and principles of criminal responsibility for sex crimes, especially those committed against juveniles. Crimes such as paedophilia are subject to more severe penalties. Its perpetrators are liable to a sentence of two to 12 years of imprisonment. The amendment also introduced the ban on conducting activity associated with the upbringing, treatment and education of juveniles or their safe-keeping, and the opportunity for the court to pass a judgment prohibiting a convict from leaving a particular place of residence without the court's consent. If the victim is under 15 years of age, the convict cannot count on the effacement of the sentence. After the perpetrator of a sexual offence, committed in connection with mental disturbance on sexual grounds, has served his/her sentence, the court can place him/her in a closed facility or direct him/her for out-patient treatment. The court can also suspend the execution of the penalty and oblige the convict to undergo sobering-up or rehabilitation treatment, and possibly therapeutic interaction, as well as to refrain from contacting other persons²⁸.

According to studies carried out by Prof. Zbigniew Izdebski²⁹, 18% of Polish teenagers say that they have experienced sexual violence and 16% admitted to having been forced into sexual acts.

Positive aspects

Positive changes in criminal (material and procedural) law concerning the punishment of perpetrators of sexual offences .

Reasons for concern

A large number of juveniles who have experienced sexual violence or have been forced into sexual acts.

²⁷European Commission against Racism and Intolerance, The third report on Poland, Strasbourg, 14 June 2005

²⁸Ustawa z dnia 27 lipca 2005r. O zmianie ustawy – Kodeks karny, ustawy - Kodeks post powania karnego i ustawy - Kodeks karny wykonawczy, (Dz.U. z 2005 r. nr 163, poz. 1363) [The act of 27 July 2005 amending the acts – The Penal Code, The Code of Penal Procedure and The Penal Executive Code (The Official Journal of 2005, No. 163, item 1363)]

²⁹The report of TNS OBOP (O_roddek Badania Opini Publicznej) of 16 March 2005, M_odzie_ o sobie czyli do_wiadczenie polskich nastolatków [The Youth about Themselves - the Experience of Polish Teenagers], available on the website <http://www.tns-global.pl/centrum/2005/2005-03/wid/979>.

Exploitation of undocumented workers*Legislative initiatives, national case law and practices of national authorities*

According to the information received from the Ministry of the Economy and Labour, in the first half of 2005, the employment inspection services working in particular regions (voivodships) inspected 11 000 entities providing employment. The inspection showed that there are 3 139 persons, including 958 foreigners, working illegally for 2 427 of the inspected entities.

In accordance with the report³⁰ containing the results of the inspection regarding the legality of employment in 2004, the most frequent violations of legal provisions, stated by the employment inspection services, included: hiring an employee without written confirmation of having entered into a contract of employment; violation of the provisions of the binding law through the performance of work by unemployed individuals registered with the labour office; the employers not requiring individuals who are being hired or given new tasks to present a written statement concerning being entered into or crossed out of the unemployment register; not paying out the amounts due for the performed work; the employers not fulfilling their promises as to the legalisation of work, which results in a situation where persons already employed register at labour offices in order to receive health insurance; not fulfilling the obligation to pay the due taxes; illegal performance of work by foreigners.

According to estimated data from the Central Bureau for Statistics (GUS)³¹, the number of persons working on the “grey-market” during the first nine months of 2004 amounted to 1 317 000 persons.

³⁰Labour Market Department, Ministry of the Economy and Labour, The report “Collective results from the activity of the employment legality inspection services in 2004”, Warsaw, March 2005

³¹Unregistered employment in Poland in 2004, the Central Bureau for Statistics, <http://www.stat.gov.pl>

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In its judgment of 11 October 2005, the European Court of Human Rights ordered the Polish authorities to pay 7 000 Euros in compensation to a person who had been placed in pre-trial detention for an excessive period of time. In the judgment the Court confirmed that Robert B.'s detention was illegal and therefore it violated Article 5 para. 1 of the European Convention on Human Rights, which prohibits arbitrary deprivation of liberty³².

Legislative initiatives, national case law and practices of national authorities

Pre-trial detention continues to be the most commonly used preventive measure in criminal cases and its duration still remains a serious problem.

As of 30 June 2005, 1 544 persons were detained on the basis of regional courts' decisions, and 994 of them had been detained for a period longer than two years. In cases of pre-trial detention applied by district courts, the numbers were 1 6771 and 192 respectively. Only a very small percentage of the appeals against court decisions concerning pre-trial detention was allowed (469 in regional courts and 404 in district courts) and more lenient measures were then used³³.

The Helsinki Foundation for Human Rights is handling the case of Tomasz W., who has been placed in pre-trial detention. The court extended his stay in pre-trial detention for a period of over two years. Tomasz W. filed a complaint to the Constitutional Tribunal stating that the lack of provisions of the maximum period of pre-trial detention in the Code of Penal Procedure is inconsistent with the Polish Constitution. The complaint has been declared admissible. The Ombudsman has joined in the complaint and the Helsinki Foundation has presented an *amicus curiae* opinion.

Each year more and more persons receive compensation for being wrongly detained or being subjected to pre-trial detention. In 2000, courts adjudged compensation to a total of 63 persons in the amount of 670 000 zloty. In 2004, 231 persons received compensation amounting to 3.84 million zloty. There is no statistical data on disciplinary proceedings against prosecutors, who often wrongly apply pre-trial detention³⁴.

Detention following a criminal conviction

Legislative initiatives, national case law and practices of national authorities

The Sejm received from the Government draft amendments to the Penal Code introducing an electronic supervision system, which would replace isolation punishments. However, the Act was not passed before the end of the mandate of the previous Parliament.

For years there has been a discussion on the subject of applying non-isolation punishments. More frequent use of non-isolation penalties would allow for the reduction of the number of individuals awaiting the execution of sentences (in 2005 the number is around 30 000) and

³²Eur.Ct. H.R. of; *Baginski v. Poland* of 11 October 2005, No. 37444/97

³³Data received from the Ministry of Justice of 14 November 2005, No. DSP-I-5006-460/05

³⁴Daily *Rzeczpospolita* of 24 of June 2005, p. C1

would limit the overpopulation of prisons. However, the new Government has announced the amendment of the Penal Code and the introduction of more severe sanctions .

In his approach to the Minister of Justice, the Ombudsman pointed out the necessity to establish treatment and rehabilitation wards at selected penitentiary units for individuals convicted of sexual offences. According to the Ombudsman, the Prison Service is not prepared for the treatment and therapy of sexual disorders. There is also no health care facility, which could handle the treatment and rehabilitation of an individual released from a penitentiary institution.

The Ombudsman also pointed out that the National Health Fund ceased to finance sexual advice clinics (poradnia seksuologiczna) which could provide out-patient treatment within their territory to the perpetrators of sex-related offences released from penitentiary institutions. The amended Penal Code provides that in case of a stay-of-execution of a prison sentence, the court is obliged to hand the perpetrator of a crime, committed in connection with disturbances of sexual preferences (zaburzenia preferencji seksualnych), over for supervision and may oblige him to undergo therapeutic treatment. A court may also impose this obligation in cases of a conditional release on parole³⁵. In practice, according to the Ombudsman this can turn out to be impossible to execute.

Deprivation of liberty for juvenile offenders

Legislative initiatives, national case law and practices of national authorities

In accordance with the report prepared by the Council of Ministers, counteracting juvenile crime cannot be based on their complete isolation from society. According to the Council of Ministers, it is necessary to introduce changes to the system in this domain, in particular to create a legal and organizational basis for conducting work, which would provide the opportunity for personal treatment of each individual. According to the report, during the previous year minors committed 70 000 crimes and offences. What is also alarming³⁶ is that there has been an increase in the number of crimes committed by children under 13 years of age.

According to the information received from the Helsinki Foundation for Human Rights and the Ombudsman Office, the average period of the juveniles' stay at correctional institutions has increased in recent times. There are some cases where the court makes decisions to send minors to correctional institutions following pressure from public opinion, instead of applying other educational measures. These situations were the subject of many approaches by the Ombudsman³⁷.

Reasons for concern

Increase in the number of minors committing criminal offences, especially children under the age of 13.

³⁵Ustawa z dnia 27 lipca 2005 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postpowania karnego i ustawy – Kodeks karny wykonawczy (Dz.U. Z 2005 r., nr 163, poz. 1363) [The Act of 27 July 2005 amending the acts – The Penal Code, The Code of Penal Procedure and The Penal Executive Code (The Official Journal of 2005, No. 163, item 1363)]

³⁶Daily Rzeczpospolita of 6-7 August 2005 p. C1

³⁷<http://www.brpo.gov.pl>

Deprivation of liberty for foreigners*Legislative initiatives, national case law and practices of national authorities*

The amendment of the Act on aliens and on granting protection to aliens within the territory of the Republic of Poland³⁸ introduced, directly into the Act, the principles for detaining aliens. The Act, in its previous content, referred to the provisions of the Code of Penal Procedure in this domain. In accordance with Article 101 of this Act, an alien, for whom there are circumstances justifying deportation, as well as an alien who evades the performance of obligations defined in the deportation decision, may be detained for a period no longer than 48 hours. In accordance with paragraph 3a of this article, the alien is released, if he is not placed at the disposal of the court within 48 hours of the moment of being detained along with a motion to place him in a guarded centre or a deportation facility, and if within 24 hours of being placed at the disposal of the court he has not been delivered a decision concerning placement in a guarded centre or deportation facility. Furthermore, an alien is released following a court order or once the reason for the detention has ceased. This change came into effect as of 14 June 2005.

Other relevant developments*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

In its communication of 4 August 2005³⁹, the Human Rights Committee stated that Poland has violated Article 9.1 and 9.4 of the European Covenant on Civil and Political Rights. According to the Committee, not providing persons suffering from schizophrenia with appropriate representation before the courts, which decide about their placement in psychiatric hospitals, constituted an arbitrary detention specified in Article 9 par. 1 of the Covenant. The Tribunal also stated that not providing women with the opportunity to file an appeal against the court's judgment constituted a violation of Article 9 par. 4 of the Covenant.

Legislative initiatives, national case law and practices of national authorities

On 7 July 2005, the Sejm passed the Act amending the act – the Code of Penal Procedure⁴⁰, which allows the detainee and his lawyer to participate in the hearing, during which the court considers the complaint against the detention. The Act was amended in accordance with the judgment of the Constitutional Tribunal of 6 December 2004, which ruled that the previous provisions did not ensure an opportunity for the detainee to present his arguments and defend his case. The Constitutional Tribunal considered the appealed provisions of the Code of Penal Procedure inconsistent with the Constitution. The amended Article 464 came into effect on 20 September 2005.

The Supreme Court, in its judgment of 5 October 2005, stated that it is necessary to release a woman, who wrote letters defaming the public prosecutor and a judge, from a psychiatric hospital. The Ombudsman demanded the repeal of the decision of the regional court, which placed her in that facility. She had previously been detained there for a period of 10 months.

³⁸Ustawa z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw, (Dz.U. z 2005 r. Nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

³⁹No. CCPR/C/84/D/1061/2002

⁴⁰Ustawa z dnia 27 lipca 2005 r. o zmianie Kodeksu postępowania karnego (Dz.U. z 2005 r., nr 169, poz. 1416) [The Act of 7 July 2005 amending the acts The Code of Penal Procedure (The Official Journal of 2005, No. 169, item 1416)]

She had also not been brought in for the court's hearings and her *ex officio* lawyer did not appear before the court.

Positive aspects

The amendment of the Code of Penal Procedure giving the detainee or his lawyer the right to participate in the hearing, during which the court considers the complaint against the detention.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

Legislative initiatives, national case law and practices of national authorities

On 26 July 2005, the Council of Ministers issued a provision, which expanded the authority of the police within the activities associated with the identification and registration of incidents occurring in public places⁴¹.

Apart from his existing authority, a police officer also has the right to record sounds and images of incidents occurring in public places. Officers may also take smear tests from the mucous membrane in the cheeks of individuals or from the biological material taken from unidentified human corpses using special crime detection packets. This must be noted in the protocol.

In his approach to the Minister of Justice – the General Prosecutor of 17 February 2005⁴², the Ombudsman expressed his concern due to the large number of operational surveillances of telephone calls performed by the Police. In 2004, the Ombudsman submitted two motions to the Constitutional Tribunal concerning compliance with the Constitution of the provisions included in the Act on tax control and the Act on the Police concerning provisions regulating operational surveillance and recording the contents of telephone calls, as well as destroying stored materials considered to be irrelevant for the proceedings conducted by the authorised body.

The Constitutional Tribunal considered the Ombudsman's motion concerning the Act on tax control⁴³ and in its judgment of 20 June 2005 it stated that the rights granted to tax boards concerning the collection, storage, processing and use of information about individuals provide the agents of the tax intelligence with excessive freedom to intrude on privacy. The legislator did not state when it is possible to collect information about individuals and to what extent. The Tribunal also questioned the amendment of the act⁴⁴ that entitles the tax intelligence personnel to monitor and register images and sounds of events taking place in public locations using technical measures. The Tribunal also has doubts about the provisions

⁴¹Ustawa z dnia 17 grudnia 2004 r. O zmianie ustawy o Policji oraz ustawy Kodeks postępowania karnego (Dz.U.z 2005 r. nr 10, poz. 70) [The Act of 17 December 2004 on the amendment of the Act on the Police and the Act – the Code of Penal Procedure (The Official Journal of 2005, No. 10, item 70)]

⁴²General Approach to the Minister of Justice – General Prosecutor of 17 February 2005, No. RPO/480974/04/VII

⁴³Ustawa z dnia 28 września 1991 r. o kontroli skarbowej (Dz.U. z 1991 r. nr 100, poz. 442 z późn.zm.) [The Act of 28 September 1991 on Tax control (The Official Journal of 1991, No. 100, item 442 with further amendments)]

⁴⁴Ustawa z dnia 19 marca 2004 r. o zmianie ustawy - Ordynacja podatkowa oraz o zmianie ustawy o kontroli skarbowej (Dz.U. z 2004 r. nr 91, poz. 868) [The Act of 19 March 2004 amending the act on the law on taxes and tax control (The Official Journal of 2004, No. 91, item 868)]

concerning subscriber (abonent) identification. Before the amendment, the act provided that subscriber identification may be presented to the tax control only in cases concerning crime prevention or detection. The current law does not include such a restriction.

On 29 March 2005, the Ombudsman approached the Minister of Justice – the General Prosecutor⁴⁵ with the issue concerning the manner of dealing with the correspondence of individuals placed in pre-trial detention. The Ombudsman informed the Minister about the complaints he received concerning censorship of the pre-trial detainees' correspondence with State and local government bodies and the Ombudsman, as well as that of bodies appointed based on international agreements on human rights protection, ratified by Poland, and asked to amend the provisions of the Penal Executive Code. In his reply of 11 April 2005, the Secretary of State at the Ministry of Justice informed that he recommended the absolute observance of the ban on censorship concerning the correspondence of convicts and pre-trial detainees, however the Penal Law Codification Commission at the Ministry of Justice expressed an opinion that the amendment of the Penal Executive Code in the scope of dealing with the correspondence of convicts and pre-trial detainees, advisable as it may be, does not require an urgent legislative initiative and should be carried out as part of the future amendments to the Code

In his approach to the Minister of National Education and Sport (MENiS), the Ombudsman pointed out the abnormalities in the performance of activities aimed at counteracting drug addiction⁴⁶, in particular by means of conducting drug tests at schools and introducing dogs trained to find narcotics. Such procedures were carried out without any legal grounds, solely based on the executive provisions issued by MENiS. According to the Ombudsman, these actions were performed by unqualified individuals without the consent of parents and students. The Ombudsman called for establishing supervision over programmes concerning the prophylactics of counteracting drug addiction, ensuring their compliance with the binding laws, and to promote various forms of lectures and speeches influencing the youth.

In his reply of 28 June 2005, the Deputy Secretary of State at the MENiS agreed with the Ombudsman's opinion, but indicated the incidental character of the problem.

Positive aspects

The Constitutional Tribunal judgment stating an inconsistency with the Constitution of certain provisions of the Act on tax control, which violated the right to privacy.

Reasons for concern

- Cases of violation of the right to privacy by the Police during operational activities;
- Censorship of the convicts' correspondence with the Ombudsman and international institutions for human rights protection;
- Violation of the students' right to privacy through the performance of drug tests at schools.

Voluntary termination of pregnancy

Legislative initiatives, national case law and practices of national authorities

In accordance with the additional information concerning the fulfilment of recommendations 8, 9 and 17 of the Human Rights Committee, formulated following the examination of the 5th periodic report for the Republic of Poland from the implementation of the provisions of the International Covenant on Civil and Political Rights covering the period between 1 January

⁴⁵General Approach to the Minister of Justice – General Prosecutor of 29 March 2005, No. RPO/480974/04/VII

⁴⁶General Approach to the Minister of National Education and Sport of 30 May 2005 RPO/466316/04/XI

1995 and 1 October 2003, the Minister of Health sent a letter on 7 March 2005 to the heads of all provinces (voivodships), asking them to remind public health care facilities providing medical services in the scope of gynecology and midwifery about the absolute obligation to implement the provisions of the Act⁴⁷.

Despite the fact that Polish legislation allows for an abortion to be performed in situations specified in Article 4a of the Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion⁴⁸ there are cases of refusals to perform an abortion in Poland in circumstances where an abortion is legal.

According to the information obtained at the Ministry of Health, 193 abortions were performed in 2004 in accordance with the above-mentioned Act and accordingly 174 and 159 such acts in 2003 and 2002. According to the data presented by the Polish Government to the Human Rights Committee, 50 000 – 70 000 illegal abortions are performed in Poland each year⁴⁹.

The information obtained at the Office of Patients' Rights, operating alongside the Ministry of Health, shows that the Office received only two complaints against doctors refusing to perform a legal abortion during its entire period of its more than three years activity. It did not undertake any actions in these cases, because the women who reported to the Office did not demand further intervention and did not put forward any case documents.

According to estimates on the extent of the "abortion underground", presented by the Polish Federation for Women and Family Planning, between 80 000 to 200 000 illegal abortions are performed in Poland each year⁵⁰. In accordance with the information provided by the Federation, the estimates included in the report remain up-to-date.

Non-governmental organisations handling women's rights also argue that Polish law lacks an effective means of appeal against the decisions of doctors refusing to perform an abortion. Also, the women themselves are not familiar with the rights they are entitled to.

On 14 June 2005, the Minister of Health appointed a supervisory group in connection with the case concerning the death of a resident of Pi_a, who lost her life as a result of a doctor's refusal to perform a necessary examination due to the risk of miscarriage⁵¹. The group's task will be to examine all the circumstances and to explain the cause of this woman's death in connection with the violation of the Act on family planning, human embryo protection and conditions of permissibility of abortion.

The Supreme Court considered the cassation appeal concerning a disability pension for a girl who was born seriously ill following the doctors' refusal to conduct pre-natal examinations and give her mother an abortion due to serious damage to the foetus. The Court considered

⁴⁷ http://www.ms.gov.pl/prawa_czl_onz/V_sprawozdanie_informacja_dodatkowa_pl.doc

⁴⁸ Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie p_odu ludzkiego oraz warunkach i dopuszczalno_ci przerywania ci__y (Dz.U. Z 1993 r. nr 154, poz. 1792) [The Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion (The Official Journal of 2003, No. 154, item 1792)]

⁴⁹ As stated in the abridged minutes from the 2240th session of the Human Rights Committee, Geneva, 27 October 2004

⁵⁰ The anti-abortion act in Poland, The Functioning, Social Consequences, Attitudes and Behaviors, The Report – September 2000, available at the website:

<http://www.federa.org.pl/publikacje/raporty/aborcja2000/index.htm>

⁵¹ The daily "Gazeta Wyborcza", Tomasz Micha_owicz „Ci__a albo _ycie" ("Pregnancy or Life") of 2 May 2005

that the refusal of an abortion constituted a violation of the law and granted compensation to the parents⁵².

The European Court of Human Rights is currently examining the case of Alicja Tysi_c⁵³, who, as a result of a refusal to perform an abortion justified by health considerations, became a category I disabled person due to loss of eyesight. She filed a complaint about the violation by Poland of Article 13 of the European Convention on Human Rights due to the lack of an effective means of appeal against the decision of a doctor, who refused to perform an abortion

Positive aspects

The Supreme Court judgment granting compensation to a woman who suffered damages due to a refusal to perform an abortion.

Reasons for concern

Number of cases of refusing women the performance of a legal abortion .

Family life

Protection of family life

Legislative initiatives, national case law and practices of national authorities

The amendment of the Act on aliens and granting protection to aliens on the territory of the Republic of Poland⁵⁴ provided for the expansion of the scope of granting permission to stay for a limited period to aliens married to Polish citizens and aliens who came to Poland to reunite with their family. Such permission is granted to an alien who had been staying in Poland based on permission to take up residence for a limited period, granted in association with marriage to a Polish citizen, as well as in association with being reunited with family and in cases of losing a spouse, divorce or separation, especially if this is justified by his/her interest.

Positive aspects

Regulation of the legal situation of aliens, former spouses of Polish citizens, who find themselves in a difficult personal situation as a result of losing a spouse, divorce or separation.

Removal of a child from the family

Legislative initiatives, national case law and practices of national authorities

According to the information received from the Helsinki Foundation for Human Rights⁵⁵, the provisions governing the principles for placing children in child-care institutions are in line with international standards, there are cases however where they have not been applied by the judges. For example, there are situations when judges pass judgments concerning the removal

⁵²Decision of the Court of 14 October 2005 r. The daily "Gazeta Wyborcza", Ewa Siedlecka, „S_d Najwy_szy zbada spraw_ „le urodzonej” (The Supreme Court will examine the case of the “ill born”) of 11 August 2005

⁵³Application No. 5410/03

⁵⁴Ustawa z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw (Dz.U. Z 2005 r. Nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

⁵⁵Program Prawa Dziecka {The Programme – Child’s Rights]

of a child from the family without carefully examining the case. Children are placed in child-care institutions for the duration of the explanatory proceeding, which in most cases lasts a very long time

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

The amendment of the Act on aliens and granting protection to aliens on the territory of the Republic of Poland was introduced in order to implement the EU directive on reuniting families. In accordance with the contents of the amendment, permission to take up residence for a limited period in order to reunite with family is granted to an alien who resides outside the territory of the Republic of Poland or has come to Poland and is the family member of an alien who lives in Poland and meets the criteria defined by the Act. An application for permission to stay for a limited period can be filed by the spouse of an alien residing on the territory of Poland, under the condition that the marriage is recognised by Polish law, the underage child of the alien and a person married to him/her, as long as the marriage is recognised by Polish law, including a child adopted by him/her, the underage child of the alien or one adopted by him/her, the underage child of the spouse of an alien residing outside the territory of Poland, which remains under his/her care, if the spouse actually has parental authority over the child. However, according to the Act, the possibility to reunite with family depends on the fulfilment of the condition of having a stable and constant source of income, sufficient to cover the costs of providing for oneself as well as family members remaining under the alien's care, and the costs of health insurance or confirmation that an insurance company has covered the costs of treatment on the territory of Poland. Individuals, who were granted refugee status, are released from the obligation to fulfil this condition if they apply for reuniting with family members within three months of the day on which they were granted refugee status. In comparison with the previous act which relieved the refugee from the obligation to fulfil this obligation without time constraints, the current law seems to be stricter and limiting the refugee's opportunity to reunite with his/her family.

Reasons for concern

Limiting, in comparison with the law previously in force, of the opportunity to reunite with family members for individuals who were granted refugee status.

Private – and family life in the context of the expulsion of foreigners

Legislative initiatives, national case law and practices of national authorities

In accordance with the amendment of the Act on aliens and granting protection to aliens on the territory of the Republic of Poland, an alien is not presented with a deportation decision, and one that has been issued against him is not executed, if the alien is married to a Polish citizen or an alien who has received permission to settle or consent to stay as a long-term resident of the European Union and the alien's further stay does not constitute a threat to national defence and safety or public safety and order, unless the decision to marry was taken with a view to avoid deportation⁵⁶. According to the amendment of the Act, such an alien no longer receives consent for a tolerated stay, as was the case before, but permission to reside for a limited period, which is granted to him/her even in the case of an illegal stay in Poland. This makes it easier for the alien to receive later permission to settle.

⁵⁶Art. 89 ust. 1 p. 2 ustawy z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw (Dz.U. z 2005 r. Nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

In accordance with the information received from the Helsinki Foundation for Human Rights, there are sometimes cases of separating families due to placement in a guarded centre or a detention facility. The spouses are often placed in two different facilities, which are frequently quite remote.

Positive aspects

Improvement of the legal situation of aliens married to Polish citizens.

Reasons for concern

Cases of violation of the right to the protection of family life of aliens placed in detention facilities.

Article 8. Protection of personal data

Independent control authority

Legislative initiatives, national case law and practices of national authorities

The decision of the General Inspector for Personal Data Protection (Generalny Inspektor Ochrony Danych Osobowych - GIODO), according to which from 31 August 2005 the catalogues listing the contents of the Institute of National Remembrance (IPN) archives are inaccessible to researchers who are not employed at the Institute, met with objections from historians, staff and members of the IPN Board. According to them, this prevents the performance of scientific research and the disclosure of truth about the mechanisms of the police state and the lawlessness of the Polish People's Republic (PRL) era.

However, according to Ewa Kulesza, the General Inspector, this decision was issued following the inspection within the IPN, during which it turned out that the fundamental obligations resulting from the Act on personal data protection⁵⁷ were not fulfilled.

Protection of personal data

Legislative initiatives, national case law and practices of national authorities

According to the information received from the GIODO⁵⁸, during the period of 1 January to 5 November 2005 the GIODO received 746 complaints concerning the violation of the Act on personal data protection, 2 172 inquiries concerning the interpretation of the Act and 276 legal acts for opinion about their compatibility with the Act on personal data protection. The GIODO performed 93 reviews and issued 573 decisions, including 48 concerning a refusal to register a set of personal data, as well as 154 decisions to erase a set of personal data from the nationwide register. During this period the GIODO lodged 46 notifications of criminal offences to the prosecution authorities.

According to the report about the GIODO's activity, published in 2005⁵⁹, general awareness of the personal data protection is successively increasing. However it is not satisfactory. The level of personal data processing by the bodies active in the public domain is systematically improving. In 2005, the GIODO invoked violations of the Act on personal data protection by

⁵⁷Interview with Ewa Kulesza, Daily *Rzeczpospolita* of 6 October 2005 p.A3

⁵⁸Information available at the website <http://www.giodo.gov.pl/246/>

⁵⁹The report of the General Inspector for Personal Data Protection for 2004, published in 2005, available at the website <http://www.giodo.gov.pl>

the Public Prosecutor's Office⁶⁰, hospitals and clinics that perform prophylactic analyses of women's breasts⁶¹, City Guard officers who collect health-related information, including data regarding physical and mental defects and other disabilities, and enter them in protocols from the questioning of individuals suspected of committing a criminal offence⁶².

There has been a significant increase in the number of consumer complaints against private sector entities – companies providing telecommunications services, banks, cable network operators, and companies performing marketing activities⁶³.

On 20 September 2005, the Minister of Finance issued a Regulation on the scope of processing information concerning private persons (consumers) following the termination of the obligation resulting from the agreement reached with a bank or any other institution entitled by law to grant credit, and the course of removing this information⁶⁴ from banks' registers.

In accordance with this Regulation, banks and other entities allowed to grant credit to consumers, as well as i.e. The Bureau of Credit Information (BIK), have the right to process information regarding private persons, which are subject to the bank's professional discretion, however only to the extent necessary to assess credit capacity and to perform a credit risk analysis. Following the termination of this obligation, any other processing of consumer data requires written consent. The client can withdraw this consent at any time.

Other principles apply to the so called "negative" information about a client, who i.e. has trouble with the repayment of credit or some of its instalments. This data may be processed for a maximum period of five years following the end of the obligation period. In this case there is no need to receive the interested person's consent, under the condition however that the client has not fulfilled his obligation or is over 60 days late with payments and at least 30 days have passed from the moment in which he received information about the intention to process such negative data without his consent⁶⁵.

Positive aspects

- Improvement of the situation in the area of personal data protection in the public sector;
- Regulation of the personal data processing principles for clients of banks and other entities granting credit, protecting the personal data of these individuals.

Reasons for concern

Increased number of complaints of violation of the Act on personal data protection in the private sector.

⁶⁰Orzeczenie Wojewódzkiego Sądu Administracyjnego w Warszawie z 7 sierpnia 2005, Nr VI SA/Wa 2280/04, Orzeczenie Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 5 października 2005 nr II SA/Wa 734/05 [Judgments of the Voivodship Administrative Court in Warsaw of 7 August 2005. No. VI SA/Wa 2280/04 and of 5 October 2005, No. II SA/Wa 734/05]

⁶¹Daily *Rzeczpospolita* of 9 August 2005 p. C2

⁶²Daily *Rzeczpospolita* of 6-7 August 2005 p. C1

⁶³The report of the General Inspector for Personal Data Protection for 2004, published in 2005, available at the website <http://www.giodo.gov.pl>

⁶⁴Rozporządzenie Ministra Finansów z dnia 20 września 2005 r. w sprawie zakresu przetwarzanych informacji dotyczących osób fizycznych (konsumentów) po wygaśnięciu zobowiązania wynikającego z umowy zawartej z bankiem lub inną instytucją ustawowo upoważnioną do udzielania kredytów oraz trybu usuwania tych informacji (Dz.U. z 2005 r. nr 189, poz. 1596) [Regulation of Minister of Finance of 20 September 2006 on the scope of processing information concerning private persons (consumers) following the termination of the obligation resulting from the agreement reached with a bank or any other institution entitled by law to grant credit, and the course of removing this information (The Official Journal of No. 189, item 1596)]

⁶⁵Daily *Rzeczpospolita* of 15 October 2005 p. C2

Protection of the private life of workers*Legislative initiatives, national case law and practices of national authorities*

According to the information from the State Labour Inspection (Państwowa Inspekcja Pracy - PIP), there are cases of violations of employees' right to privacy, yet there is no statistical data outlining the extent of this occurrence. The violations mainly consist in reading electronic mail, inspecting employees' offices, tapping private calls made from company's phones, examining employees using a lie detector, or performing alcohol or narcotics tests.

Article 9. Right to marry and right to found a familyLegal recognition of same-sex partnerships and recognition of the right to marry for transsexuals*Legislative initiatives, national case law and practices of national authorities*

Polish law still does not allow for establishing partner relationships and same sex or transsexual marriages.

Other relevant developments*Legislative initiatives, national case law and practices of national authorities*

According to the Children's Rights Ombudsman, children raised in full families, whose low-income parents have once again married, are discriminated as regards advances on alimony. He approached the Ombudsman with a request to file an appeal to the Constitutional Tribunal against the provisions of the Act on proceedings towards alimony debtors and alimony advance as being inconsistent with the Constitution and the Convention on the Rights of the Child. According to the Spokesperson for Children's Rights, these criteria also make it more difficult for single mothers to build up a new family, because they would lose the advance after getting married⁶⁶.

Reasons for concern

Limiting single mothers' possibility to build up a new family by the provisions of the new Act on proceedings towards alimony debtors and alimony advance.

Article 10. Freedom of thought, conscience and religionIncentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection*Legislative initiatives, national case law and practices of national authorities*

In December 2004, the High Commissioner of the Police appointed the Plenipotentiary of the High Police Commissioner for Human Rights Protection and the Plenipotentiaries for Human Rights Protection Issues acting in the voivodship headquarters and police academies. The Plenipotentiaries' tasks are included in the Police action schedule in the domain of human rights for 2005 and cover the monitoring and coordination of police activities undertaken in an aim to combat ethnic and racial discrimination, anti-Semitism and xenophobia, as well as cases of hate speech.

⁶⁶Daily Rzeczpospolita of 15 September 2005 p. C1

According to the report of the European Commission against Racism and Intolerance⁶⁷ (ECRI), the measures taken by the Polish authorities are still insufficient to significantly reduce the number of anti-Semitism symptoms, which are sporadically displayed through physical aggression towards Jews, vandalism against synagogues and Jewish schools, as well as the desecration of Jewish graves and cemeteries, and even more often through written and verbal abuse aimed at Jews.

The ECRI recommended that the Polish authorities make significant effort to fight against anti-Semitism through the use of all possible measures necessary to combat its manifestations, regardless of their origin, especially through the effective use of the existing legislation, aimed at preventing and punishing anti-Semitism by persons associated with the justice system and establishing cooperation with and assistance to non-governmental organisations. The ECRI also recommends that the Polish authorities encourage politicians and public opinion-makers, in particular religious leaders, to take a firm public stance against anti-Semitism.

This report was however criticised by the Association of Jewish Religious Communes and representative of the Embassy of Israel. According to them Poland is not an anti-Semitic country and no attacks on members of Jewish community or Synagogues were observed⁶⁸.

In accordance with information received from the Helsinki Foundation for Human Rights, there is no data concerning the racist incidents directed against Muslims, as well as no publicly available study of islamophobia in Poland.

According to the information from the Ministry of the Economy of January 2005⁶⁹, in the last decade there has been a significant increase in the general number of recruits performing substitute military service, from 5 450 in 1993 to 11 670 in 2003. In 2004 the voivodship commissions for substitute military service considered 3 692 applications from recruits regarding the possibility of being transferred to substitute military service, and 1 642 recruits were later transferred. At the end of 2004, an overall number of 10 130 recruits were eligible for substitute military service, out of which 3 306 actually performed substitute military service. This amounts to 32.6% of the total number of recruits eligible for substitute military service. As a result of a lack of employment, 6 825 recruits await the assignment of substitute military service.

Good practices

The appointment of the Plenipotentiary of the High Police Commissioner for Human Rights Protection and Plenipotentiaries for Human Rights Protection Issues acting in the voivodship headquarters and police academies.

⁶⁷European Commission against Racism and Intolerance, Third report on Poland, Strasbourg 14 June 2005 p. 30

⁶⁸Daily "Gazeta Wyborcza" of 16 June 2005, p. 7, also <http://fzp.jewish.org.pl/news0605.html>

⁶⁹Ministerstwo Gospodarki i Pracy, Departament Spraw Obronnych, Analiza funkcjonowania s_u_by zast_pczej w 2004 r. Raport dost_pny na stronie [The Ministry of the Economy and Labour, Department for Defense Issues, Functional analysis of the substitute military service in 2004, Report available at the website]

<http://www.mgip.gov.pl/Praca/SLUZBA+ZASTEPCZA/Funkcjonowanie+sluzby+zastepcz ej/>

Article 11. Freedom of expression and of information

Freedom of expression and of information

Legislative initiatives, national case law and practices of national authorities

On 28 July, The Sejm adopted three Acts: on the circulation of financial instruments⁷⁰; on the public offer and the conditions for entering financial instruments into organised circulation and on public companies⁷¹; on the supervision of the financial market⁷². They replaced the single Act on the public circulation (sale) of stocks and bonds. These Acts contain provisions imposing honesty and reliability requirements on journalists who write about the stock-exchange, similar to those concerning analysts recommending the purchase or sale of stocks. The Sejm rejected the amendment of the Senate and the arguments of the Press Chamber (Izba Wydawców Prasy), which stated that the press law is an instrument that insufficiently guarantees the honesty and reliability of information presented by journalists⁷³.

Criminal proceedings in defamation cases have continued to be a serious problem in 2005. Such a possibility is provided for by Article 212 par. 2 of the Penal Code⁷⁴. According to the statistical data obtained in the Press Freedom Monitoring Center in the years 2003 – 2004 prosecutor offices dealt with 131 criminal cases against journalists, editors and redactors. 393 cases were dealt with by courts (338 brought by private persons). 96 cases were remitted and in 15 other cases accused persons were convicted. Another 15 persons were acquitted by the courts.

On 8 June 2005, the Helsinki Foundation for Human Rights filed a constitutional complaint to the Constitutional Tribunal in the case of Marian M. – a journalist, who was sentenced by the District Court in Brzeg for publishing an article in which he allegedly used defamatory language against prosecutors, debt collectors and judges in Wrocław. The Helsinki Foundation entered the proceedings as a public representative on 11 December 2004 and presented an *amicus curiae* opinion suggesting the submission of a legal question to the Constitutional Tribunal. On 22 February 2005, the Regional Court in Opole passed a judgment, in which it upheld the judgment of the District Court.

Another problem regarding freedom of speech is the possibility to secure a complaint in court cases related to the media activities and the similar possibility for the court to secure a complaint on the protection of personal interests by prohibiting the publication of information about a given person or problem⁷⁵. The Helsinki Foundation for Human Rights presented an *amicus curiae* opinion to the Court of Appeal in Warsaw. In the opinion the Foundation questioned the conformity with the Constitution of the provisions of the Code of Civil Procedure on securing complaints in court cases concerning the protection of personal interests filed against the media and asked the court to present a legal question to the Constitutional Tribunal.

⁷⁰Ustawa z dnia 29 lipca 2005 r. O obrocie instrumentami finansowymi (Dz.U. z 2005 r. Nr 183), poz. 1538 [Act of 29 July 2005 on the circulation of financial instruments (The Official Journal of 2005, No. 183, item 1538)]

⁷¹Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego obrotu oraz o spółkach publicznych (Dz.U. z 2005 r. Nr 183, poz. 1539) [Act of 29 July 2005 on the public offer and the conditions for entering financial instruments into organised circulation and on public companies (The Official Journal of 2005, No. 183, item 1539)]

⁷²Ustawa z dnia 29 lipca 2005 r. O nadzorze nad rynkiem kapitałowym (Dz.U. z 2005 r. Nr 183, poz. 1537) [Act of 29 July 2005 on the supervision of the financial market (The Official Journal of 2005, No. 183, item 1537)]

⁷³Centrum Monitoringu Wolności Prasy [The Centre for Monitoring Freedom of Speech], http://www.freepress.org.pl/syg_prawo.html

⁷⁴Ustawa z dnia 16 czerwca 1997 r. Kodeks karny (Dz.U. z 1997 r. Nr 88, poz. 553) [Act of 16 June 1997 The Penal Code (The Official Journal of 1997, No. 88, item 553)]

⁷⁵Art. 730 Kodeksu postępowania cywilnego [Article 730 of the Code of Civil Procedure]

Another example of interference in the freedom of speech is the prohibition to contact and to interview prosecutors, which was applied by the Regional Prosecutor's Office in Lublin to a journalist of the daily *Dziennik Wschodni*. The ban was imposed due to criticism aimed at the prosecutor's office expressed in one of the articles published by this journalist. The prosecutor's office only allowed for written correspondence with the prosecutors⁷⁶.

In another case the public prosecutor indicted the editor-in-chief of the daily *Rzeczpospolita* for the publication of parts of file notes from a pending case meaning the unauthorised dissemination of information from pre-trial investigations despite the fact that this information leaked out of the prosecutor's office⁷⁷.

On 2 August 2005, Robert Biedro_, the Head of the NGO called Campaign Against Homophobia was fined 600 zloty (around 150 euro) by the District Court in Elbl_g⁷⁸ for insulting Catholics.

He told journalists that the statement made by the activist of the Catholic organisation - the Polish Family Association - who called homosexuality a disease and suggested to prohibit homosexuals from working as teachers, "fully expresses the fascist, nationalist and Catholic nature of the witch-hunt against the homosexual community".

The case was decided in absentia (the accused was not summoned for the trial). Such a course of action could only have been used based on Article 500 par. 3 of the Code of Penal Procedure in a situation in which the court considers unquestionable the circumstances of the offence and the guilt of the accused. The Helsinki Foundation for Human Rights helped the accused to prepare a protest against the judgment.

Earlier, the same Prosecutor's Office rejected the information against the activist of the Polish Family Association for slandering homosexuals⁷⁹.

Reasons for concern

- Cases of criminal proceedings for defamation;
- Possibility to secure a complaint lodged with the court against media by means of prohibiting certain press reports.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

The Ombudsman approached the Constitutional Tribunal⁸⁰ with a motion to state the inconsistency with the Constitution of Article 65 in connection with Article 65a par. 2 and 3 of the Act – The traffic law to the extent to which it makes the organisation of an assembly conditional on receiving permission to carry it out. According to the Ombudsman, the provisions of the Act – The traffic law considerably limit the constitutional freedom to peaceful assemblies⁸¹.

⁷⁶Daily *Rzeczpospolita* of 31 October – 1 November 2005, p. A3

⁷⁷Daily *Rzeczpospolita* of 26 August 2005 p. A1

⁷⁸A judgment of the District Court in Elbl_g X City Department of 27 July 2005 r. No. X K 845/05

⁷⁹Daily *Gazeta Wyborcza*, Ewa Siedlecka, "Proces jak u Kafki" 4 sierpnia 2005

⁸⁰General Approach to Constitutional Tribunal of 30 June 2005 No. RPO/505746/05/I

⁸¹Ustawa z dnia 20 czerwca 1997 r. Prawo o ruchu drogowym (Dz.U.z 1997 r. Nr 98, item 602) [Act of 20 June 1997 – The traffic law (The Official Journal of 1997, No. 98, item 602)]

The Helsinki Foundation for Human Rights presented its *amicus curiae* opinion in this case.

The President of Warsaw refused the Equality Foundation permission to organise the Equality Parade, which was intended as a demonstration in defence of the rights of homosexuals. On 10 May 2005, the Equality Foundation filed a request to the President concerning the organisation of the parade. President, in accordance with his previous announcements, issued a negative decision on 3 June 2005, in which he cited the insufficient fulfilment of the requirements of the traffic regulations. The organisers filed applications to organise eight rallies. The President of Warsaw refused to grant permission for six of those rallies. Appeals were not considered before the day of the parade. The parade, which can be considered as illegal in light of the decision issued by the President of Warsaw, took place on 11 June 2005. Yet the police protected the demonstration's participants. It became a demonstration in defence of the freedom of assembly, and not just the rights of homosexuals. This practice continued in the later period. On 19 November in Poznan, the police detained around 60 participants of the manifestation entitled "The Equality March", for which the authorities had not given consent. The demonstrators protested against discrimination due to gender, skin colour, sexual orientation and disability. However, the police failed to react to the slogans of the anti-gay demonstrators, who shouted out such things as "Gas the gay!" and "send dykes to Auschwitz". Poznan authorities, was appealed by organizers of the march to the Regional Administrative Court. In its judgment of 14 December 2005⁸² the Court quashed the decision as taken in violation of Article 11 of the ECHR and Article 57 of the Constitution. A week after "The Equality March" in Poznan demonstrations in defense of the democratic right to assembly, entitled "The freedom march walks on", were held in most cities in Poland. They were peaceful. In most cities the authorities allowed for them to be held.

Reasons for concern

President of Warsaw's prohibition of the Equality Parade in June 2005.

Freedom of association

Legislative initiatives, national case law and practices of national authorities

The Helsinki Foundation for Human Rights informed the District Prosecutor's Office in Łódź-Widzew about the criminal offence of interfering with trade union activities. The case concerned the violation by an employer – a supermarket – of the rights of activists of trade unions by subjecting them to persecution and dismissing them, which constitutes a criminal offence on the basis of Article 35 of the Act on trade unions⁸³. The public prosecutor refused to initiate criminal proceedings.

Article 13. Freedom of the arts and sciences

Freedom of the arts

Legislative initiatives, national case law and practices of national authorities

Judicial proceedings are still pending in the case of Dorota Nieznalska convicted by the District Court in Gdańsk for offending religious feelings by organising the exhibition entitled "Passion". The Regional Court quashed the judgment of the District Court and sent the case back to the first instance. Representatives of the Helsinki Foundation for Human Rights monitor the hearings.

⁸² Judgment of the Regional Administrative Court In Poznan f 14 December 2005, No. IV SA/Po 983/05

⁸³Ustawa z dnia 23 maja 1991 r. O zwi_żkach zawodowych (Dz.U. Z 1991 r. Nr 55, item 234 z późn.zm) [Act of 23 May 1991 on trade unions (the Official Journal of 1991, No. 55, item 234, with further amendments)]

Freedom of research and academic freedom*Legislative initiatives, national case law and practices of national authorities*

Controversy concerning the limitation of access to scientific research was aroused by the GIODO decision of 31 August 2005 (mentioned at the page 27 of the report) on the prohibition of access to the catalogues listing the contents of the IPN archives for researchers, who are not the employees of the Institute. According to the GIODO, a review carried out at the Institute revealed that access to personal files found in the catalogues had been granted to unauthorised individuals. The GIODO's decision came under protest from historians, employees and members of the IPN Board. According to them, "this decision makes it impossible to conduct scientific research and to disclose the truth about the mechanisms of the police state and the lawlessness of the Polish Persons's Republic (PRL) era. This prevents IPN from performing its statutory tasks, which include providing information regarding the assembled files. This exemplifies the abuse of authority, because the majority of the archive materials do not contain any names"⁸⁴.

Article 14. Right to educationAccess to education*Legislative initiatives, national case law and practices of national authorities*

On 2 August 2005, the Polish Government adopted the Educational Strategy for the years 2007-2013, the objective of which is to raise the level of education of Polish society and to adapt the educational model to the changing social conditions. As part of the strategy, the Government proposed inter alia to develop a system of early support for children who have additional schooling needs, to remove barriers in access to education for individuals with special educational needs, to increase access to education, and to increase the role of pre-school education. In addition, access of children from national minorities to education should be improved.

In the educational strategy the Government also included a recommendation to charge fees for all higher education, combined with a grant system for students from low-income families and a student loan system. This has been met with a general protest from politicians. Moreover, in order to make such changes, the Polish Constitution would have to be amended⁸⁵.

The regulation of the Minister of National Education and Sport of 23 April 2004 on the detailed principles for pedagogic supervision⁸⁶ came into effect on 1 September 2005. It introduces the new methods of checking the quality of work of schools and educational institutions and obliges persons working in the field of educational supervision to possess the necessary qualifications. The regulation applies to the employees of the MENiS education offices, the supervisory unit of the Ministry of Culture and district pedagogical supervisory teams at regional courts. Such persons will have to complete special training.

⁸⁴Daily *Rzeczpospolita* of 1 September 2005 r. p.A3

⁸⁵Daily *Rzeczpospolita* of 3 August 2005 p. A1

⁸⁶Rozporz_dzenie Ministra Edukacji Narodowej i Sportu z 23 kwietnia 2004 r. o szczeg_owych zasadach sprawowania nadzoru pedagogicznego (Dz.U. Z 2004 r. nr 89, poz. 845) [The regulation of the Minister of the National Education and Sport of 23 April 2004 on the detailed principles for pedagogic supervision (The Official Journal of 2004 No 89, item 845)]

Access to schooling for disabled children and youth

On 18 January 2005, the MENiS issued two regulations: on the conditions for organising schooling, education, and care for the disabled and socially unadjusted children and youths in pre-schools and openly accessible or integrative schools, as well as on the conditions for organising schooling, education, and care for the disabled and socially unadjusted children and youths in special pre-schools and schools, as well as centres. In these regulations the following matters were settled: ensuring students and graduates with a medical certificate stating their need for special schooling, appropriate conditions and forms for taking exams in elementary schools, middle schools, school-leaving exams in high schools, as well as exams confirming professional qualifications.

There are cases of restricted access of disabled children to schooling. One such report is the subject of a General Approach of the Ombudsman to the Minister of Social Policy⁸⁷, in which he pointed out that a significant percentage of children living in social care institutions are not able to fulfil their educational obligations.

One of the examples is the case of a six-year-old, Marek F., who is disabled. His mother attempted for several months to get the commune (*gmina*) authorities to ensure transport for him to the rehabilitation-education centre⁸⁸ so that he could continue his education. As a result of the intervention of the Helsinki Foundation of Human Rights including a complaint lodged with the Voivodeship Administrative Court, the head of the commune organised transport to schools for disabled children.

The Helsinki Foundation for Human Rights intervened with the MENiS stressing the necessity to supervise the activities of the communes regarding the transportation of disabled children to schools. MENiS ordered the educational authorities to oversee the situation in this respect.

Refugees and persons applying for refugee status

The amended Act on the Educational System extended the right to free schooling to the children of individuals applying for refugee status. According to Article 94A par. 2 p. 10⁸⁹, since 1 October children of aliens applying for refugee status are granted the right to education on similar conditions as Polish citizens.

However, according to the UN High Commissioner for Refugees, the data from the Office for Repatriation and Aliens indicates that in fact less than 10 percent of children of asylum seekers attend schools⁹⁰. A similar percentage of children attend Polish language classes organised in the refugee centres. Both parents and children complain about the organisation of these classes (all children, regardless of their age, go to the same class, which slows down the learning process). The classes are held infrequently – usually twice a week. An example of good practice is the increasing number of volunteers teaching Polish both in refugee centres and in the Polish Humanitarian Action offices.

The amended Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland introduced changes in the conditions for providing social aid to aliens. According to Article 61 par. 1 p. 3 of the Act - social aid in refugee centres also includes the provision of didactic materials for children attending public educational institutions and

⁸⁷General Approach to Minister of Social Policy of 9 May 2005, No. PO/451217/03/XI

⁸⁸Such a duty is defined in the Art. 69 of the Constitution

⁸⁹Ustawa o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act on the amendment of the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland]

⁹⁰UNHCR, « Integracja – Wydarzenia », Z Obcej Ziemi, No. 22, available at the website http://www.unhcr.pl/publikacje/zobcejziemi/nr22integracja_wydarzenia.php

schools and covering the related costs. According to par. 5 of the Article, children who attend school receive funds for buying food at school.

National minorities

The Act on national and ethnic minorities and regional language⁹¹, adopted by the Sejm on 6 January 2005, confirmed, in Article 17, the right of individuals, who belong to national or ethnic minorities to learn the minority language or have classes held in the minority language, and to learn the history and culture of the minority. The method of fulfillment of this right is defined by the amended Act on the Educational System⁹², which in Article 13 obliges the Minister of Education to ensure that teachers are prepared for teaching these subjects, handbooks are provided for the schools teaching minorities, activities that popularise the knowledge about the history, culture, language and religious traditions of the national and ethnic minorities are taking place.

Positive aspects

- Adoption of the Educational Strategy of the Government for the years 2007-2013;
- Granting the right to education to children of asylum seekers on the same conditions as for Polish citizens;
- Adoption of the Act on national and ethnic minorities and regional language.

Reasons for concern

Limited access to education for the disabled children.

Vocational training

Legislative initiatives, national case law and practices of national authorities

According to the amendment to the Act on promotion of employment and job market institutions, made by the Act on amendment of the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland, the aliens who received permission for a tolerated stay obtained the opportunity to register as unemployed persons at employment offices and to participate in vocational training organised by these offices⁹³.

Article 15. Freedom to choose an occupation and right to engage in work

The right to engage in work and the right for nationals from other member States to seek employment, to establish themselves or to provide services

Legislative initiatives, national case law and practices of national authorities

Poland introduced on a reciprocal basis a two-year transitional period for free access to the labour market for citizens of certain European Union member states. Citizens of the United

⁹¹Ustawa z dnia 6 stycznia 2005 r. O mniejszościach narodowych i etnicznych oraz o języku regionalnym (Dz.U. Z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]

⁹²Ustawa z dnia 7 września 1991 r. O systemie oświaty (Dz.U. Z 1991 r. Nr 95, poz. 425 z późn.zm) [Act of 7 September 1991 on the educational system (The Official Journal of 1991, No 95, item 425 with further amendments)]

⁹³Ustawa z dnia 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy (Dz.U. z 2004 r. Nr 99, poz. 1001, z późn.zm) [Act of 20 April 2004 on promotion of employment and job market institutions (The Official Journal of 2004, No 99, item. 1001, with further amendments)]

Kingdom, Ireland, Sweden, and of those countries that acceded to the EU on May 1 2004 are not obliged to obtain a work permit.

According to the amendments to the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland⁹⁴, there is no obligation to obtain a work permit for those foreigners who have a long-term EU resident permit, are members of a family of Polish citizens, are citizens of EU countries and of countries with whom the European Union entered into free movement agreements, if they have a permit to live on the territory of the Republic of Poland for a defined period and for foreigners who have a long-term EU resident permit for another member country and who will receive a permit to live in Poland for a defined period.

Positive aspects

Exemption from the obligation to obtain a work permit for citizens of the EU and countries with whom the European Union entered into free movement agreements, who are the family members of Polish citizens.

The prohibition of any form of discrimination in access to employment

Legislative initiatives, national case law and practices of national authorities

In 2004 the State Labour Inspection (PIP) received 94 complaints regarding discrimination in employment. The PIP inspectors considered 21% of them as justified and 4% of them as partially confirmed. In 2005 the number of complaints increased two-fold. During the first half of 2005, the PIP received 156 complaints concerning discrimination in employment⁹⁵. The complaints included the descriptions of various reasons and criteria for the discrimination. In many cases the complainants indicated a few possible criteria or just limited themselves to a general statement concerning the existence of discrimination, without stating the motives for it. The accusations included in the complaints most frequently concerned discrimination due to age, health and disability, extent of working hours and membership in unions, and to a lesser degree due to gender. In the opinion of the complainants, the most frequent manifestation of discrimination consists in offering unfavourable terms of remuneration or other employment aspects. A lesser number of complaints concerned employees being overlooked during promotions or selection for training aimed at improving professional qualifications⁹⁶. Following the inspection, the PIP submitted post-inspection reports to employers regarding the violation by the employers of the obligation to make the contents of the provisions on the equal treatment in employment available to employees. The PIP stated that there was no such information in the case of 32.6% of the inspected employers. The employees, who complained against these discriminative actions, received information concerning the right to file a complaint to the labour court⁹⁷.

⁹⁴Art. 17 ustawy z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach, ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw. (Dz.U.z 2005 r. Nr 94, poz. 788) [Art. 17 of the Act of 22 April 2005 on the amendment of the Act on aliens, Act on granting protection to aliens within the territory of the Republic of Poland and other selected acts (The Official Journal of 2005, No 94, item. 788)]

⁹⁵Informacja uzyskana z Państwowej Inspekcji Pracy nr GNP-306-4560-1007/05/PE [Information received from the State Labour Inspection, No. GNP-306-4560-1007/05/PE]

⁹⁶Państwowa Inspekcja Pracy, Główny Inspektorat Pracy, Równe Traktowanie Kobiet i Mężczyzn w stosunkach pracy, Mobbing w środowisku pracy, Warszawa 2005 r. [State Labour Inspection, Equal Treatment of Women and Men, Mobbing in the working environment, Warsaw 2005]

⁹⁷Państwowa Inspekcja Pracy, Główny Inspektorat Pracy, Równe Traktowanie Kobiet i Mężczyzn w stosunkach pracy, Mobbing w środowisku pracy, Warszawa 2005 r. [State Labour Inspection, Equal Treatment of Women and Men, Mobbing in the working environment, Warsaw 2005]

Access to employment for asylum seekers*Legislative initiatives, national case law and practices of national authorities*

The amended Act on granting protection to aliens within the territory of the Republic of Poland introduced the possibility for an asylum seeker to be employed. According to Article 30A of the Act, the asylum seeker has the right to work, if the decision on the status of refugee in the first instance is not delivered within one year from the application and the delay was not caused by the alien. He/she can then apply to the President of the Office of Repatriation and Aliens, who will issue a certificate which, together with a temporary certificate of identity of the alien, constitutes the basis for the alien to obtain a work permit.

Access to employment in public administrations*Legislative initiatives, national case law and practices of national authorities*

On 17 June 2005, the Sejm amended the Act on civil service and local government employees⁹⁸, reducing the possibility to employ individuals with political links or friends and family of office heads at central government and local administration. Those applying for civil service positions will have to fulfil strict conditions – publication of free positions on notice boards at the office and in the Public Information Bulletin (internet) along with the conditions that must be met, publishing the list of candidates that meet the conditions and after the selection – publication of the name of the person selected along with the reasoning of the decision or publication of the information about not selecting any of the candidates. This will apply for all leadership positions in the civil service, public agencies and public funds.

Positive aspects

Limiting the employment of persons linked politically or friends and family of the heads of the offices at central and local administration.

Article 16. Freedom to conduct a businessFreedom to conduct a business*Legislative initiatives, national case law and practices of national authorities*

In a judgment of 20 May 2005 the Supreme Court⁹⁹ stated that clauses in contracts, which limit the economic freedom of one of the parties, violate the principles of social co-existence and thus have no legal force. This thesis was formulated by the Court as a result of a case in which two parties had a contract, based on which the plaintiff company agreed to sell the defendant certain goods, which he then sold to his clients. The contract contained a clause that in case of late payment all discounts granted by the seller would be annulled. According to the Supreme Court, maintaining the commercial relationship under these conditions for the sole

⁹⁸ Ustawa z dnia 7 czerwca 2005 r. o zmianie ustawy o s_u_bie cywilnej oraz niektórych innych ustaw (Dz.U. z 2005 r. nr 139, poz. 1164) [Act of 7 June 2005 amending the Act on civil service and other acts, (The Official Journal of 2005, No. 139, item 1164)]

⁹⁹Wyrok S_du Najwy_szego z 20 maja 2005 r. sygn. II CK 354/03, OSNC z 2005 r. nr 5, poz. 91 [Judgment of the Supreme Court of 20 May 2005 No. II CK 354/03, OSNC of 2005, No 5, item 91]

reason that the defendant may use his undefined contract rights limits economic freedom, and therefore violate the principle of community life¹⁰⁰.

The Ombudsman asked the Constitutional Tribunal to declare unconstitutional article 1 p. 20 of the Act of 29 July 2005 amending the act on the profession of a nurse and midwife and about the profession of a medical doctor and dentist¹⁰¹, coming into force on 1 January 2006. It makes it irregular for nurses and midwives to be employed on the basis of civil-law contracts. This restriction applies to all public health institutions, not only public but also private.

According to a World Bank report Poland fell nine places in the ranking of countries reviewed on the ease of conducting economic activity and is now in 54th place¹⁰².

Article 17. Right to property

The right to property and the restrictions to this right

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Court of Human Rights, in its judgment of 28 July 2005¹⁰³ has found a violation by Poland of Article 1 of the Additional Protocol to the European Convention on Human Rights in the case of the decision to revoke a customs depot license by a Customs Office. As a result the company of the applicant went into bankruptcy. The Customs Office did not present any legal basis for its decision.

In another case, *Hutten-Czapska vs. Poland*¹⁰⁴, the Court has found a violation of Article 1 of the Additional Protocol to the European Convention on Human Rights, because of the law that limits the amount of rent charged by the owners of private apartment buildings to 3% of the replacement value of the building. Such an amount does not allow the owners of the buildings even to make necessary renovations and to maintain the buildings. The judgment is not final. The case is pending before the Grand Chamber of the Court.

Legislative initiatives, national case law and practices of national authorities

According to the Supreme Court judgment of 28 September 2005, I CK 164/05, the owner of a store or a person providing services at premises, in which there is a radio playing, must pay for broadcasting the music or prove that it does not bring material benefits¹⁰⁵.

In a General Approach to the Minister of Infrastructure of 13 May 2005, the Ombudsman pointed out that owners, who were dispossessed because their properties were in the path of highways to be built, do not get compensation for the use of their land prior to the act of dispossession. The Ministry of Infrastructure responded by saying that it would prepare

¹⁰⁰Daily *Rzeczpospolita* of 12 October 2005 p.C2

¹⁰¹Ustawa z dnia 29 lipca 2005 o zmianie ustawy o zawodach piel_gniarki i po_oznej oraz o zawodzie lekarza i lekarza dentystry (Dz.U. z 2005 r. nr 175, poz. 1461) [Act of 29 July 2005 on the profession of a nurse and midwife and about the profession of a medical doctor and dentist (The Official Journal of 2005, No. 175, item 1461)]

¹⁰² Daily *Rzeczpospolita* of 4 November 2005 p. C1

¹⁰³ Ec.H.R. Rozenzweig and Bonded Warehouses Ltd v. Poland, judgment of 28 July 2005, Appl. No. 51728/00

¹⁰⁴ Ec.H.R. *Hutten – Czapska v. Poland*, judgment of 22 February 2005, Appl. No. 35014/97

¹⁰⁵ Orzeczenie S_du Nawy_szego z 28 wrze_nia 2005 r. Nr I CK 164/05 [Supreme Court judgment of 28 September 2005, No I CK 164/05]

appropriate draft bills¹⁰⁶ to correct this situation. To date, the necessary provisions have not been adopted.

Positive aspects

Strengthening of copyright protection for music authors.

Reasons for concern

The lack of provisions for granting compensation to owners of land, dispossessed for the purpose of highway construction, for the usage of their land prior to the act of dispossession.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

In a judgment of 28 September 2005, the European Court of Human Rights approved the friendly settlement in the case regarding the property left by Polish citizens on the territory of the former Soviet Union¹⁰⁷ (the so-called *mienie zaburza_skie*). The Polish Government agreed to award the applicant¹⁰⁸ the amount of 213 000 Polish zloty (about 53 000 Euro) as just satisfaction and about 24 thousand Polish zloty (about six thousand Euro) for costs and expenses.

Legislative initiatives, national case law and practices of national authorities

On 8 July 2005, the Sejm adopted the Act on exercise of the right to compensation for properties left outside of the current borders of the Republic of Poland¹⁰⁹. The aim of the law was to properly and fully implement the above mentioned judgment of the European Court of Human Rights in the case of *Broniowski vs. Poland*¹¹⁰. At the end of April 2005, as a result of the judgment of the Constitutional Tribunal, the article of the 2003 Act on compensation for the Polish citizens who left property on the territory of the former Soviet Union, became invalid. This provision restricted compensation to 15% of the value of the property, the compensation however could not exceed 50 thousand zloty. On the basis of this judgment, the provision of the 1996 Act on commercialisation and privatisation of companies which limited in a similar way the right to include the value of privatised state-owned companies as part of the compensation also became invalid. According to the new Act, the list of persons entitled to compensation was expanded and it no longer solely includes persons driven from the former territory of the Republic of Poland or those who left this territory as a result of treaties and agreements listed in the Act, but also those who as a result of other circumstances related to the war that began in 1939 were forced to leave the former territory of Poland.

The right to compensation will be confirmed following the applications which are to be submitted by the end of 2008.

¹⁰⁶General Approach to Minister of Infrastructure of 13 May 2005, No. RPO/452332/03/IV

¹⁰⁷Ec.HR. *Broniowski v. Poland* of 28 September 2005, Appl. No. 31443/96

¹⁰⁸*Ibidem*

¹⁰⁹Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej (Dz.U. z 2005 r. Nr 169, poz. 1418) [Act of 8 July 2005 on the realization of the right to compensation for leaving property outside of the current borders of the Republic of Poland (The Official Journal of 2005 No. 169, item 1418)]

¹¹⁰Ec.HR. *Broniowski v. Poland* of 28 September 2005, Appl. No. 31443/96

The law introduced several new forms of compensation. One of them is to include the value of real estate left behind the current border of Poland in the payment for real estate belonging to the State Treasury. Another form is a payment from the Compensation Fund.

Positive aspects

New provisions on the right to compensation in the so called *mienie zabu_a_skie* cases.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

The majority of rights granted to the asylum seekers by the current laws are fulfilled by the authorities responsible for considering the applications for granting refugee status. Non-governmental organisations have been informed that asylum seekers, during their status interviews, have problems with reading out the records of the interviews and with the manner of justifying the negative decisions, misinforming the aliens by the public officials.

The most important problem is however the lack of access to free legal assistance. Such assistance is not provided by the State, instead it is provided by some non-governmental organisations. Their estimates show that only 15-20% of the asylum seekers have access to legal assistance in the course of the refugee status proceedings

Amendments to the Act of aliens and Act on granting protection to aliens within the territory of the Republic of Poland introduced a number of changes in the refugee status proceedings. Article 11 expanded the possibility to have translated documents that are evidence in such proceedings. From 14 June 2005, if necessary, documents may also be translated by the second instance authority – The Refugee Board.

Article 22 of the Act obliges the authority receiving the refugee status application to inform the alien, in a language understandable to him/her, about his/her rights and obligations and about the legal consequences of not fulfilling these obligations. Additionally, information should be given about the organisations that have a statutory obligation to assist refugees. Problems with receiving information about the rights to which the asylum seekers are entitled, are especially acute for persons who are in guarded centres or in deportation facilities.

According to the new provisions the alien, who retracted his/her application to grant refugee status, can receive financial aid for voluntary departure from Poland.

Contrary to most countries of the European Union, Poles have a positive opinion about asylum seekers. According to a study undertaken by the public opinion study centre TNS OBOP (O_rodok Badania Opinii Publicznej), most Poles (77%) think that Poland should accept refugees, because in the past Poles were asylum seekers themselves. At the same time 67% of persons polled are afraid that the inflow of asylum seekers will increase unemployment, and 49% are afraid that it will cause crime to rise. At the same time, 63% think that the State should guarantee the refugees the right to stay in special centres until they are able to support their living¹¹¹.

Reception of asylum seekers

According to the report of the control of the performance of duties associated with the protection of aliens by the central government, carried out by the Supreme Chamber of

¹¹¹www.tns-global.pl

Control (Najwy_sza Izba Kontroli - NIK) as a part of the EU accession preparation¹¹², the NIK has positively assessed the standards of living in the refugee centres. At the same time, the NIK observed irregularities in ensuring adequate living standards in one of the centres and ensuring secure conditions to both the foreigners and the employees of the centre, as well as the centre itself.

Positive aspects

The amendment of the Act on granting protection to aliens within the territory of the Republic of Poland improving the situation of asylum seekers in the status proceedings .

Good practices

Respecting the procedural rights of persons seeking refugee status.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

According to the data received from the Office for Repatriation and Aliens (URIC) the recognition rate (the percentage of positive decisions for granting refugee status) in the period from 1 January to 6 December 2005 equalled about 10 % (6 203 asylum seekers applied for refugee status, 2 170 decisions were issued and in 285 cases asylum seeker was granted refugee status).

Such a low percentage of refugee statuses granted results from the fact that in the majority of cases, the Polish authorities do not grant refugee status to the Russian citizens of Chechen origin , even though they meet the conditions of the Geneva Convention and the New York Protocol, i.e. they have justified reason to fear retribution based on their nationality or political beliefs. These individuals usually receive a permit for a tolerated stay based on Article 97 para. 1. 1 of the Act on granting protection to aliens within the territory of the Republic of Poland.

There are drastic cases in which the Office for Repatriation and Aliens refuses – in violation of Article 1A¹¹³ of the Convention Relating to the Status of Refugees (Geneva Convention) to grant refugee status to Chechen women, who are victims of rape by soldiers or other officials of the Russian Federation stationed or working in Chechnya.

The Office of Repatriation and Aliens applies improper interpretation of the definition of the exclusion clause from Article 1F¹¹⁴ of the Geneva Convention. According to the information

¹¹²Najwy_sza Izba Kontroli, Informacja o wynikach kontroli realizacji przez administracj_ rz_dow_ zada_ zwi_zanych z ochron_ cudzoziemców w kontek_cie przyst_pienia Polski do Unii Europejskiej, 27 czerwca 2005 r. dost_pna na stronie http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep [Supreme Chamber of Control (NIK), Information about the review results from the performance by the government administration of duties associated with the protection of aliens in the context of Poland's accession in the European Union, 27 June 2005, available on the website http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep

¹¹³Art. 1A: »For the purpose of the present Convention, the term « refugee » shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it »

¹¹⁴Art. 1F: »The provision of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that a)He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make a provision in respect of such crimes; b)He has committed a serious non-political crime outside the country of refuge

from non-governmental organisations assisting the aliens and refugees in many cases the administrative authorities do not interpret correctly the concepts of crimes against peace and humanity, as well as non-political crimes. In one of the cases the Office for Repatriation and Aliens refused granting refugee status to a woman who only delivered food to fighters accused of terrorist activities¹¹⁵. However, the refusals to grant refugee status based on the Art. 1F are sporadic.

Reasons for concern

Cases of improper interpretation of Art. 1A and 1F of the Geneva Convention by the administrative authorities in refugee status related cases.

Unaccompanied minors seeking asylum

Legislative initiatives, national case law and practices of national authorities

Each year the Border Guard directed approximately 200 minors to the Police Shelters for Children after they illegally crossed the Polish border. 80% of these juveniles run away without informing the employees of the public facilities.

In the period from 1 January to 6 December 2005 125 unaccompanied minors applied for refugee status (169 in 2004, 146 in 2003 and 161 in 2002). The minors mainly originate from countries such as Romania, the Russian Federation, Vietnam, India, Pakistan, Afghanistan, China and Mongolia.

In 2004, the Polish authorities signed an agreement with local government authorities in Warsaw concerning the possibility to place about 10 unaccompanied minors, who applied for refugee status, in a foster home. Another agreement was signed in September 2005. As a result, about 20 children were given the opportunity to stay at two foster homes. The problem that remains is the inability to grant legal status to those children, who were not granted refugee status and a tolerated residence, and who cannot be deported to their country of origin¹¹⁶.

According to the Supreme Chamber of Control report of 27 June 2005 covering the period from 1 September 2003 to 30 June 2004, there were certain violations of rights of unaccompanied minors, in particular with regard to ensuring around the clock care, as required by the Regulation of the Minister of Internal Affairs and Administration on the conditions of accommodation for unaccompanied minors and the standards of care in centres for aliens. As a result of placing two families in the zone for minors, one of the unaccompanied minors was beaten and cut with a knife by an adult living in the zone.¹¹⁷

Reasons for concern

prior to his admission to that country as a refugee; c) He has been guilty of acts contrary to the purposes and principles of the United Nations »

¹¹⁵ *Inter alia* Decision of the Chairman of the Office for Repatriation and Aliens of 6 November 2005 No. DP-II-2347/SU/2004

¹¹⁶ Information received from the Office of the United Nations High Commissioner for Refugees in Warsaw

¹¹⁷ Najwyższa Izba Kontroli, Informacja o wynikach kontroli realizacji przez administrację rządową zadań związanych z ochroną cudzoziemców w kontekście przystąpienia Polski do Unii Europejskiej, 27 czerwca 2005 r. dostępna na stronie http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep [Supreme Chamber of Control (NIK), Information about the review results from the realization by the government administration of tasks associated with the protection of aliens in the context of Poland's accession in the European Union, 27 June 2005, available on the website http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep]

Lack of around the clock care for unaccompanied minors.

Article 19. Protection in the event of removal, expulsion or extradition

Collective expulsions

No collective expulsions established

Subsidiary protection and prohibition of removals of foreigners to countries where they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

Legislative initiatives, national case law and practices of national authorities

The Act on granting protection to aliens within the territory of the Republic of Poland¹¹⁸ introduced more favourable provisions on the release of aliens from deportation facilities or guarded centres. According to Article 44 para. 1 of the Act the aliens placed in detention because they submitted an application for refugee status while not having the right to enter or stay in Poland, can be released from detention under certain conditions. These include the probability that they meet the conditions to be granted asylum, as defined in the Geneva Convention, or conditions for permission for a tolerated stay based on Article 97 para. 1.1 of the Act on granting protection to aliens within the territory of the Republic of Poland. Previously it was possible to release aliens only in the case of the probability that they meet the conditions to be granted refugee status.

According to the statistical data of the Office for Repatriation and Aliens in the period from 1 January to 6 December 2005, 1 684 permissions were granted. They were obtained mostly by aliens from Chechnya.

For individuals of Chechen origin the permission for a tolerated stay was given to persons fulfilling the conditions for receiving refugee status. According to information from non-governmental organisations that provide legal assistance to aliens and refugees, there are cases in which persons, who meet the conditions for getting subsidiary protection, do not receive the permission for a tolerated stay. The organisations reported that there were only rare cases where a person was forcibly expelled after they were refused refugee status or the permission for a tolerated stay and obliged to leave the territory of the Republic of Poland.

There is no data regarding the number of expulsions of Chechen nationals to the territory of Belarus or the Russian Federation. According to the data received from the Polish Border Guards, a majority of the expulsions were performed on the request of individuals staying in the deportation facilities. It cannot be excluded that there are cases of expelling individuals to countries in which there is a risk of being exposed to a treatment that violates Article 2 or 3 of the European Convention on Human Rights.

Positive aspects

¹¹⁸Ustawa z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach, ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw. (Dz.U.z 2005 r. Nr 94, poz. 788) [Act of 22 April 2005 on the amendment of the Act on Aliens, Act on granting protection to aliens within the territory of Republic of Poland and other selected acts. (The Official Journal of 2005, No 94, item 788)]

Introduction of the new law regarding the release from deportation facilities aliens when it is probable that they meet the conditions for receiving a permit for a tolerated stay.

Reasons for concern

Granting only subsidiary protection (tolerated stay) to persons who meet the conditions for receiving refugee status.

Foreigners under a life-saving medical treatment

Legislative initiatives, national case law and practices of national authorities

Non-governmental organisations providing legal assistance to aliens and refugees are aware of many cases of granting permission for a tolerated stay to foreigners under a life-saving medical treatment. These permissions were given based on Article 97 par. 1 p. 1 and 2 of the Act on granting protection to aliens within the territory of the Republic of Poland. It happened in cases where the expulsion of the aliens would cause a threat to their lives or expose them to torture, inhumane or degrading treatment, and punishment, as well as in cases where it was not possible to execute the expulsion decision because of reasons caused neither by the authority nor the alien. However there is no data regarding the number of permits granted to this category of aliens. Also there is no data available on the number of expulsions from the territory of Poland of aliens, who belong to this category.

Positive aspects

Granting foreigners under a life-saving medical treatment permission for a tolerated stay.

Legal remedies and procedural guarantees regarding the removal of foreigners

Legislative initiatives, national case law and practices of national authorities

In the cases of expulsions the rights of the aliens are generally respected. The main problem is the lack of access to legal assistance and translators for the majority of aliens staying in guarded centres and deportation facilities.

CHAPTER III. EQUALITY**Article 20. Equality before the law**Equality before the law*Legislative initiatives, national case law and practices of national authorities*

In the approach to the Head of the Parliamentary Committee on Administration and Internal Affairs¹¹⁹ of the Sejm the Ombudsman pointed out the unequal treatment in the scope of the right to repatriation of individuals of Polish origin residing in the Asian part of the Russian Federation and Poles residing in the European part of the country.

The provisions of Article 10 of the Act on repatriation¹²⁰ states that the Council of Ministers may specify, by means of a regulation, the countries or parts of the Russian Federation, other than those listed in Article 9, whose citizens of Polish origin can apply for an entry visa for repatriation, in particular the countries in which individuals of Polish origin are discriminated against because of religion, nationality or political opinions. In his response¹²¹, the Head of the Parliamentary Committee on Administration and Internal Affairs stated that the Committee's work plan for the upcoming period does not include taking legislative initiatives regarding the amendment of the Act on repatriation.

Reasons for concern

Unequal treatment of individuals of Polish origin in the scope of the opportunity to apply for repatriation.

Article 21. Non-discriminationProtection against discrimination*Legislative initiatives, national case law and practices of national authorities*

The Act of 6 January 2005 on national and ethnic minorities in the Republic of Poland and on regional language¹²² introduces a ban on discrimination as a result of belonging to such minorities¹²³. According to Article 6 par. 2 of this Act, public authorities are obliged to take appropriate measures to support the full and actual equality in the sphere of economic, social, political and cultural life between individuals belonging to minorities and the majority; protect individuals who are exposed to discrimination, hostility and violence resulting from their belonging to particular minorities; and to consolidate multicultural dialogue. Based on Article 23 of this Act, a Joint Commission of the Government and National and Ethnic Minorities has been established as an opinion-making and advisory body for the President of the Council of Ministers.

¹¹⁹General Approach to the Head of the Parliamentary Committee on Administration and Internal Affairs of 30 March 2005, No. RPO/498764/64/05/IX

¹²⁰Ustawa z dnia 9 listopada 2000 r. o Repatriacji (Dz.U. z 2000 r. nr 106, poz. 1118) [Act of 9 November 2000 on Repatriation (The Official Journal of 2000, No 106, item 1118)]

¹²¹The response of 20 June 2005

¹²² Ustawa z dnia 6 stycznia 2005 r. O mniejszościach narodowych i etnicznych oraz o języku regionalnym (Dz.U. z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]

¹²³ In accordance with the contents of Article 2 of the Act, this only applies to Polish citizens.

Council Directive 2000/78/EC was implemented in its entirety, whereas the implementation of Directive 2000/43/EC is not satisfactory. In 2003, only laws concerning the ban on discrimination in employment were entered into the Polish legislation¹²⁴. To date, no special body has been established under Article 13 of the Directive 2000/43/EC. On 5 November 2005, the new Government liquidated the Office of the Government Plenipotentiary for the Equal Status of Men and Women, which performed the tasks referred to in the Directive, mainly counteracting the discrimination of women, discrimination due to age, as well as racial discrimination, xenophobia and intolerance. The Office's tasks will now be handled by one of the departments within the Ministry of Employment and Social Policies.

An attempt to systematise activities in support of counteracting racism and xenophobia is exemplified by the National Action Plan for Counteracting Racial Discrimination Xenophobia and Related Intolerance, approved by the Council of Ministers in 2004, which is to be implemented in the years 2004 – 2009. The Programme's strategic objective is to prepare methods of counteracting racism and xenophobia, in particular by means of educational and preventive activities intended to raise social awareness, as well as carrying out studies, including statistical ones¹²⁵. The programme is being implemented by relevant ministers, central administration, central public institutions, the Ombudsman, public broadcasters and the provincial organs of government administration, in cooperation with local government entities and non-governmental organisations. However, at present there is no study available describing the state of implementation and the results of the programme.

Positive aspects

- Entry into force of the Act on national and ethnic minorities in the Republic of Poland and on regional language, which introduced a ban on discrimination as a result of belonging to such minorities;
- Implementation of the National Action Plan for Counteracting Racial Discrimination Xenophobia and Related Intolerance.

Reasons for concern

Liquidation of the Office of the Government Plenipotentiary for the Equal Status of Women and Men.

Fight against incitement to racial, ethnic, national or religious discrimination

Legislative initiatives, national case law and practices of national authorities

The Sejm conducted work on the amendments to the Penal Code. One of the proposed amendments concerned the inclusion of paragraphs 2 and 3 in Article 256, which would enable the prosecution of perpetrators preparatory actions undertaken for the purpose of divulging materials that propagate a fascist or other totalitarian political system and incite hatred on grounds of differences in nationality, ethnicity, race or denomination, or due to lack of denomination¹²⁶. However, the amendment was not passed prior to the completion of the previous Sejm's term.

¹²⁴ The Labor Code has been amended: Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy – Kodeks Pracy (Dz.U. z 2003 r. nr 213, poz. 2081) [The Act of 14 November 2003 on the amendment of the Act - Labour Code and the amendment of some other acts (The Official Journal of 2003 No. 213, item 2081)]; Ustawa z dnia 7 marca 2003 o zatrudnieniu i przeciwdziałaniu bezrobociu (Dz.U. Z 2003 r. nr 58, poz. 514) [The Act on 7 March 2003 on employment and counteracting unemployment, The Official Journal of 2003 No. 58, item 514)]

¹²⁵ National Action Plan for Counteracting Racial Discrimination Xenophobia and Related Intolerance 2004 – 2009, published on the webpage of the Government Plenipotentiary for Equal Status for Women and Men, <http://www.rownystatus.gov.pl> p. 4

¹²⁶ The draft bill presented by the President of the Republic of Poland on the amendment of the Act – The Penal Code, the act – Introductory provisions of the Penal Code and some other acts, a Sejm

The District Court in Warsaw issued a judgment in the case of Leszek Bubel, parliamentary candidate from the Polish National Party, sentencing him to half a year's imprisonment suspended for two years and a fine of 25 000 zloty for publishing a collection of articles entitled "The Polish-Jewish War on Crosses" ("Polsko-żydowska wojna o krzyże") in 2000. The Court decided that the statements and opinions included in the collection constitute an infringement of the constitutional freedom of speech and insulted the entire Jewish nation.

Remedies available to the victims of discrimination

Legislative initiatives, national case law and practices of national authorities

Article 61, paragraph 4 of the Code of Civil Procedure, which was amended in order to implement Directive 2000/43/EC and entered into force on 5 February 2005, provides non-governmental organisations whose statutory tasks include the protection of equality and non-discrimination, with the right to file a complaint to the court with the consent and on behalf of the persons allegedly subject to discrimination, as well as to enter, at any stage, into the proceedings with the consent of the plaintiff¹²⁷.

Positive aspects

Amendments to the Code of Civil Procedure providing non-governmental organisations the right to file a complaint to the court with the consent and on behalf of the persons allegedly subject to discrimination, as well as to enter, at any stage, into the proceedings with the consent of the plaintiff.

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

As part of the implementation of the Programme in support of the Roma community¹²⁸, financial means were distributed among local communities that implemented programmes aimed at improving the situation of Roma on the labour market, in particular through professional training. However, the majority of Roma, who benefited from the programme, found employment within their community – as assistants for Roma education in schools or provide services for other persons of Roma origin¹²⁹.

Protection of Gypsies / Roms

Legislative initiatives, national case law and practices of national authorities

Currently, a long-term, nation-wide Programme in support of the Roma community is being executed by the Minister of Interior and Administration¹³⁰. One of the objectives of this programme is to improve security and decrease Polish society's reluctance towards individuals belonging to the Roma community, in particular by preparing police officers for working within the Roma environment.

publication No. 181, available on the website of the Polish Sejm <http://ks.sejm.gov.pl/proc4/wykazy/ust10h.htm>

¹²⁷ Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks Postępowania cywilnego i niektórych innych ustaw (Dz.U. z 2004 r. nr 172, poz. 1804) [The Act of 2 July 2004 amending the act – The Code of Civil Procedure and some other acts (The Official Journal of 2004, No. 172, item 1804)]

¹²⁸ Programme for the Roma community in Poland, Warsaw, August 2003, available on the webpage http://www.mswia.gov.pl/spr_oby_mn_prog_romowie_txt.html

¹²⁹ Informacja uzyskana w Helsińskiej Fundacji Praw Człowieka

¹³⁰ Programme for the Roma community in Poland, Warsaw, August 2003, available on the webpage http://www.mswia.gov.pl/spr_oby_mn_prog_romowie_txt.html

However, according to the ECRI¹³¹, despite the approval of two government programmes for the Roma, the majority of the Roma Community suffer due to exclusion from society and difficult living conditions, and continue to be the victims of racial violence. The ECRI recommended that the Polish authorities perform an analysis of the impact of discrimination on the Roma Community and underlined the necessity to pass the entire legislation banning discrimination in all areas of social life.

Positive aspects

Implementation of a long-term, nation-wide Programme in support of the Roma community.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Legislative initiatives, national case law and practices of national authorities

The Act on National and Ethnic Minorities and Regional Language¹³² that entered into force on 6 January 2005, provides in Article 4, para 2 that no one can be obliged, other than on the basis of the Act, to reveal information about one's affiliation with a minority or about one's descent, minority, language or religion.

Protection of linguistic minorities

Legislative initiatives, national case law and practices of national authorities

The Act on National and Ethnic Minorities and Regional Language, confirms the right of the minorities to freely use their mother tongue in private and public life, in spreading and exchanging information and the right to learn their mother tongue or to be instructed in their mother tongue. According to the Act, traditional names of towns, villages and streets can be used alongside the official ones, but only on the territory of the communes entered into the Register of Communes, where the toponyms are used in the minority language. The Kashub language was recognised as a regional language.

The regulation regarding the placement of additional names in the languages of national and ethnic minorities and in regional languages on signs and boards¹³³ has been introduced and entered into force on 3 September 2005.

The Act on National and Ethnic Minorities and Regional Language gives the members of minority groups the right to use and spell their first names and surnames according to the rules of the minority language, in particular to register their names in the Registry Office and use them in such a form in IDs. The Act provides for the transcription of first names and surnames of persons from minorities whose languages use alphabets other than the Latin alphabet¹³⁴.

¹³¹European Commission against Racism and Intolerance, The third report on Poland, Strasbourg, 14 June 2005

¹³²Ustawa z dnia 6 stycznia 2005 r. O mniejszościach narodowych i etnicznych oraz o języku regionalnym (Dz.U. Z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]

¹³³Rozporządzenie Ministra Infrastruktury o umieszczeniu na znakach i tablicach dodatkowych nazw w językach mniejszości narodowych i etnicznych oraz językach regionalnych (Dz.U. Z 2005 r. nr 157, poz. 1320) [The regulation of the Minister of Infrastructure regarding the placement of additional names in the languages of national and ethnic minorities and in regional languages on signs and boards (The Official Journal of 2005, No. 157, item 1320)]

¹³⁴ Article 7 of the Act

Positive aspects

Confirmation by the new Act of the right of the national and ethnic minorities to freely use their mother tongue in private and public life, in dissemination and exchange of information and the right to learn their mother tongue or to be instructed in their mother tongue.

Article 23. Equality between man and womenGender discrimination in work and employment*Legislative initiatives, national case law and practices of national authorities*

In his approach to the Minister of Social Policy¹³⁵, the Ombudsman recommended the introduction of a flexible retirement age for women, because the currently binding retirement age, which is lower for women than for men, results in women receiving lower pensions. According to the Ombudsman, maintaining the current situation will hinder the equal treatment of women and men on the labour market.

The Open Society Institute report on the situation of women in the new EU member states and the candidate states shows that in Poland 58% of all women are convinced as to the existence of discrimination. 35% of all men share this opinion. In accordance with the latest statistics women earn 83% of men's salaries. The report stresses that Poland does not have a transparent system that would enable to compare the salaries of men and women and it indicates the lack of proper legal foundation for the functioning of the Office of the Plenipotentiary for the Equal Status of Women and Men. According to the report there are no programmes encouraging men to play a greater role in family life, to change their views on the division of duties within the family or to take advantage of parental leave¹³⁶.

Reasons for concern

- Lack of flexible retirement age for women;
- Differences in the salaries of women and men.

Positive actions seeking to promote the professional integration of women*Legislative initiatives, national case law and practices of national authorities*

In accordance with the guidelines of the National Programme for Women (Krajowy Program Dzia_a_na Rzecz Kobiet) – the second phase of implementation¹³⁷, established by the Government, the activities carried out as part of this programme in 2005 included tasks aimed at the professional integration of women: the increase of women's access to information on employment opportunities, efficient professional training, advisory and employment agency services, including outside their typical areas of employment, preparation and performance of professional training for women, publication of information on entrepreneurial activities, as well as other activities included in the National Programme, mainly dealing with the fight against discrimination and improving the possibility to consolidate motherhood and a professional career¹³⁸.

¹³⁵General Approach to the Minister of Social Policy of 11 May 2005, No. RPO/476111/04/III

¹³⁶Daily *Rzeczpospolita* of 5 May 2005 p. A8

¹³⁷<http://www.rownystatus.gov.pl/pl/index.php?m=artykul&art=65> (7.11.2005)

¹³⁸Informacja Rz_ du dotycz_ca realizacji Krajowego Programu Dzia_a_na Rzecz Kobiet – II etap wdro_ eniowy [Government information concerning the implementation of the National Programme for Women - the second phase of implementation] <http://www.rownystatus.gov.pl/pl/index.php?m=dokumenty&kat=12> (07.11.2005)

Good practices

The implementation of the National Programme for Women in the scope of the professional integration of women.

Gender discrimination in the access to goods and services*Legislative initiatives, national case law and practices of national authorities*

According to the information received from women's organisations, women continue to have limited access to contraceptives and pre-natal tests. However, there is no statistical data presenting the extent of this occurrence.

Reasons for concern

Limited access for women to pre-natal tests and contraceptives.

Participation of women in political life*Legislative initiatives, national case law and practices of national authorities*

Women continue to constitute the minority in political life. Women constituted only 22 % of persons holding senior positions in the previous government (one minister only). As a result of the parliamentary elections that took place on 23 September 2005, 93 women were elected to the parliament. They constitute about 20% of all parliamentarians.

Article 24. The rights of the childPossibility for the child to be heard, to act and to be represented in judicial proceedings*Legislative initiatives, national case law and practices of national authorities*

The amendment to the Code of Civil Procedure¹³⁹ of 2004 introduced in Articles 185 a and b rules for questioning witnesses under the age of 15 in cases involving sexual offences and offences against morality, as well as offences against family. According to these provisions the minor can be questioned only once. The questioning should be performed in the presence of a qualified psychologist. In 2005 the new law entered into force and judges are becoming more sensitive to this problem. In addition, special rooms for questioning children were created at police stations.

However, in family related matters, there are still situations in which the judges deciding custody cases do not listen to the opinion of children, even those who are 15 or 16 years old.

Good practices

Positive changes regarding questioning by the courts witnesses under 15 years of age in cases involving sexual offences and offences against morality, family and caretakers.

¹³⁹Ustawa z dnia 6 czerwca 1997 Kodeks post powania karnego (Dz.U. z 1997 r. nr 89, poz. 555) [Act of 6 June 1997 Code of Criminal Procedure (The Official Journal of 1997, No 89, item. 555)]

Article 25. The rights of the elderlyParticipation of the elderly to the public, social and cultural life*Legislative initiatives, national case law and practices of national authorities*

The amendments to the Act on social security came into force on 1 September 2005¹⁴⁰. New provisions limit the possibility to earn a living for individuals receiving pensions and disability or family payments (rents) by changing the limit of earnings, below which the pension and disability payment will be paid in full. In accordance with the Act, only pensioners who have reached the common retirement age of 60 years for women and 65 years for men can earn additional money above their pensions without limitations. All other persons, including those receiving payments (as a result of inability to work or associated with family issues), must declare their additional income. The pension and payment will be paid out in full, if the person's income does not exceed the amount equal to the bottom limit. This amounts to 70% of the average monthly salary for a quarter of the year. However, the payment of a social pension will be suspended if the pensioner earns income higher than 30% of the average salary.

In his approach to the Minister of National Education and Sport, the Ombudsman pointed out the practice of limiting the period of leave for recuperation for teachers having the right to retire. In accordance with Article 73 par. 2 and Article 88 of the Teachers' Charter, a teacher, who received certification from a doctor regarding the necessity to benefit from leave for recuperation and wishes to continue treatment, is "forced" to cease performing professional work. In the opposite situation, the period of leave is shortened. According to the Ombudsman, the very fact that a person has the right to retire cannot be interpreted as retirement in the case of applying for recuperation leave¹⁴¹.

Reasons for concern

- Limitation of the possibility to earn a living for individuals receiving pensions and disability or family payments (rents)
- Limitation of the period of recuperation leave for teachers who have the right to retirement.

The possibility for the elderly to stay in their usual life environment*Legislative initiatives, national case law and practices of national authorities*

The number of welfare institutions for the elderly in Poland continues to be very low. In practice, the elderly do not have access to welfare institutions and therefore the majority of them live in their own homes. There is also a lack of access to assistance services for the elderly which could be performed at home.

Article 26. Integration of persons with disabilitiesProtection against discrimination on the grounds of health or disability*Legislative initiatives, national case law and practices of national authorities*

The Doctors' Trade Union of Poland filed a motion to the Constitutional Tribunal, in which it complained about certain provisions of the Act on social security related to workplace

¹⁴⁰Ustawa z dnia 29 lipca o zmianie ustawy o pomocy spo_ecznej oraz ustawy – Karta Nauczyciela (Dz.U. z 2005 r. nr 179, poz. 1487) [Act of 29 July 2005 amending the act on social security and the act – The Teacher's Charter (The Official Journal of 2005, No. 179, item 1487)]

¹⁴¹Daily *Rzeczpospolita* of 13-15 August 2005 p. C1

accidents and occupational diseases¹⁴² stating that they violate the constitution and discriminate disabled persons in the job market. The Act introduced the obligation to suspend compensation payments for workplace accidents and occupational illness in cases where the disabled person has income, for example from a job. Such provisions push disabled persons to seek employment on the grey-market, if they need additional income.

Activities with the aim of improving the situation of disabled persons are coordinated by the State Fund for Rehabilitation of Disabled Persons (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych - PFRON) which passed a resolution on 19 July 2005 that established new programmes for the integration of disabled persons called "Access", "Education" and "Disabled Persons Information Centres". The objective of the "Access" programme is to increase the accessibility of public utility buildings for disabled persons. The programme "Education" is designed to provide equal access of disabled children and youth to learning and to improve the conditions of children's and youths' stay in centres which provide 24-hour education and care. The programme "Disabled Persons Information Centres" aims to provide disabled persons, the institutions acting on their behalf, as well as their employers with current and reliable data necessary to receive and provide proper help and assistance¹⁴³.

Professional integration of persons with disabilities: positive actions and employment quotas

Legislative initiatives, national case law and practices of national authorities

In 2005 several acts were passed, which regulate the situation of disabled persons in the labour market.

Poland ratified Convention No. 159 of the International Labour Organisation regarding vocational rehabilitation and employment of disabled persons¹⁴⁴.

On 1 November 2005 the Act on vocational and social rehabilitation and employment of disabled persons came into force. According to the amended Article 11 of this Act, disabled persons registered in the district unemployment office or looking for work have the right to benefit from employment services as well as trainings, internships, intervention jobs and on-the-job training¹⁴⁵.

On 15 October 2005 the amendment of the regulation of the Council of Ministers of 2005 on the conditions of giving *de minimis* assistance to businessmen, who operate sheltered workshops has entered into force¹⁴⁶. The regulation governs the rules for paying out funds,

¹⁴²Ustawa z dnia 30 października 2002 r. o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych (Dz.U. z 2002 r. nr 199, poz. 1673) [Act of 30 October 2002 on social security related to workplace accidents and occupational diseases (The Official Journal of 2002, No 199, item 1673)]

¹⁴³Information available on the Web page of the Ministry of Social Policy, www.mps.gov.pl

¹⁴⁴Oświadczenie Rządu z dnia 20 stycznia 2005 r. w sprawie mocy obowiązującej Konwencji nr 159 Międzynarodowej Organizacji Pracy dotyczącej rehabilitacji zawodowej i zatrudniania osób niepełnosprawnych, przyjętej w Genewie, dnia 20 czerwca 1983 r. (Dz.U. z 2005 r. nr 43, poz. 413) [Government Declaration of 20 January 2005 on the legal force of the binding Convention No. 159 of the International Labour Organisation concerning occupational rehabilitation and hiring of disabled persons, approved in Geneva on 20 June 1983 (The Official Journal of 2005, No. 43, item 413)]

¹⁴⁵Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych, (Dz.U. z 1997 r. nr 123, poz. 776 ze zmianami wprowadzonymi ustawą z dnia 28 lipca o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy oraz o zmianie niektórych innych ustaw (Dz.U. z 2005 r. nr 164, poz. 1366) [Act of August 27, 1997 r. on the occupational and social rehabilitation and hiring of disabled persons, (The Official Journal of 1997, No 123, item 776 with later amendments introduced by the Act of 28 July 2005 on the amendment of the Act on promotion of employment and job market institutions and on the amendment of chosen other Acts (The Official Journal of 2005, No. 164, item 1366)]

¹⁴⁶Rozporządzenie Rady Ministrów z dnia 13 września 2005 r. zmieniające rozporządzenie w sprawie szczególnych warunków udzielania pomocy *de minimis* przedsiębiorcom prowadzącym zakłady pracy chronionej (Dz. U. z 2005 r. nr 189, poz. 1591) [The regulation of the Council of Ministers of 13

which are equal to the difference between the salaries of disabled persons and the monthly subsidy to the salary paid from the PFRON. It also governs paying out advance payments for personal income tax for such expenditure as creation, modernisation, renovation and maintenance of the rehabilitation base, preparation of workstations and their adaptation, salaries of persons caring for participants in the rehabilitation programme, the organisation of rehabilitation medical holidays, sports and recreational activities. The employers can also spend the funds from the company fund on training, basic and specialist medical care, advice and rehabilitation services, supplemental pay for being able to communicate using sign language, and other expenses associated with individual rehabilitation programmes for disabled employees¹⁴⁷.

In spite of the activities undertaken by government institutions in order to increase access to employment for disabled persons, their situation has not improved. According to the available statistical data, only 23.4% of disabled persons of a productive age had a job – compared to 74.9 percent of able bodied persons¹⁴⁸. This number is 2.3% lower than in 2003. According to statistical data from the Ministry of Social Policy, in August 2005 the percentage of disabled persons among all those seeking jobs and registered in employment offices was equal to 2.7%.

According to Government information about the activities it undertook in 2004 in order to implement the 1 August 1997 Resolution of the Sejm - “The Disabled Persons Charter”¹⁴⁹, the PFRON carried out the following activities: refunding the costs of the existing or new workplaces’ adaptation for disabled persons, refunding salary costs of disabled persons, refunding social security taxes paid by the employers, financing of professional trainings, granting loans for disabled unemployed persons to start up business activities, co-financing bank loans taken out by sheltered workshops and refunding the increased costs of hiring disabled persons with mental disabilities or blindness.

According to this information, by 31 December 2005, 111 workplaces were adapted in the public sector and 378 in the private sector. As a result of this 498 disabled persons were hired. Other benefits for employers of disabled persons are as follows: contract with employers, on the basis of which they could receive every other month for 18 months a refund of a disabled person’s salary and social security taxes to be paid by the employers if the disabled person was hired for an existing or new job. In 2004 the co-financing included 12 648 disabled persons. Also in 2004, 7 569 disabled persons were trained during courses organised by the district self-governments and employers. Out of this number, 1 146 persons received a job after the training was completed.

In addition to the activities described above, PFRON also carried out the following programmes – Telework (using IT techniques to aid the employment of disabled persons – in 2004 jobs were created for 41 persons), Junior (professional development of disabled graduates – 74 jobs created), disabled persons in public service (job creation in public administration institutions for disabled persons, who are unemployed and/or seeking a job – 670 jobs were created) and programme towards modernity (sustaining jobs for disabled persons in sheltered workshops).

It is difficult to assess the effectiveness of the activities carried out by the PFRON, because the report of the Supreme Chamber of Control (Najwyższa Izba Kontroli – NIK) compiled

September 2005 amending the regulation on the conditions of giving *de minimis* assistance to businessmen, who operate sheltered workshops has entered into force (The Official Journal of 2005 No. 189, item 1591)]

¹⁴⁷Daily *Rzeczpospolita* of 15 October 2005 p. C2

¹⁴⁸Dane statystyczne Ministerstwa Polityki Społecznej [Statistical data of the Ministry of Social Policy] http://www.mps.gov.pl/osoby_niepełnosprawne.php?dzial=389 (07.11.05)

¹⁴⁹Uchwała Sejmu RP z dnia 1 sierpnia 1997 r. Karta Praw Osób Niepełnosprawnych [Sejm Resolution of 1 August 1997 - “Disabled Persons Charter”]

during the second half of 2004, found that the financial resources of the Fund, earmarked for carrying out programmes for health and social rehabilitation of disabled persons, were spent uneconomically and incorrectly. The main concerns of the NIK were related to improper preparation of programmes, not compiling correct data and unequal treatment of the beneficiaries of the programmes¹⁵⁰.

Reasons for concern

Low ratio of employment of disabled persons.

¹⁵⁰Supreme Chamber of Control report, http://www.niepe_nosprawni.pl

CHAPTER IV. SOLIDARITY**Article 27. Workers' right to information and consultation within the undertaking****Article 28. Right of collective bargaining and action**Social dialogue*Legislative initiatives, national case law and practices of national authorities*

In accordance with the report of the National Committee of the Independent Self-Governing Trade Union (NSZZ) “Solidarność (Solidarity)” entitled “The annual review of the violations of trade union rights in Poland in 2004”¹⁵¹, the Trade Union Freedom Committee of the International Labour Organisation published a report about a complaint filed by NSZZ “Solidarność” concerning the Government’s failure to guarantee the effective implementation of ILO Conventions No. 87¹⁵², 98¹⁵³ and 135¹⁵⁴. Part of the ILO report consists of recommendations for the Polish Government to renew and intensify efforts within a three-party’s Voivodship Social Dialogue Committee in order to persuade partners to hold talks and negotiations, as well as to renew the social dialogue aiming to guarantee the exercise of the freedom of association and collective negotiations, especially in the scope of recognising trade unions and protection against discrimination due to trade union membership.

The right of collective actions (right to strike) and the freedom of enterprise or the right to property and the issue of the intervention of the judiciary into collective actions*Legislative initiatives, national case law and practices of national authorities*

In accordance with the PIP's report for the year 2004, there has been a significant decrease in the number of refusals to register collective agreements in comparison with the previous year (12.2% in 2003 and 7.4% in 2004). However, the trade unions still have doubts as to the type of documents required to register a collective agreement.

In 2004 there has been an insignificant increase in the number of collective agreements containing provisions with certain irregularities. (from 24% in 2003 to 26% in 2004). The PIP pointed out, however, that it is becoming more and more sporadic for parties to include in the collective agreements provisions more favourable than provided in the Labour Code¹⁵⁵.

Positive aspects

A decrease in the number of refusals to register collective agreements.

¹⁵¹The report is available on the website <http://www.solidarnosc.org.pl/obrona/index.htm>

¹⁵²Konwencja MOP nr 87 z 1948 r. o wolności związkowej i ochronie praw związkowych (Dz.U.z 1958 r. nr 29, poz. 125) [ILO Convention No. 87 of 1948 on freedom of association and the protection of trade union rights (The Official Journal of 1958, No. 29, item 125)]

¹⁵³Konwencja MOP nr 98 z 1949 r. prawo organizowania się i rokowań zbiorowych (Dz.U. z 1958 r. nr 29, poz. 126) [The ILO Convention No. 87 of 1948 on the right to assembly and collective negotiations (The Official Journal of 1958, No. 29, item 126)]

¹⁵⁴Konwencja MOP nr 135 z 1971 r. o reprezentacji pracowników (Dz.U. z 1977 r. nr 39, poz. 178) [ILO Convention No. 135 of 1971 on the representation of employees (The Official Journal of 1977, No. 39, item 178)]

¹⁵⁵Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

Reasons for concern

More sporadic cases of including in the collective agreements provisions more favourable than the Labour Code.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

The Sejm adopted an amendment to the Act on the promotion of employment and on labour market institutions, which was published on 30 August 2005¹⁵⁶. Changes of rules on financial support for employers providing working places for persons previously unemployed came into force on 1 November 2005. Employers are entitled to receive them from the employment office. The Act increases financial support to equip or supplement the workplace of an unemployed person over 50 years of age, who has been employed by a company as part of intervention work. Since 1 November communes (*gmina*) can also organise public work and the Head of the commune can direct unemployed persons who do not have the right to receive unemployment benefits or benefit from social aid, to perform the so called public utility work in their place of residence for 10 hours a week.

From 1 January 2006, anyone who legally employs an unemployed person as a house aid, will be able to deduct the incurred tax contributions from his\her taxes. From 1 January 2006, unemployment benefits will also be paid out to unemployed individuals who lost their job and are not entitled to an old age or disability pension¹⁵⁷.

On 1 July 2005 the Sejm passed an Act amending the social security system¹⁵⁸ in order to facilitate starting different business, especially by young unemployed persons. For this category of persons the amendment reduced the amount of instalment insurance premium for social security by 70%. However the Act does not cover individuals who intend to perform economic activity in the scope of learned professions. This raises doubts from the point of view of the principle of equality before the law.

The Ombudsman approached the Minister of Economy and Labour on the issue concerning the lack of opportunity to appeal the refusal to consider the motion for the Head of the commune to award an unemployed person financial means to undertake economic activity in accordance with the Act on the promotion of employment and on labour market institutions¹⁵⁹. The amendments to this Act¹⁶⁰ only apply to an obligation of the Heads of communes to made public a list of employers and persons, with whom the labour market assistance agreements were reached, by placing it on an official notice-board for a period of 30 days.

¹⁵⁶Ustawa z dnia 28 lipca 2005 o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy (Dz. U. z 2005 r. nr 164, poz. 1366) [Act of 28 July 2005 amending the Act on the promotion of employment and on labour market institutions (the Official Journal of 2005 No. 164, item 1366)]

¹⁵⁷Daily *Rzeczpospolita* of 1 September 2005 p.C2

¹⁵⁸Ustawa z dnia 29 lipca o zmianie ustawy o pomocy społecznej oraz ustawy – Karta Nauczyciela (Dz.U. z 2005 r. nr 179, poz. 1487 [Act of 29 July 2005 amending the act on social security and the act – The Teacher's Charter (The Official Journal of 2005, No. 179, item 1487)])

¹⁵⁹General Approach to the Minister of the Economy and Labour of 22 May 2005 No. RPO/479850/04/VIII

¹⁶⁰Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy oraz zmianie niektórych innych ustaw (Dz.U. z 2005 r. Nr 164 poz. 1365) [Act of 28 July 2005 on the promotion of employment and on labour market institutions and some other acts (the Official Journal of 2005, No. 164, item 1365)]

Positive aspects

Improving unemployed persons' access to placement services.

Article 30. Protection in the event of unjustified dismissal

Reasons for dismissals

Legislative initiatives, national case law and practices of national authorities

In accordance with the National Committee of the Independent Self-Governing Trade Union "Solidarność" report, the termination of an employment contract with trade union activists remains one of the most frequently used methods of counteracting trade unions. According to the report, the employers often used disciplinary dismissals against the activists, which resulted in the immediate termination of work relations. There are also frequent cases of intimidating the members of a union in order to force them to resign from work. Some members of trade unions meet with discrimination at work due to their union affiliation, for example by receiving lower salaries than the other employees.

Remedies against the decision of dismissal and compensation due in the event of an unjustified dismissal

Legislative initiatives, national case law and practices of national authorities

The Constitutional Tribunal¹⁶¹ in its judgment of 18 October 2005 stated that the provisions, according to which the courts can assess damages for unjustified dismissal equal to two-weeks' to three months' salary, are in compliance with the Constitution. The Tribunal ruled that in employment relationships equality before the law does not mean identical rules and obligations of different groups of employees.

According to the judgment of the Constitutional Tribunal¹⁶² of 30 May 2005, the Act on protection of workers' claims in case of bankruptcy of the employer, amended in 2002¹⁶³ worsened the legal situation of employees. Their protection in case of bankruptcies of the employers was diminished. The Act changed the definition of bankruptcy of the employer and limited the scope of protection of workers. It also limited the scope of claims covered from the Fund of Guaranteed Workers Benefits (Fundusz Gwarantowanych Władcz Pracowniczych). According to the Tribunal, the fundamental principle of citizens' good faith in the state and the law it enacts was broken. This principle is a key element of the state ruled by law¹⁶⁴.

As a result of inspections performed at 191 employers, the PIP found that the largest number of irregularities in dissolving employment contracts due to reasons outside of the control of the employees was related to non-payment of severance pay (28%), understating the amount

¹⁶¹Wyrok Trybunału Konstytucyjnego z 18 października 2005 r. nr SK 48/03 [Judgment of the Constitutional Tribunal, October 18, 2005 No SK 48/03]

¹⁶²Wyrok Trybunału Konstytucyjnego z dnia 30 maja 2005 r. nr P 7/04 [Judgment of the Constitutional Tribunal, May 30, 2005 No P 7/04]

¹⁶³Ustawa z 30 sierpnia 2002 r. o restrukturyzacji niektórych należności publicznoprawnych nowelizująca ustawę z 29 sierpnia 1993 r. o ochronie roszczeń pracowniczych w razie niewypłacalności pracodawcy (Dz.U. z 2002 r. nr 155, poz. 1287) [Act of August 30, 2002 r. on the restructuring of certain public amounts due which amended the August 29, 1993 Act on protection of workers claims in case of bankruptcy of the employer (The Official Journal of 2002, No. 155, item 1287)]

¹⁶⁴Art. 2 of the Constitution of the Republic of Poland

of the severance pay (10%), and not paying compensation for shortening the period of notice (5%)¹⁶⁵.

Reasons for concern

Limiting the protection of employees in case of bankruptcy of employers.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

The inspections performed by the State Labour Inspection in retail stores show that in a significant number of the stores there were infringements of labour safety and hygiene provisions. The infringements concerned, in particular, the storage of goods, hygienic and sanitary equipment found in social rooms, organisation of workspaces, equipping employees in proper clothing and footwear. PIP paid special attention to blockage of evacuation routes (violations were found in 27% of the stores). The Inspectorate noted other violations as well – for example dangerous areas in the workplace were not marked properly, or employees did not have access to equipment manuals¹⁶⁶.

Sexual and moral harassment at work

Legislative initiatives, national case law and practices of national authorities

In 2004, the PIP registered 395 complaints, in which accusations of mobbing were mentioned. Over half of them were considered to be unjustified, 31 complaints turned out to be fully justified and 43 cases of mobbing accusations were partially confirmed. The evidence, gathered during the inspections undertaken by PIP inspectors during the consideration of 76 complaints was not sufficient to claim the existence of mobbing. The complaints considered by the PIP with allegations against employers concerning actions defined as mobbing in the Labour Code, indicate that the complainants often expend the definition of mobbing onto other irregularities at labour institutions, e.g. violation of provisions concerning working hours by forcing employees to work longer than the statutory norms without appropriate compensation defined by the Labour Code. In response to the complaints, the inspectors most frequently informed the complainants about the arrangements made during the inspection and instructed them on the possibility to file a complaint to the labour court to award appropriate compensation from the employer¹⁶⁷.

Working time

Legislative initiatives, national case law and practices of national authorities

Nearly half of the employers controlled in 2004 by the PIP violated the rules of paying supplements to salaries, including overtime pay. PIP raised the alarm in its report that there has been a significant deterioration of the situation of employees working overtime compared

¹⁶⁵Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁶⁶Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁶⁷Państwowa Inspekcja Pracy, Główny Inspektorat Pracy, Równe Traktowanie Kobiet i Mężczyzn w stosunkach pracy, Mobbing w środowisku pracy, Warszawa 2005 r. [State Labour Inspection, Equal Treatment of Women and Men, Mobbing in the working environment, Warsaw 2005]

to the previous year. The percentage of employers who improperly record working time has increased from 39 to 49%¹⁶⁸.

According to the inspections performed by PIP in the “Biedronka” and “Kaufland” supermarket chains, the rights of workers were violated throughout Poland – especially regarding working hours. The main violations concerned falsifying attendance lists and infringing on safety provisions by forcing workers to carry heavy weights. Several cases are under investigation by the prosecutors throughout the country. Several dozen employees interviewed by the prosecutors confirmed that they were forced to work overtime without pay. Two former directors of the supermarket chains and two managers were indicted¹⁶⁹.

On 19 January 2005 there was another hearing in the case brought to the court by a manager of one of the stores in the “Biedronka” supermarket chain. The manager was forced to work overtime without any additional compensation. It is the first case in which an employee of a supermarket brought a claim to court for overtime pay. The Regional Court in Gdansk awarded the claimant the overtime pay. The Court of Appeals in Gdansk heard the complaint of the other party and overturned the judgment of the lower court and sent the case to be tried again¹⁷⁰. The Court of Appeals to a large extent agreed with the judgment of the Regional Court regarding the key problems. Because the court based its judgment on Article 322 of the Code of Civil Procedure, which serves to estimate the amount of hours worked, the judgment will have a great significance in defining the rules for estimating overtime in cases where the available evidence does not make it possible to calculate precisely the actual overtime of the employee.

At the same time, the State Labour Inspection informed the attorney general’s office that the manager of the Biedronka store committed a criminal offence by falsifying working time records (to which she was forced) The Helsinki Human Rights Foundation intervened in this case at the office of the Chief Labour Inspector.

In the decision of 21 December 2004¹⁷¹, the Regional Prosecutor in Poznan overruled a decision of the District Prosecutor Poznań-Grunwald about the refusal to initiate investigations to examine whether the members of the Management Board of Jeronimo Martins Dystrybucja Sp. z o.o., the owner of the “Biedronka” chain, committed a criminal act defined in Article 218 and Article 220 of the Penal Code, and in particular whether they systematically abused workers’ rights.

Article 32. Prohibition of child labour and protection of young persons at work

Protection of minors at work and monitoring of the protection

Legislative initiatives, national case law and practices of national authorities

According to the PIP report, there are fewer abuses of the rights of minors in the workplace each year. According to PIP, there were only incidental cases of employing minors at night time and in overtime or not paying wages to minors. However, PIP pointed out that there are still violations of rights of minors by employers. The situation worsened in the cases of preliminary medical examinations for minors (22%), or recording working time during work

¹⁶⁸Daily *Rzeczpospolita* of 3 August 2005 p. C2, Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁶⁹Daily *Rzeczpospolita* of 14 September 2005 p.C1, Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁷⁰Wyrok Sadu Apelacyjnego w Gdańsku z dnia 19 stycznia 2005 r. sygn III Apa 125/04 [Judgment of the Court of Appeals in Gdansk of 19 January 2005, signature III Apa 125/04]

¹⁷¹Decision of the Regional Prosecutor Office in Poznan of 21 December 2004, No. I Dsn 3274/04/G

performed for apprenticeship purposes (41%). According to PIP, the cause of such a situation is often an intention to limit the labour costs¹⁷².

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

According to the PIP report, women much more often than men use the parental leave rights associated with raising children. The number of women benefiting from the possibility of taking maternity leave is decreasing. According to the data from 2003, only one in 25 women took maternity leave. Even fewer women use the right to unpaid extended post-maternity leave.

As part of the National Programme for Women, actions are undertaken in order to improve the situation of women in the job market, including publishing information about workers rights – especially rights related to maternity – as well as actions to increase the availability of care institutions for children (day care centres, pre-schools, after-school clubs).¹⁷³

The Ombudsman, in his General Approach to the Minister of Social Policy¹⁷⁴ stressed the incorrect interpretation of provisions regarding maternity benefits during maternity leave. The Undersecretary in the Ministry of Social Policy wrote, in response to the Approach¹⁷⁵, that according to the opinion of the Minister of Economy and Labour it would be reasonable to define the length of the maternity leave in the Labour Code. To date, such provisions have not been introduced to the Labour Code.

Positive aspects

Government programmes intended for women with the purpose of dissemination of information about workers' rights with regard to maternity.

Reasons for concern

Decrease in the number of women applying for and using maternity leave and unpaid extended post-maternity leave.

Protection against dismissal on grounds related to the exercise of family responsibilities

Legislative initiatives, national case law and practices of national authorities

According to PIP, the violations of workers' rights with regard to parental rights are fairly infrequent. However, a significant number of employees are not familiar with provisions of the Labour Code in this respect. In two companies inspected by PIP there were cases of refusal to grant the father maternity leave which was not used by the mother.

¹⁷²Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁷³Informacja Rz_ du dotycz_ ca realizacji Krajowego Programu Dzia_a_ na Rzecz Kobiet – II etap wdro_ eniowy [Government information concerning the implementation of the National Programme for Women - the second phase of implementation]

<http://www.rownystatus.gov.pl/pl/index.php?m=dokumenty&kat=12> (07.11.2005)

¹⁷⁴General Approach to the Minister of Social Policy of 16 June 2005, No. RPO/506917/05/III

¹⁷⁵Response of 18 July 2005

PIP announced that it would undertake a promotional campaign in order to inform employees about their parental rights¹⁷⁶.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

On 25 September 2005, Poland signed the Revised European Social Charter. The ratification of the Charter will be carried out in accordance with Article 89 Sec. 1 of the Polish Constitution after a bill is passed to approve the ratification.

On 22 April 2005, the Sejm passed the Act on proceedings against alimony debtors¹⁷⁷ which replaced the Alimony Fund dissolved in 2004¹⁷⁸. The Act introduced advance payments for alimony to which the children raised by single parents and full orphans of legal age were entitled. The payments can be awarded to persons who were granted alimony but for whom the payments could not be executed for at least three months, and for whom the average income in the family is below the amounts defined in the Act. On 28 July 2005 the Act was amended¹⁷⁹ - the group of entitled persons was extended to include children raised by a person whose spouse is legally incapacitated or is in prison with a sentence longer than three months.

The Act closed a gap created by the dissolution of the Alimony Fund, but the Ombudsman was not satisfied with the provisions of the Act. According to his General Approach to the Minister of Social Policy, the advance alimony payments should be given to both children from single-parent families and full families. According to the Ombudsman, unequal treatment encourages divorces and separations. The Ombudsman stressed that such provisions violate the constitutional principle of equality and threaten the stability of marriages¹⁸⁰.

The Ombudsman also made General Approaches to different institutions regarding issues related to social care. In an approach to the Constitutional Tribunal he asked to examine the compliance of provisions of the 2004 Act on Social Care with the Constitution, including provisions carried over from the 2001 Act that were already deemed unconstitutional by the Tribunal. The Approach concerned the determination of the income of persons conducting business activity, who seek legal assistance. The determination of income is based on estimates prepared by the Government institutions. According to the Ombudsman they violate the constitutional principle of equality, because for all other persons seeking benefits, the criterion is their real income¹⁸¹. In a judgment of 15 October 2005, the Constitutional Tribunal stated that the provisions are not in compliance with the Constitution.

In his General Approach to the Minister of Economy and Labour¹⁸² the Ombudsman signalled that, as a result of the verification of the right to earlier retirement for persons taking care of a

¹⁷⁶Report of the Chief Labour Inspector on the work of the State Labour Inspection in 2004 presented to the Sejm in 2005. http://pip.bip.ornak.pl/pl/bip/sprawozd_pip_2004

¹⁷⁷Ustawa z dnia 22 kwietnia 2005 o postępowaniu wobec dłużników alimentacyjnych oraz zaliczce alimentacyjnej (Dz.U. z 2005 r. nr 86, poz. 732) [The Act of April 22, 2005 on proceedings against alimony debtors and on advance alimony payments (The Official Journal 2005, No 86, item 732)]

¹⁷⁸About the problems that arose from the dissolution of the Alimony Fund we wrote in the Report about observance of basic rights in Poland in 2004.

¹⁷⁹Ustawa z dnia 28 lipca 2005 o zmianie ustawy o promocii zatrudnienia i instytucjach rynku pracy oraz o zmianie niektórych innych ustaw (Dz.U. Z 2005 r. nr. 164, poz. 1366) [The Act of July 28, 2005 on the change of the Act on promotion of employment and job market institutions and about the change of chosen other acts (The Official Journal of 2005, No. 164, item 1366)]

¹⁸⁰Daily *Rzeczpospolita* of 9 August 2005 p. C1

¹⁸¹Daily *Rzeczpospolita* of 13-15 August 2005 p. C1

¹⁸²General Approach to Ministry of Economy and Labour of 15 May 2005, No. RPO/450839/03/III

disabled child, a number of persons have recently lost the right to benefits. Looking at the current situation on the job market it is more than likely that individuals, who lose the right to pension benefits will not find appropriate jobs.

The regulation of the Minister of Social Policy of 8 March 2005 on special shelters for mothers with small children and for pregnant women¹⁸³ came into force on 2 April 2005. The regulation defines the ways in which such special shelters function, the standards of services provided, the method of referral and admittance to the shelters. The special shelters are becoming support institutions and their role is to isolate the individuals seeking assistance from the perpetrators of violence and to help them overcome crisis situations.

In a judgment of 11 May 2005, the Constitutional Tribunal deemed unconstitutional the provisions of the Act on family benefits because of the violation of the principle of equality before the law. The Act stipulates that only single parents are entitled to such benefits. According to the Tribunal, the proposed provisions of the Act, which prefer single parents by giving them a supplement to family benefit, and taking away such benefits from persons raising children in a full family, encourage changing the legal status of a family, which endangers the permanence of marriages. Thus they violate Article 18 of the Constitution.

Positive aspects

- Signing of the Revised European Social Charter;
- Introduction of the Act on proceedings against alimony debtors which regulates the situation of persons who were granted alimony but for whom the payments could not be executed.

Social assistance for undocumented foreigners and asylum seekers

Legislative initiatives, national case law and practices of national authorities

The amendment to the Act on granting protection to aliens on the territory of the Republic of Poland¹⁸⁴ changed the rules for granting social benefits to aliens applying for refugee status. For aliens who received permission for a tolerated stay the amendment prolonged the period of stay in reception centres up to three months after receiving a final decision on their status. Before that, such a possibility was limited only to aliens who received refugee status.

The Act extended the benefits granted to asylum seekers to include the provision of didactic materials for children attending public educational institutions and schools and covering the related costs. It also gave the children the right to receive funds for buying food at school.

¹⁸³Rozporządzenie Ministra Polityki Społecznej z 8 Marca 2005 r. w sprawie domów dla matek z małoletnimi dziećmi i kobiet w ciąży (Dz.U. Z 2005 r. nr 43, poz. 418) [The regulation of the Minister of Social Policy of 8 March 2005 on special shelters for mothers with small children and for pregnant women (The Official Journal of 2005, No. 43, item 418)]

¹⁸⁴Ustawa z dnia 22 kwietnia 2005 o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw, (Dz.U. z 2005 r. nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

Because the situation in health care services remains difficult, access to many specialist services is scarce. There are cases, however, when the National Health Fund (Narodowy Fundusz Zdrowia – NFZ) refuses to finance medical procedures for certain categories of patients without any convincing legal basis. It happens particularly often to patients suffering from cancer. According to the Ombudsman¹⁸⁵, the NFZ uses the age criterion to make a decision whether to finance a given treatment. This was the case for a man who had colon cancer. The NFZ refused to finance an expensive therapy because he was over 65 years old. In his response¹⁸⁶, the Chairman of the NFZ ensured that he would make all efforts to increase the financing of drug programmes.

Another case of a refusal to provide medical treatment by the NFZ was referred to the Voivodship Administrative Court. The Court decided that a decision of the NFZ to refuse repayment of a diagnostic test, which led to identifying a dangerous brain tumour requiring immediate intervention, was immoral and cannot be tolerated. It pointed out that the law allows providing medical treatment without the required doctor's referral and the Fund had an obligation to pay for medical examinations done at private institutions, if it was only thanks to them that a life was saved. The case concerned a patient who was refused a referral to a specialist doctor by the so-called "doctor of first contact"¹⁸⁷.

Reasons for concern

- The generally difficult financial situation of health care service providers;
- Discrimination of certain categories of patients as far as access to cancer therapies is concerned.

Drugs

Legislative initiatives, national case law and practices of national authorities

In 2005, following a public debate, a new Act on counteracting drug addiction was passed¹⁸⁸. In comparison to the old Act it increased the number of health care institutions that can administer methadone therapies to include private health care institutions. According to the new Act, drug and psychotropic substance possession will still be penalised. According to Article 62 of the Act, a person who has drugs or psychotropic substances in his/her possession, is subject to a prison term of up to three years. In cases of lesser significance, the offender may be subject to a fine, restriction of liberty, or imprisonment for up to one year. In cases where the crime related to the use of drugs or psychotropic substances is perpetrated by an addicted person, and that person received a suspended sentence, the court will mandate that the convict undergo therapy or rehabilitation in a health care institution and place him/her under the supervision of an assigned person, institution or association. In cases where the court does not suspend the sentence it can place the convict in an appropriate health care institution before the prison term is served.

¹⁸⁵General Approach to Chairman of National Health Fund of 27 June 2005, No. RPO/508444/05/X

¹⁸⁶Response given on 12 July 2005

¹⁸⁷Daily *Rzeczpospolita* of 29 September 2005 p. C1

¹⁸⁸Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu narkomanii (Dz.U. z 2005 r. nr 179, poz. 1484) [Act of 29 July 2005 on counteracting drug addiction (The Official Journal of 2005, No. 179, item. 1484)]

The Act also introduces the possibility of suspending the pre-trial proceedings by the prosecution office, if an addicted person or a user of psychotropic substances, who was accused of committing a criminal offence for which the penalty is less than five years of prison time voluntarily submits to treatment and rehabilitation or participation in a preventive-medical programme carried out by a health care institution. After the public prosecutor initiates the proceedings, it can take into account the results of the treatment and either proceed further with the accusation or make a request to the court to conditionally discharge the accused.

Article 36. Access to services of general economic interest

Article 37. Environmental protection

The right to access to information in environmental matters¹⁸⁹

Legislative initiatives, national case law and practices of national authorities

In 2005, the Sejm amended the following acts: the Environmental Protection Law¹⁹⁰, the Water Law¹⁹¹, and the Act on the trading of the allowances to emit greenhouse gases and other substances into the atmosphere¹⁹². These amendments introduced a series of new or amended provisions concerning the open public's participation in making decisions and settlements in the scope of environmental protection. The amendments were aimed at implementing the European Union Law, in particular Directive 2003/35/EC regarding public participation¹⁹³, the framework water directive 2000/60/WE¹⁹⁴, Directive 2002/49/EC of 2002 relating to the assessment and management of environmental noise (i.e. the framework directive on the protection against noise)¹⁹⁵ and Directive 2003/87/EC regarding emission

¹⁸⁹ Information from Jendro_ka Jerzma_ski Bar i Wspólnicy. / Jendroska Jerzanski Bar & Partners. Prawo gospodarcze i ochrony_rodowiska. Sp. z o.o. / Environmental Lawyers Wroc_aw - Kraków - Toru_

¹⁹⁰ Ustawa z dnia 18 maja 2005 r. o zmianie ustawy - Prawo ochrony_rodowiska oraz niektórych innych ustaw, (Dz. U. Z 2005 r. nr 113, poz. 954) [Act of 18 May 2005 on the amendment of the Act – Environmental Protection Law and chosen other acts (The Official Journal of 2005, No. 113, item 954)]

¹⁹¹ Ustawa z dnia z dnia 3 czerwca 2005 r. o zmianie ustawy - Prawo wodne oraz niektórych innych ustaw (Dz. U. z 2005 r. nr 130, poz. 1087) [Act of 3 June 2005 on the amendment of the Act – The Water Law and chosen other acts (The Official Journal of 2005, No. 130, item 1087)]

¹⁹² Ustawa z dnia 22 grudnia 2004 r. o handlu uprawnieniami do emisji do powietrza gazów cieplarnianych i innych substancji (Dz. U. z 2005 r, nr 281, poz. 2784) [Act of 22 December 2004 on the trading of the allowances to emit greenhouse gases and other substances into the atmosphere (The Official Journal of 2005, No. 281, item 2784)]

¹⁹³ Dyrektywa 2003/35/WE Parlamentu Europejskiego i Rady z 26 maja 2003 r. przewiduj_ca udzia_spo_ecze_stwa w odniesieniu do sporz_dzania niektórych planów i programów w zakresie_rodowiska oraz zmieniaj_ca w odniesieniu do udzia_u spo_ecze_stwa i dost_pu do wymiaru sprawiedliwo_ci dyrektywy Rady 85/337/EWG i 96/61/WE (Dz. Urz. UE L 156 z 25.06.2003) [Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (The Official Journal of the EC L 156 of 25.06.2003)]

¹⁹⁴ Dyrektywa 2000/60/WE Parlamentu Europejskiego i Rady z dnia 23 pa_dziernika 2000 r. ustanawiaj_ca ramy wspólnotowego dzia_ania w dziedzinie polityki wodnej (Dz. Urz. WE L 327 z 22.12.2000) [Directive 2000/60/EC of The European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (The Official Journal of the EC L 327 of 22.12.2000)]

¹⁹⁵ Dyrektywa 2002/49/WE Parlamentu Europejskiego i Rady z dnia 25 czerwca 2002 r. odnosz_ca si_do oceny i zarz_dzania poziomem ha_asu w_rodowisku (Dz. Urz. WE L 189 z 18.07.2002) [Directive

allowance trading¹⁹⁶; however they also introduced provisions limiting the open public's participation in making decisions and settlements in the scope of environmental protection.

The amendment of the Act on environmental protection introduced, among other things, the obligation to publicly present the provisions of the drafts of such documents as: the state environmental policy, the environmental protection programme on all levels, the air protection programme and the programme on the protection of the environment against noise. The amendment also changed the deadline for submitting comments and motions by the public in the case of plans and programmes concerning environmental protection, which is now "at least 21 days" (instead of the strictly defined 21 days). The new provisions now also require the public announcement of information about the intention to carry out an administrative hearing, which is open to the public. The amendment of the act also introduces a change warranting the publication of information about the intention to refrain from performing assessments of the impact of the environmental protection plans and programmes on the environment. The amendment of the Act – The Water Law introduced a procedure concerning the public's participation in the preparation of plans for water usage, and the Act on the trading of emission allowances introduced an obligation to ensure the opportunity for the public to participate in the preparation of the national plan for awarding emission allowances.

However, the amendment of the Act – the Environmental Protection Law introduced a restriction in the public's participation in two ways – it limited the number of persons who are entitled to have the status of a party in proceedings and limited the opportunity for social organisations to benefit from the rights of a party in proceedings.

Thus, in the proceedings to grant permission for the emission of substances and energy into the environment, the status of a party is currently only granted to, apart from the mover, the entities administering the territory within the area where the above-standard effects are believed to occur.

The Act also limited the rights of social organisations to participate as a side in proceedings. In accordance with the amendment, only those environmental organisations may participate in a proceeding, which have expressed such a will and have additionally submitted their comments and conclusions. The social organisations' participation was also restricted in cases concerning the environmental conditions of the programmes and projects associated with environmental protection, as well as in proceedings for granting an emission permit.

The deadline for the transposition of Directive 2003/4/EC¹⁹⁷ passed on 14 February 2005, but the legislative body failed to introduce the required legal changes before this date. The Directive provides for the introduction of greater rights to the public in association with access to information about the environment than those included in the provisions currently binding in Poland.

2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (The Official Journal of the EC L 189 of 18.07.2002)

¹⁹⁶ Dyrektywa 2003/87/WE Parlamentu Europejskiego i Rady z dnia 13 października 2003 r. ustanawiająca system handlu przydziałami emisji gazów cieplarnianych we Wspólnocie oraz zmieniająca dyrektywę 96/61/WE (Dz. Urz. WE L 275 z 25.10.2003) [Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (The Official Journal of the EC L 275 of 25.10.2003)]

¹⁹⁷ Dyrektywa 2003/4/WE Parlamentu Europejskiego i Rady z dnia 28 stycznia 2003 r. w sprawie publicznego dostępu do informacji dotyczących środowiska i uchylająca dyrektywę Rady 90/313/EWG (Dz. Urz. UE L 41 z 14.02.2003) [Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (The Official Journal of the EC L 41 of 14.02.2003)]

On 24 August 2005, the District Court in Bielsk Podlaski passed a judgment recognising the claim of the environmental organisation Green Federation "Gaja" from Szczecin. The organisation lodged a civil claim against the Polish State Forest Service, which contracted – according to the organisation, illegally – the cutting-down of seven over 100-year-old oak trees in the Primeval Bialowieski Forest. The Green Federation "Gaja" stipulated for "the restoration of the previous state in accordance with the law by dedicating the amount of 9246.84 zloty (around 2300 euros) to the performance of tasks associated with the plan aimed at protecting the nature reserve of the Primeval Bialowieski Forest". This case constitutes one of the first examples of the practical application of Article 323 para. 2 of the Act - Environmental Protection Law, which, among other things, provides environmental organisations with the opportunity to lodge a civil claim in the common interest of environmental protection (traditionally the possibility to lodge a civil claim is reserved for persons who have incurred damages, i.e. the ones whose personal legal interest was violated). The appeal was lodged by the Polish State Forest Service and the case is currently pending before the Regional Court in Bialystok.

Positive aspects

Implementation of European Union directives introducing a series of new or amended provisions regarding the open public's participation in making decisions and settlements in the scope of environmental issues.

Reasons for concern

Restriction in the public's participation in environmental cases in two ways: limiting the number of persons entitled to have the status of a party in proceedings and limiting the opportunity for social organisations to benefit from the rights of a party in such proceedings.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

According to the President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK), two thirds of consumers in Poland are not familiar with their rights. Similarly, business persons do not know their obligations with regard to the consumers. Entities which have a dominant position on the market, i.e. those, which in the past operated in sectors closed to competition such as Telekomunikacja Polska, energy companies, or transport companies, are trying to eliminate competitors or prevent them from entering the market. UOKiK does not investigate individual complaints but actions undertaken on behalf of collective interests of consumers have an influence on the situation of the weaker participants of the market. In 2004, the UOKiK issued 154 decisions, and thanks to its activities 143 new clauses were entered into the register of forbidden contract clauses. It has to be noted that most businesses, which were fined by the UOKiK, disagree with the decisions and appeal these decisions to court, significantly prolonging the proceedings¹⁹⁸.

The report of the UOKiK on the results of inspections of activities of construction and real estate development companies showed that many of them use forbidden clauses in their contracts. Among the 137 companies inspected throughout Poland, almost 2/3 used contracts in which there were forbidden clauses, and almost one in three companies made only oral contracts with their clients. According to the information from UOKiK, most of the

¹⁹⁸Information given by the President of Office of Competition and Consumer Protection to the daily *Rzeczpospolita* of 14-15 of May 2005 p. C3

companies removed the forbidden clauses from the contract forms soon after the inspection of the Office.¹⁹⁹

In 2005 UOKiK inspected supermarket chains and fined some of them for using marketing practices and advertisements which were meant to mislead the consumers. The inspected supermarkets offered improperly marked goods in their promotions. The improper marking usually consisted in the fact that the supermarket required payment for the goods, which were marked as 'free'. The Office considers this dishonest advertising was meant to deceive customers, which violates the Act on protection of competition and consumers²⁰⁰.

UOKiK also studied the actions of dishonest companies that organise presentations or trips combined with shopping. Many companies give false information about the conditions of sales agreements. The President of UOKiK also found a violation of law by a company which gave the consumers false information about the right to withdraw from a sales agreement²⁰¹.

UOKiK also intervened in the cases of wrongful practices of banks and Internet providers.

Reasons for concern

Cases of violations of consumer rights by dominant entities on the market.

¹⁹⁹Daily *Rzeczpospolita* of 29 September 2005 p.C1

²⁰⁰Ustawa z dnia 15 grudnia 2000 o ochronie konkurencji i konsumentów (Dz.U. z 2000 r. nr 122, poz. 1319) [the Act of 15 December 2000 on protection of competition and consumers (The Official Journal of 2000, No. 122, item 1319)]

²⁰¹Daily *Rzeczpospolita* of 6-7- August 2005 p.C2

CHAPTER IV. SOLIDARITY

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Article 40. Right to vote and to stand as a candidate at municipal elections

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

Right to social assistance for the persons who have exercised their freedom of movement

Legislative initiatives, national case law and practices of national authorities

The Polish provisions grant the right to benefit from social assistance payments to foreigners staying on the territory of Poland, who possess permission to settle, permission to stay as a long-term resident of the European Union, permission to stay for a limited period, tolerated stay or refugee status, as well as to citizens of the European Union, if they have permission to stay²⁰².

Article 46. Diplomatic and consular protection

²⁰²Ustawa z dnia 12 marca 2004 r. o pomocy spo_ecznej (Dz.U. z 2004 r. nr 64, poz. 593, z p_ón_zm) [Act of 12 March 2004 on social assistance (The Official Journal of 2004, No. 64, item 593, with further amendments)]

CHAPTER.V. CITIZENS' RIGHTS

Article 47. Right to an effective remedy and to a fair trial

Access to a court and, in particular, the right to legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

The number of attorneys providing their services in Poland is still very low. According to data from the CCBE (Conseil des Barreaux Européens), 27 611 attorneys and legal advisors provide services in Poland, which means that there is one per 1.376 residents. In comparison, in Spain, which has a comparable population, there are five times as many licensed legal professionals. There has also been a multiple increase in the number of court cases²⁰³ in Poland.

In the future an increase in the number of attorneys, legal advisers and notaries is supposed to be ensured by the Act on the advocate's profession²⁰⁴, passed by the Sejm, which should facilitate access to the legal profession. The Act came into force on 10 December 2005. In accordance with the amendment, the existing corporate exams for the attorney, legal advisor or notary apprenticeships shall be replaced by state-supervised exams conducted exclusively in the form of written tests organised by commissions appointed within the Ministry of Justice. Doctors of law, as well as individuals, who after completing their studies have been working on posts associated with the execution and creation of the law for at least five years, will also be allowed to take such an exam.

The Government has approved the Act on access to cost-free legal assistance, which establishes, inter alia, the Office of Legal Assistance for poor persons. However, it was not possible to submit the draft of this Act to the Sejm prior to the parliamentary elections. The new Government claims however, that it will continue dealing with the draft. At present, legal assistance for poor persons is provided mainly by non-governmental organisations.

The Supreme Court Resolution of 14 January 2005²⁰⁵ regarding court supervision of arbitrators' decisions is also important for regulating access to the court. The Supreme Court confirmed that an individual is entitled to lodge a complaint against the judgment of the resolution passed by a panel of arbitrators as part of the arbitration proceedings²⁰⁶ introduced by the Code of Civil Procedure. Article 179 of the Public Procurement Act²⁰⁷ was not clear in this extent and its literary interpretation suggested the inadmissibility of such a complaint. The Supreme Court decided that since the judgment of the panel of arbitrators determines the legal situation of both the individual lodging an appeal, as well as the one placing the order, then each of these parties shall be considered as authorised to file a complaint against the resolution issued in the first instance by the arbitrators in accordance with the principle guaranteed by Article 78 of the Constitution of the Republic of Poland guaranteeing everyone the right to lodge an appeal from the first instance decisions of the courts and administrative organs. An exception to this principle would have to be clearly indicated by the Act.

²⁰³Daily *Rzeczpospolita* of 8 August 2005 p. C2

²⁰⁴Ustawa z dnia 30 czerwca 2005 r. o adwokaturze i niektórych innych ustaw (Dz.U. z 2005, nr 163, poz. 1361) [Act of 30 June 2005 on the advocate's profession and other acts(The Official Journal of 2005, No. 163, item 1361)]

²⁰⁵Uchwała S_ du Najwy_ szego z 14 stycznia 2005 r. Sygn. III CZP 71/04 [Resolution of the Supreme Court of 14 January 2005, Signature III CZP 71/04]

²⁰⁶Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy – kodeks post_ powania cywilnego (Dz.U. z 2005 r. nr 78, poz. 1478) [Act of 28 July 2005 on the amendment of the Act - Code of Civil Procedure (The Official Journal of 2005, No. 78, item 1478)]

²⁰⁷ Ustawa z dnia 29 stycznia 2004 r. Prawo zamówie_ publicznych (Dz.U. z 2004 r. nr 19, poz. 177) [Act of 29 January 2004 The Public Procurement Act (The Official Journal of 2004, No. 19, item 177)]

Positive aspects

The introduction of the new law facilitating access to legal professions.

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

A social study carried out by scientists from the Jagiellonian University has shown that according to the survey's participants, judges are the most corrupt parts of the administration of justice. Every other survey participant does not believe in the fairness of courts. Poles believe that a significant number of judges take bribes, are influenced by political affiliation and give in to pressure from their superiors. The study shows that these opinions are shared by lawyers, as well as a significant group of judges. One in every five declares that he/she is aware of the fact that his/her colleagues take bribes²⁰⁸.

The Sejm passed an Act amending provisions concerning the selection of lay judges²⁰⁹. The draft was prepared following revelations that during the previous selection of lay judges the candidates were recommended by political parties. The amendment gives the right to recommend a person for the post of lay judge to a group of at least 25 citizens inhabiting a given territory, as well as the presidents of courts, associations, trade union organisations and employer organisations, excluding political parties. As a result of the fact that there is a large number of criminal cases pending against lay judges (according to the statistical data of 19 March 2004, 135 criminal proceedings were pending or were completed against them), the amendment obliges a lay judge to file a declaration affirming that no criminal proceedings have been initiated against him. In accordance with this amendment, the lay justice's mandate will be terminated in the case of a final conviction for a criminal offence. Previously, if a lay judge was found guilty, the termination of the mandate was not obligatory – it was possible for him/her to be removed by the President of the Court following a motion from the commune council that selected him/her. Lay judges should also finish at least secondary education.

Positive aspects

The new law making it impossible for individuals convicted or having criminal proceedings initiated against them, to serve as lay judges.

Reasons for concern

The opinion within the society that corruption in the administration of justice is widespread.

Reasonable delay in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

During 2005, in many cases against Poland, the ECHR found a violation of Article 6 par. 1 of the Convention due to the excessive length of judicial proceedings.

²⁰⁸ http://wiadomo_ci.onet.pl of 18 July 2005 p. C1

²⁰⁹ Ustawa z dnia 1 lipca 2005 o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Dz.U. z 2005 r. nr 169, poz. 1413) [Act of 1 July 2005 on the amendment of the Act – The law on the structure of common courts and some other acts (The Official Journal of 2005, No. 169, item 1413)]

Legislative initiatives, national case law and practices of national authorities

During the first half of 2005, over 4.7 million cases were submitted to courts which were able to handle over 4.8 million cases. The current arrears amount to 1.5 million and are lower than during the same period of the previous year by around 300 000 cases²¹⁰. Even if statistical data indicates generally gradual improvements in the work of justice system, courts still too frequently break or adjourn hearings without proper justifications.

The positive changes are most visible in warrant and registration proceedings and in the manner of handling the real-estate register. As of February 2005, 950 000 of the existing real-estate registers were put into electronic form and 86 000 new registers were created. The computerisation of the courts is under way. The Ministry of Justice passed a new set of work provisions for courts which provide for, among other things, the possibility for the President of the court to establish a two-shift work system at courts, the extension of the hours for receiving clients, the shortening of the holiday break and the adoption of explicit principles regarding the sequence of admitting cases²¹¹.

During the first six months of 2005, 2 652 complaints²¹² were submitted to the upper level courts on the basis of the new Act on a complaint against excessive length of the court proceedings²¹³. In the first 10 months since the entry into force of this Act, 366 complaints were submitted to the High Administrative Court against the excessive length of administrative court proceedings²¹⁴.

The information received from the Helsinki Foundation for Human Rights shows²¹⁵ that there are situations in which the courts considering cases against the excessive length of a proceedings merely declare that the case is being prolonged, but do not grant any compensation.

On 19 August 2005 the President signed two Acts of 28 July 2005 amending the Code of Civil Procedure. The first one is aimed at reforming the arbitration jurisdiction²¹⁶. The second one introduces mediation into civil procedure²¹⁷. Thanks to these laws, in the case of efficient mediation the parties will be able to sign an agreement confirmed by the court. If a settlement is subject to execution, its sanctioning will take place during a proceeding to confer a feasibility clause. The new law on arbitration provides an opportunity for the court of conciliation to decide upon all disputes which can be the subject of a settlement, excluding cases concerning alimony. This also concerns cases intended to state the invalidity of resolutions passed by company organs, when this is provided for in their statutes or agreements²¹⁸. Thanks to the amendment, the parties will be able to exercise their rights more quickly and efficiently.

²¹⁰Statistical data available on the website of the Ministry of Justice

²¹¹Daily *Rzeczpospolita* of 9 August 2005 p.C3

²¹²Statistical data obtained in the Ministry of Justice, <http://www.ms.gov.pl>

²¹³ Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sadowym bez uzasadnionej zwłoki, (Dz.U. z 2004 r. nr 179, poz. 1843) [Act of 17 June 2004 on a complaint against infringement on a party's right to have its case heard by a court without undue delay (The Official Journal of 2004, No. 179, item 1843)]

²¹⁴Daily *Rzeczpospolita* of 1 August 2005 C2

²¹⁵ Program Działania Prawne w Interesie Publicznym [The Programme – Public Interest Law Actions]

²¹⁶Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy – kodeks postępowania cywilnego (Dz.U. z 2005 r. nr 78, poz. 1478) [Act of 28 July 2005 on the amendment of the Act – The Code of Civil Procedure (The Official Journal of 2005 No. 78, item 1478)]

²¹⁷Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy – kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz.U. z 2005 r. nr 172, poz. 1438) [Act of 28 July 2005 on the amendment of the Act – The Code of Civil Procedure and some other acts (The Official Journal of 2005 No. 172, item 1438)]

²¹⁸Daily *Rzeczpospolita* of 23 August 2005 p.C2

Positive aspects

- Improvements of the situation in the administration of justice concerning the length of the court proceedings;
- New law on mediation and arbitration.

Right to the enforcement of judicial decisions

Legislative initiatives, national case law and practices of national authorities

According to the information received from the Helsinki Foundation for Human Rights²¹⁹, the inability to execute court decisions, in particular in criminal and administrative cases, constitutes a serious problem. Information about the execution of judgments in criminal cases was included in the part describing developments within Article 4 of the Charter of Fundamental Rights. There are also frequent cases of refraining from the execution of administrative court decisions by public authorities.

Article 48. Presumption of innocence and right of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

The problem consists in the violation of the principle of presumption of innocence in cases involving recidivists. The monitoring by the Helsinki Foundation for Human Rights²²⁰ shows that there are cases in which the courts do not consider the evidence presented by the recidivists. They also constitute the largest group of persons being denied of an *ex officio* defence lawyer.

In the judgment of 26 October 2005, the Constitutional Tribunal declared inconsistent with the Constitution the provisions of the Act on the Institute of National Remembrance (Instytut Pamięci Narodowej – IPN) in the scope in which they deprive the interested persons – other than the victim – of the right to receive information about the documents that concern them, as well as the manner of gaining insight into those documents. According to the Tribunal, the judgment provided for an opportunity to directly exercise this right, also by persons other than victims. This enables persons accused of cooperation with the organs of national security during the period of communism, to include their own supplementations, rectifications, updates, explanations and documents, or their copies, in their documentation collected in the IPN²²¹.

Positive aspects

The judgment of the Constitutional Tribunal enabling the interested persons to exercise their right to access to documents stored at the IPN.

Reasons for concern

Cases of violation of the presumption of innocence against recidivists.

²¹⁹ Program Dzia_ania Prawne w Interesie Publicznym [The Programme – Public Interest Law Actions]

²²⁰ Program Dzia_ania Prawne w Interesie Publicznym [The Programme – Public Interest Law Actions]

²²¹ Wyrok Trybunału Konstytucyjnego z dnia 26 października 2005 r. nr K 31/04 [Supreme Court Ruling of 26 October 2005, No K 31/04]

The rules governing the evidence in criminal matters

Legislative initiatives, national case law and practices of national authorities

According to the information received from the Helsinki Foundation for Human Rights²²², not all rules concerning gathering of evidence in criminal cases are being respected, in particular during pre-trial proceedings carried out by the police and the public prosecutor. The most frequent problems arise during the presentation for identification of the alleged perpetrator and questioning of the suspect.

Also, in a small number of cases DNA material collected at the scene of the incident was used as evidence. In some cases statements of so called crown witnesses were the only basis for the conviction of the accused.

The right to freely choose one's defence counsel and the right to an interpreter

Legislative initiatives, national case law and practices of national authorities

In April 2005 the Sejm adopted an amendment of the Act on the Border Guard, which specifies that during disciplinary proceedings only another officer of the Border Guard, indicated by the accused officer, may serve as his defender²²³. Similar provisions are included in the Act on the Police²²⁴ and the Act on the Customs Service²²⁵.

The above mentioned amendments were the subject of an approach of the Ombudsman to the Constitutional Tribunal²²⁶. According to the Ombudsman the new law limits defence rights. The Ombudsman filed also a complaint to the Constitutional Tribunal against this law.

The Ombudsman lodged the cassation appeal with the Supreme Court against the refusal by the lower level court in the minor offence case to reimburse the acquitted person costs of defence of his choice. According to the Ombudsman this decision was taken in flagrant violation of the Code of Criminal Procedure. While it is true that the Code does not expressly oblige the court to repay such costs, its provisions regarding the reimbursement of an *ex officio* lawyer's costs should apply *mutatis mutandis*²²⁷.

Article 49. Principles of legality and proportionality of criminal offences and penalties

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

²²²Program Klinika „Niewinno__” {The Programme - The "Innocence" Clinic}

²²³Ustawa z dnia 22 kwietnia 2005 r. o zmianie ustawy o stra_y granicznej oraz niektórych innych ustaw (Dz.U. Z 2005 r. nr 90, poz. 757) [Act of 22 April 2005 on the amendment of the Act on the Border Guard and some other acts (The Official Journal of 2005, No. 90, item 757)]

²²⁴Ustawa z dnia 6 kwietnia 1990 r. o Policji, (Dz.U z 1990 r. nr 30, poz. 179 z pó_n.zm) [Act of 6 April 1990 on the Police (The Official Journal of 1990, No. 30, item 179 with further amendments)]

²²⁵Ustawa z dnia 24 lipca 1999 r. S_u_bie Celnej (Dz.U. z 1999 r. nr 72, poz. 802) [Act of 24 July 1999 on Customs Service (The Official Journal of 1999, No. 72, item 802)]

²²⁶General Approach of the Ombudsman to the Constitutional Tribunal of 13 October 2005, No. RPO/511174/05/IX

²²⁷Daily *Rzeczpospolita* of 6 October 2005 p.C1