

**102/7/A/2013**

**JUGDMENT**

of 29 October 2013

**Ref. No. U 7/12\***

**In the Name of the Republic of Poland**

**The Constitutional Tribunal, in a bench composed of:**

Małgorzata Pyziak-Szafnicka – Presiding Judge

Andrzej Rzepliński – Judge Rapporteur

Piotr Tuleja,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 29 October 2013, in the presence of the applicant, the Minister of the Interior and the Public Prosecutor-General, an application by the Polish Ombudsman to determine the conformity of:

§ 11(1) and § 11(2) of the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation, which constituted an annex to the Regulation of 26 August 2004 issued by the Minister of the Interior and Administration with regard to requirements which should be met by detention facilities and as regards the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation (Journal of Laws - Dz. U. No. 190, item 1953), to Article 123(1) of the Act of 13 June 2003 on Foreigners (Journal of Laws - Dz. U. 2011 No. 264, item 1573, as amended), Article 11(1)(2) of the Act of 12 October 1990 on the Border Guard (Journal of Laws - Dz. U. of 2011 No. 116, item 675, as amended), as well as to Article 41(1) in conjunction with Article 31(3), Article 47 in conjunction with Article 31(3) and Article 92(1), first sentence, of the Constitution of the Republic of Poland,

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\*The operative part of the judgment was published on 3 December 2013 in the Journal of Laws - Dz. U. item 1429.

adjudicates as follows:

## I

**§ 11(1) and § 11(2) of the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation, which constituted an annex to the Regulation of 26 August 2004 issued by the Minister of the Interior and Administration with regard to requirements which should be met by detention facilities and as regards the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation (Journal of Laws - Dz. U. No. 190, item 1953) are inconsistent with Article 41(1), Article 47 in conjunction with Article 31(3) as well as with Article 92(1), first sentence, of the Constitution of the Republic of Poland.**

## II

**The provision referred to in part I will cease to have effect after the lapse of 9 (nine) months from the date on which the judgment is published in the Journal of Laws of the Republic of Poland.**

Moreover, the Tribunal decides:

**pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), to discontinue the proceedings as to the remainder on the grounds that issuing a judgment is useless.**

## STATEMENT OF REASONS

[...]

## III

The Constitutional Tribunal has considered as follows:

1. The subject of the review

1.1. The subject of the review in the present case comprises § 11(1) and § 11(2) of the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation (hereinafter: the Rules of Procedure), which constituted an annex to the Regulation of 26 August 2004 issued by the Minister of the Interior and Administration with regard to requirements which should be met by detention facilities and as regards the Rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation (Journal of Laws - Dz. U. No. 190, item 1953; hereinafter: the Rules of Procedure), in the following version:

- “1. During detention in a detention facility, where this is justified for reasons of maintaining security and order, a foreigner shall be subject to a search.
2. The search of the foreigner shall consist in searching his/her body and outerwear, underwear and shoes, as well as objects in his/her possession or belonging to him/her. The search of the body and the inspection of outerwear, underwear and shoes shall be carried out in a room only in the presence of authorised persons of the same gender as the foreigner.”.

1.2. The said regulation was issued on the basis of Article 123(1) of the Act of 13 June 2003 on Foreigners (Journal of Laws - Dz. U. of 2011 No. 264, item 1573, as amended; hereinafter: the Act on Foreigners), which provided the following authorisation: “The minister competent for internal affairs shall specify by regulation requirements that should be met by detention facilities for foreigners detained pending deportation and the rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation, in particular taking account of the number of detainees in rooms and cells for foreigners, as well as the maintaining of order in a given detention facility”.

1.3. Challenged § 11(1) and § 11(2) of the Rules of Procedure were included in chapter 4 of the said Rules of Procedure, entitled “Maintaining Order in Detention Facilities”. Thus, it should be assumed that the lawgiver deemed that Article 123(1) of the Act on Foreigners (in the part after the word “as well as”) was a sufficient basis of

regulating the search of foreigners and presumed that it might be categorised as an organisational and disciplinary matter related to the detention of foreigners in a detention facility.

1.4. Pursuant to Article 102(1) of the Act on Foreigners, a foreigner shall be deprived of liberty by being detained in a detention facility, if:

- 1) there is a risk that the foreigner that is the subject of deportation proceedings may escape from the facility;
- 2) the foreigner has been served with a decision on deportation without any information on the time-limit within which s/he is to leave the territory of the Republic of Poland;
- 3) the foreigner did not leave the territory of the Republic of Poland within a time-limit specified in a given decision on deportation;
- 4) the foreigner crossed or attempted to cross the Polish border illegally.

Detention pending deportation applies to foreigners when any of the above-mentioned circumstances occurs and there is a risk that the foreigners may not adhere to rules concerning detention in given detention facilities (Article 102(2) of the Act on Foreigners).

A decision on detaining a given foreigner in a detention facility is made by a competent court. Consequently, what constitutes a ground for depriving a foreigner of liberty by detaining him/her in a detention facility pending deportation is not a suspicion that the said person has committed an offence.

## 2. The admissibility of adjudication in the case.

2.1. In the applicant's opinion, the challenged provisions are inconsistent with Article 41(1) in conjunction with Article 31(3) as well as Article 47 in conjunction with Article 31(3) of the Constitution, insofar as a matter reserved for a statute is regulated in a legal act of a lower rank i.e. a regulation.

2.2. Detaining a foreigner in a detention facility pending deportation entails depriving him/her of personal liberty safeguarded on the basis of Article 41(1) of the Constitution. What explicitly arises from Article 41(1), second sentence, of the Constitution is an obligation lying with the lawgiver to regulate rules and procedures for limiting liberty by statute. Personal liberty is closely linked to personal inviolability which is the individual's freedom from arbitrary interference of public authorities in his/her physical, spiritual and mental autonomy (see the judgment of the Constitutional Tribunal

of 5 March 2013, ref. no. U 2/11, OTK ZU No. 3/A/2013, item 24, part III, point 3.3.). Personal inviolability is a particularly important prerequisite for the exercise of personal liberty by the individual in a democratic state ruled by law which guarantees freedoms (see *ibidem*). Therefore, a search of a person always implies interference on the part of an organ of public authority in the realm of constitutionally protected freedoms and personal inviolability (see an analogy with a direct coercion in the judgment in the case U 2/11, part III, point 3.4).

2.3. The search of a person undoubtedly results in interference in the right to privacy, enshrined in Article 47 of the Constitution. Any restrictions of that right must be specified by statute in compliance with Article 31(3) of the Constitution, which – within that scope - constitutes a higher-level norm for the review that should be applied in conjunction with other provisions.

2.4. Also, in the present case, the Tribunal has also determined whether the challenged provisions were issued on the basis of an authorisation granted by statute, i.e. whether they are also consistent with Article 92(1), first sentence, of the Constitution.

2.5. Taking the above into account, the Tribunal deems that the higher-level norm for the review in the present case is Article 41(1), Article 47 in conjunction with Article 31(3) as well as Article 92(1), first sentence, of the Constitution.

3. The issue of the constitutionality of § 11(1) and § 11(2) of the Rules of Regulations in the light of Article 41(1) as well as Article 47 in conjunction with Article 31(3) of the Constitution

3.1. The search of a person carried out on the basis of the challenged provisions constitutes interference in personal inviolability, protected on the basis of Article 41(1) of the Constitution, and in the right to privacy, enshrined in Article 47 of the Constitution. In the light of the requirements set out for the legislator in Article 31(3) and Article 41(1) of the Constitution, as regards interference in the two freedoms, only the legislator's intervention is admissible. Also, the legislator must intervene in a complete and precise way. In a legal act of a lower rank than a statute, under the condition that explicit authorisation has been granted by the legislator, only organisational issues related to the course of the search of a person may be specified.

3.2. The binding Act on Foreigners does not regulate the matter of carrying out the search of a person. What is more, such a term does not occur there at all, and Article 123(1) of the Act on Foreigners does not include authorisation to regulate that matter in a regulation. Also, taking account of the view of the Minister of the Interior, the Tribunal states that the authorisation included in Article 123(1) of the Act on Foreigners to specify the rules of procedure on organisational and disciplinary matters related to the detention of foreigners in detention facilities pending deportation may not constitute a ground for regulating the search of foreigners.

3.3. The Tribunal stresses that Article 41(1), second sentence, of the Constitution prohibits restricting personal liberty in legal acts of lower rank than statutes, and at the same time it requires that all substantive-law grounds for interference in personal liberty should be set out by statute. Also, a statute needs to outline a procedure for restricting the said liberty (cf. the judgment of the Constitutional Tribunal of 10 March 2010, ref. no. U 5/07, OTK ZU No. 3/A/2010, item 20, part III, point 3.2.).

The same rule governs the admissibility of interference in the right to privacy. In the judgment of 23 June 2009 in the case K 54/07 (OTK ZU No. 6/A/2009, item 86, part III, point 5), when making reference to the jurisprudence of the European Court of Human Rights (*inter alia* to the judgment of 2 August 1984 in the case of *Malone v. the United Kingdom*, Application no. 8691/79, paragraphs 67-68 and 79), the Tribunal notes that, in the context of that freedom of the individual, it is indispensable to sufficiently determine the precise and specific statutory basis of interference in the realm of that freedom and it is inadmissible to impose restrictions on the freedom by means of a legal act of lower rank than a statute. Also, the Tribunal stresses that norms which limit the right to privacy should be regulated at the statutory level (see also the judgment in the case U 2/11, part III, point 4.3.)

3.4. Looking for a standard which should be met by the search of a person, one should refer to provisions governing the deprivation of liberty. The situation of a foreigner detained in a detention facility pending deportation is in an actual sense – not a legal sense – similar to the situation of a person who is provisionally detained or of a convict punished with the penalty of deprivation of liberty. The scope of search in the context of detainees or convicts is specified by statute (Article 116(2)-(4) of the Act of 6 June 1997 – the Executive Penal Code, Journal of Laws - Dz. U. No. 90, item 557, as amended), and not, as

in the case of foreigners, by a regulation. The search of a person carried out by the police is regulated by statute (Article 15(1)(5) of the Act of 6 April 1990 on the Police, Journal of Laws - Dz. U. of 2011 No. 287, item 1687, as amended). The said provision also mentions a ground for such a search: a justified suspicion that a prohibited act has been committed for which the law prescribes a penalty. Similar provisions are absent from the Act on Foreigners and the Act on the Border Guard.

As a side remark, the Tribunal notes that a foreigner detained in a detention facility pending deportation is neither a suspect nor an accused person, and definitely not someone convicted for the commission of an offence (see part III point 1.4 of the statement of reasons). Therefore, admissible interference in the rights and freedoms of that person must in principle be narrower in scope than interference in the rights and freedoms of a suspect, an accused person or a convict.

3.5. Since, in the light of the requirements set out in Article 41(1) and Article 47 in conjunction with Article 31(3) of the Constitution, all grounds for resorting to the above-mentioned search in the case of foreigners detained in detention facilities pending deportation should be specified by statute; the Tribunal states that § 11(1) and § 11(2) of the Rules of Procedure are inconsistent with Article 41(1) as well as Article 47 in conjunction with Article 31(3) of the Constitution. The challenged provisions are also inconsistent with Article 92(1), first sentence, of the Constitution. Indeed, they were issued without any statutory authorisation (see part III, point 3.2. of the statement of reasons).

3.6. Both of these freedoms of the individual, constituting higher-level norms for the constitutional review in the present case – personal liberty (Article 41(1) of the Constitution) as well as the freedom from interference in one's private life (Article 47 of the Constitution) - are not absolute in character. The limits of the admissible restriction of those freedoms may only be determined by statute (Article 41(1) as well as Article 47 in conjunction with Article 31(3) of the Constitution). The search of a foreigner in a detention facility pending deportation, as in the case of persons deprived of liberty for being suspected of committing an offence or for being convicted and punished with the penalty of deprivation of liberty, constitutes special interference in the above-mentioned freedoms of the individual, particularly due to the fact that the search of a person additionally narrows down the realm of personal liberty. Grounds for allowing the search of a person, also in the case of a person deprived of personal liberty, may never be left to be regulated by a lawgiver who issues legal acts of lower rank than statutes. They always require a

statutory form. The legislator needs to specify the said grounds in a complete and precise way. The search of a person as an action that considerably interferes in the realm of the rights and freedoms of the individual may not be classified as an organisational and disciplinary matter.

3.7. Taking into account the above findings, adjudication on the conformity of the challenged provisions to Article 123(1) of the Act on Foreigners and Article 11(1)(2) of the Border Guard proves useless.

#### 4. The effects of the judgment.

In part II of the operative part of this judgment, the Tribunal defers the date when the challenged provisions will cease to have effect by 9 months. During that period, the legislator is obliged to enact statutory provisions which will regulate the application of the search of foreigners detained in detention facilities pending deportation.

For the above-mentioned reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.