

Judgement of 3<sup>rd</sup> June 2008, [K 42/07](#)

## PRINCIPLES FOR MAKING CASE RECORDS ACCESSIBLE IN THE COURSE OF PRELIMINARY PROCEEDINGS

(OTK ZU 2008, No. 5A, item 77)

<b>Type of proceedings:</b> <a href="#">abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5 judges	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
The possibility of making case records accessible solely upon a consent of the organ conducting preliminary proceedings, where within the proceedings a decision concerning a temporary arrest is taken.  [Article 156 § 5 of the Act of 6 <sup>th</sup> June 1997 – Code of Criminal Procedure]	Right to defence  Prerequisites for the admissibility of limitations upon constitutional rights and freedoms  [Constitution: Article 42 paragraph 2, read in conjunction with Article 31 paragraph 3]
	Principle of a democratic state ruled by law  Principle of legality  [Constitution: Article 2, read in conjunction with Article 7]

Article 156 of the Code of Criminal Procedure (hereinafter referred to as: the CCP) specifies the principles of making case records accessible and making any copies thereof for such subjects as the parties to proceedings, defence counsels or attorneys and statutory representatives.

In his application, the Commissioner for Citizens' Rights challenged only the legal norm stemming from § 5 of the above-mentioned Article 156 of the CCP, while his allegations were limited to that part of the provision which establishes the formal-procedural requirement for making case records accessible, i.e. the obligation to obtain the consent of the organ conducting preliminary proceedings. Furthermore, doubts arose for the Commissioner as regards the application of the provision in situations where a decision concerning a temporary arrest is taken in the course of preliminary proceedings. Given the above, and in light of the principle stating that the Constitutional Tribunal shall be bound by the limits of the application, the provision has only been reviewed within the aforementioned scope.

### RULING

**Article 156 § 5 of the Act of 6<sup>th</sup> June 1997 – the Code of Criminal Procedure, insofar as it allows for an arbitrary exclusion of free access to those materials of preliminary proceedings that substantiate the motion of a public prosecutor concerning a temporary arrest, does not conform**

**to Article 2 and Article 42 paragraph 2, read in conjunction with Article 31 paragraph 3 of the Constitution.**

#### PRINCIPAL REASONS FOR THE RULING

1. The constitutional right to defence constitutes a fundamental standard of a democratic state ruled by law, which signifies that it applies to all proceedings concerning penal accountability. Therefore, it should be understood broadly, i.e. as a right vested in any person from the moment of institution of criminal proceedings against them (in practice from the moment of presenting the charges to the accused) till the issue of a valid court judgement and the enforcement thereof.
2. The right to defence is not absolute in nature, yet any limitation thereupon is subject to an assessment undertaken against the background of the principle of proportionality. The prerequisites for the admissibility of limitations upon the exercise of constitutional rights and freedoms are: imposition of the limitations by way of statute, a functional relation between the limitation and the realisation of values specified in Article 31 paragraph 3, prohibition on the violation of the essence of a given right or freedom, as well as the existence of a necessity to impose such limitations in a democratic state ruled by law. The third prerequisite implies the need to consider whether the introduced regulation is capable of producing the intended effects, whether the regulation in question is indispensable for the protection of the public interest and whether the effects thereof are proportionate to the burdens imposed by it on the citizen.
3. The jurisprudential practice proves that Article 156 § 5 of the CCP is understood in three different ways. First and most common way of understanding presupposes that the phrase “records in the course of preliminary proceedings” encompasses both the case records “proper” and “arrest records” that include a motion of a public prosecutor with all the documents attached thereto. A consequence of such a division is that courts adopt a principle whereby access to all of the above-mentioned documents is solely dependent on the consent granted by the organ conducting preliminary proceedings. According to the second way understanding, the public prosecutor’s motion concerning the imposition (or extension of period) of a temporary arrest and all documents attached thereto should be subject to different legal rules. In such circumstances, the accused and their defence counsel have free access to the above-mentioned motion, yet access to the documents connected therewith is still dependent upon a consent of the organ conducting the preliminary proceedings. The last and least common way of understanding adopted by courts assumes that both the motion of a public prosecutor and the evidence contained in case records are encompassed by Article 156 § 1 of the CCP, which, consequently, signifies that it is admissible to make them accessible to the accused and their defence counsel without the need to obtain a consent of the organ conducting proceedings.
4. The point of divergence as regards the interpretation of the challenged provision lies in the very general manner of its formulation. In this respect, of particular significance are both lack of specification of prerequisites that the organ conducting the proceedings should take into account, and the fact that the lawmaker failed to define the meaning of the phrase “court case records”, as contained in the challenged provision.
5. The challenged provision remains in contradiction with the standards of diligent legislation and the specificity of law. In practice, the wording of the provision under review enables the organ conducting proceedings to arbitrarily interpret the circumstances that are

decisive as regards the consent to make records or other materials of proceedings accessible to the suspect and their defence counsel.

6. Preliminary proceedings are not based on the principle of free access to case records. As a matter of principle, such assumption is legitimate, since the possibility of attaining the aims of preliminary proceedings is dependent upon such factors as keeping some of the information confidential. Therefore, the principle of making case records accessible in court proceedings is replaced by a discretionary nature of the principle in preliminary proceedings. The answer to the question as to whether the suspect or their defence counsel may acquaint themselves with case records depends each time on legal circumstances and, above all, factual background.
7. Any interference with the sphere of the right to defence, such as the refusal to grant access to case records, becomes an issue of particular significance in view of the imposition (or extension of period) of a temporary arrest. Against the background of criminal proceedings, it is possible to point to provisions that allow the accused (and their defence counsel) to gain partial knowledge of the evidence gathered at a particular stage of preliminary proceedings. These mechanisms, however, may be regarded as being equivalent to the right to access the materials of preliminary proceedings that justify the motion of a public prosecutor concerning a temporary arrest.
8. For the proper realisation of the right to defence, where a preventative measure in the form of a temporary arrest has been applied, it is necessary for the person arrested (as well as their defence counsel) to personally acquaint themselves with the materials of preliminary proceedings justifying the motion of a public prosecutor. The above-indicated mechanisms do not guarantee this to the same extent as the right to access case records does.
9. Article 156 § 5 of the CCP is very often regarded as a provision on the basis of which it is possible to deny access to the records of arrest proceedings. Such limitation of the right to defence does not fulfil the above-discussed criteria stemming from Article 31 paragraph 3 of the Constitution. The challenged provision disregards the principle of proportionality, since it allows for an excessive limitation of the right of an individual, even to an extent that the limitation may encroach into the essence of the constitutional right to defence. Similarly, the provision in question does not fulfil the principle of subsidiarity, in view of the fact that the effectiveness of preliminary proceedings may be ensured using other methods which would be less burdensome for the citizen. In particular, this may encompass a greater selectivity of information included in the justification of the motion concerning an arrest.
10. A broad access of the suspect to case records has been confirmed by the jurisprudence of the European Court of Human Rights in Strasbourg. An obligation arising from the jurisprudence guarantees the suspect access to the evidence contained in the records of preliminary proceedings to an extent that is necessary to assess the grounds for a temporary arrest. By way of the present decision, the Constitutional Tribunal has shared this view. The right to defence should be the decisive factor in the choice of the part of case records to be made accessible to the temporarily arrested person and their defence counsel. All materials of preliminary proceedings justifying the motion of a public prosecutor in this respect have to be freely accessible.
11. Taking into account the standards set by the jurisprudence of the European Court of Human Rights, an amendment to Article 156 § 5 of the CCP consisting in the addition of general clauses (e.g. the interest of the administration of justice) to the provision, and constituting grounds for the refusal to grant access to documents, would not amount to an ade-

quate guarantee that should be ensured to the temporarily arrested person as regards their access to case records.

## EFFECTS OF THE JUDGEMENT

The decision in the present case has the nature of the so-called scope judgement. Therefore, finding the unconstitutionality of a challenged provision within a particular scope, as has been decided by the Tribunal, does not result in the loss of its binding force. The interpretation of the challenged regulation should be altered so as to eliminate unconstitutional interpretation. In the event of initiation by a public prosecutor of interlocutory proceedings concerning the imposition or the extension of period of a temporary arrest, the accused against whom the preventative measure is to be taken shall retain the right to peruse those documents of the preliminary proceedings (or part of the records) that constitute the substantiation of the public prosecutor's motion. Furthermore, the Tribunal has recognised the need for legislative amendments.

### Provisions of the Constitution

**Art. 2.** The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

**Art. 31. [...] 3.** Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 42 [...] 2.** Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.