Judgment of 20th April 2004, K 45/02

EXTRAORDINARY TERMINATION OF THE EMPLOYMENT OF OFFICERS OF THE FORMER STATE SECURITY OFFICE. STATUS OF CHIEFS OF THE INTERNAL SECURITY AGENCY AND FOREIGN INTELLIGENCE AGENCY. CERTAIN COMPETENCES OF THESE AGENCIES

Type of proceedings: Abstract review **Initiator:** Group of Deputies	**Composition of Tribunal:** 5-judge panel	**Dissenting opinion:** 1

Legal provisions under review	**Basis of review**
Appointing the Chiefs of the Internal Security Agency (ISA) and the Foreign Intelligence Agency (FIA) as Secretaries of State [Internal Security Agency and Foreign Intelligence Agency Act 2002: Article 14(1)]	Incompatibility of office of Deputy with certain other State offices [Constitution: Article 103(1)]
Authority of ISA officers to issue “behavioural orders” [*Ibidem*: Article 23(1) point 1]	Rule of law Protection of human dignity Freedom of the individual Principle of proportionality [Constitution: Articles 2, 30 and 31]
Authority of ISA officers to observe and record events in public places [*Ibidem*: Article 23(1) point 6]	Rule of law Protection of human dignity Principle of proportionality Right to protection of private life Freedom and privacy of communication Limitation of public authorities’ powers to gather information on citizens [Constitution: Articles 2, 30, 31(3), 47, 49 and 51(2)]
Authority for the Prime Minster to issue a regulation concerning the exchange of information within the “government’s information community” [*Ibidem*: Article 41(2)]	Conditions for authorising the issuing of a regulation [Constitution: Article 92(1)]
Possibility of terminating an officer’s employment following liquidation of State Security Office (SSO) [*Ibidem*: Article 230(1)]	Principle of legality in respect of public authorities Right of equal access to public service [Constitution: Articles 7 and 60]
Excluding the application of so-called protective time-limits for termination of employment in the above case [*Ibidem*: Article 230(7)]	Principle of equality Right of equal access to public service [Constitution: Articles 32 and 60; International Covenant on Civil and Political Rights: Article 25(c)]

Prior to the entry into force of the Internal Security Agency (ISA) and Foreign Intelligence Agency (FIA) Act 2002, the functions connected with internal State security and with so-called civil intelligence were concentrated in the State Security Office (SSO), subordinated to the Prime Minister. The aforementioned Act liquidated the SSO and divided the aforementioned duties between two newly created Agencies, which were also subordinated to the Prime Minister, whose names are mentioned in the Act's title. The 2002 Act was adopted following changes in political power as a result of the parliamentary elections in autumn 2001. During the legislative procedure concerning the discussed Act, a number of provisions became the subject of political and legal controversies.

The most controversial issues related to certain norms contained in Article 230 of the Act (cf. points I.5 and I.6 of the ruling), which allowed for the extraordinary termination of employment of former SSO officers. Although such officers, by virtue of law, automatically became ISA or FIA officers, the Chief of the relevant Agency was entitled, within 14 days of the entry into force of the 2002 Act, to easily terminate their employment without any need to provide special reasons for such termination (Article 230(1) point 2). Termination of employment would take effect within one month from the day on which the interested party was served with notice thereof (Article 230(4)). The legislator excluded the possibility for such officers to rely on statutory provisions governing the favourable time periods within which termination of employment may normally occur (the so-called protective time-limits, cf. Article 230(7)).

Further controversy was encountered in respect of Article 14(1) of the Act (cf. point I.1 of the ruling), which endowed the Chiefs of both Agencies, as appointed by the Prime Minister, with the rank of Secretary of State (i.e. a person assisting and representing a Minister). This enabled these offices to be held by current Members of Parliament. In accordance with Article 103(1), read in conjunction with Article 108, of the Constitution, it is prohibited for Members of Parliament to jointly hold a position of employment within government administration (the so-called incompatibility of offices), except in relation to holding the office of a Member of the Council of Ministers or a Secretary of State.

The aforementioned provisions of the Internal Security Agency and Foreign Intelligence Agency Act, and moreover provisions thereof indicated in points I.2–I.4 of the ruling, concerning certain functions and activities of these Agencies, were challenged before the Constitutional Tribunal by a group of Deputies who alleged that these provisions were incompatible with the constitutional provisions, and with the International Covenant on Civil and Political Rights, cited in the ruling.

The Tribunal upheld all of the applicants' allegations. ***Judge Bohdan Zdziennicki*** delivered a dissenting opinion disagreeing with the Tribunal's ruling that it was incompatible with the Constitution to bestow the rank of Secretary of State on the Chiefs of the ISA and FIA (point I.1 of the ruling) and to permit termination of the officer's employment relationship (point I.5 of the ruling).

The provisions of the Act indicated in points I.1, I.5 and I.6 of the ruling lost their binding force on the day this ruling was published in the Journal of Laws. With regard to the remaining provisions, the Tribunal delayed the loss of binding force (cf. part II of the ruling) and provided the legislator with time in which to adopt appropriate amendments.

RULING

I

1. Article 14(1) of the challenged Act, insofar as it bestows the rank of Secretary of State on the Chiefs of the Internal Security Agency and Foreign Intelligence Agency, does not conform to Article 103(1) of the Constitution (prohibition on Deputies undertaking employment within the government administration, excluding the offices of Member of the Council of Ministers or a Secretary of State).

2. Article 23(1) point 1 of the aforementioned Act (the authority of ISA officers to issue "behavioural orders" in the course of performing activities defined in Article 21) does not conform to Article 2 (rule of law), Article 30 (protection of human dignity) and Article 31 of the Constitution (freedom of the individual and legal reservation in relation to limitations thereupon).

3. Article 23(1) point 6 of the Act (the authority of ISA officers to observe and record, with the use of technical means, images of public events and sounds accompanying these events in the course of performing activities defined in Article 21) does not conform to Article 2, Article 30, Article 47 (right to legal protection of private life), Article 49 (privacy of communication) and Article 51(2) (personal data protection), read in conjunction with Article 31(3), of the Constitution (legal reservation in relation to, and proportionality of, limiting constitutional rights and freedoms).

4. Article 41(2) of the Act (authority of the Prime Minister to issue a regulation defining the procedure for information exchange within "the government's information community" and requirements, within this scope, in respect of State administration organs) does not conform to Article 92(1) of the Constitution (requirements related to authorisation to issue regulations).

5. Article 230(1) of the Act, insofar as it assumes, on the basis of point 2 of this provision, the possibility of terminating an officer's employment relationship, does not conform to Article 7 (functioning of public authorities on the basis, and within the limits, of the law) and Article 60 of the Constitution (right of equal access of citizens to public service).

6. Article 230(7) of the Act, insofar as it excludes the application of provisions of Article 60(4) and Article 63 of the Act (time-limits for terminating an employment relationship) with regard to officers referred to in Article 230(4) (one month for terminating the employment relationship on the basis of Article 230(1) point 2) – does not conform to Article 32 (principle of equality), Article 60 of the Constitution and Article 25(c) of the International Covenant on Civil and Political Rights (right of equal access to public service).

II

The Tribunal ruled that the loss of binding force of the provisions cited above in points 2, 3 and 4 shall be delayed until 31st December 2004.

PRINCIPAL REASONS FOR THE RULING

1. The principle of legality, requiring organs of public authority to function on the basis of, and within the limits of, the law (Article 7 of the Constitution), precludes the possibility of dividing State officers into those who shall continue in service and those whose employment relationship shall be terminated arbitrarily without having prop-

erly defined the prerequisites and procedure for such a division. The reorganisation of the State administration may not be utilised as an occasion to exchange personnel by evading legal provisions guaranteeing officers greater stability of employment.

2. The inclusion of employment stability within statutory provisions gives rise to legitimate expectations that the legislator will not arbitrarily amend those provisions.

3. The particular guarantees of employment stability for State special service officers, which extend noticeably further than normal employment (i.e. labour relationship) stability guarantees, fulfil a diverse function within a democratic State governed by the rule of law. First, they serve to realise the citizen's right of equal access to public service (Article 60 of the Constitution). Second, they ensure protection of the individual rights of officers by preventing their superiors from making arbitrary assessments in cases when service conditions require subordination and far-reaching flexibility. Third, these guarantees are a factor in favour of the political neutrality and stability of special services, limiting the ability to which they may be used in the political interest of the parliamentary majority.

4. An analysis of the provisions of the Internal Security Agency and Foreign Intelligence Agency Act 2002, and also the articles of association of both these Agencies, leads to the conclusion that the 2002 Act merely divides the realisation of the duties of the former State Security Office between two Agencies, both of which operate in the same legal form and possess a similar internal organisational system as the SSO. The Act ensured continuity of service for former SSO officers and did not introduce any amendments concerning requirements to be fulfilled by newly employed officers. Accordingly, the provisions of this Act do not justify a reconstruction of the officer corpus of the Internal Security Agency or Foreign Intelligence Agency. Nor do they contain provisions constituting the grounds for selection of those officers who will continue in service and those whose employment relationship will be terminated. By authorising, in Article 230(1) point 2, the Chiefs of both Agencies to terminate the employment relationship with any officer within 14 days from the day of the Act's entry into force – after considering "the professional qualifications of the officer, his usefulness to the service in the ISA or FIA and also the employment level and budget" – the legislator endowed the Agency Chiefs with excessive freedom and discretion, whilst making reference to inadequate criteria in a situation where changes in the functioning of special services were in fact of an organisational, as opposed to a structural, character. In permitting termination of the employment relationship on ambiguously defined criteria, the challenged provisions are incompatible with Articles 7 and 60 of the Constitution (point I.5 of the ruling).

5. In light of the constitutional principle of equality (Article 32), all entities possessing the same relevant characteristics should be treated equally, without any favourable or discriminatory differentiation. This principle permits differentiation of similar subjects but only where the differentiation criterion applied by the legislator is justified and fair.

6. Article 230(7) of the 2002 Act constitutes an unjustified differentiation in the level of protection in respect of officers' employment relationships by excluding the application of favourable time-limits, defined in Articles 60(4) and 63, for terminating an employment relationship in respect of officers who refused to accept the proposed

conditions of service or who were served notice of termination of their employment. Accordingly, this provision does not conform to the general principle of equality (Article 32 of the Constitution), nor to the guarantees of equal access of citizens to public service contained in Article 60 of the Constitution and Article 25(c) of the International Covenant on Civil and Political Rights (point I.6 of the ruling).

7. The first sentence of Article 103(1) of the Constitution, exempting Members of the Council of Ministers and Secretaries of State from the general prohibition preventing Members of Parliament from undertaking employment within government administration, is a restrictive norm of a constitutional character. In defining the constitutional contents of the notion of Secretary of State mentioned in this Article, given the absence of a clear definition within the Constitution, it may be assumed that the constitutional legislator intended this term to have the same meaning assigned to it by legislation in force at the time of the entry into force of the 1997 Constitution (the so-called pre-existing notion). At that time, the status of a Secretary of State in government administration was regulated by the Organisation and Functioning of the Council of Ministers and the Scope of Ministers' Activities Act 1996, at present under the name of the Council of Ministers Act 1996. This statute defined the position of Secretary of State as being integrally bound with the position of Minister; in particular, a Secretary of State shall assist the Minister in his tasks and duties, represent the Minister to a defined degree and shall submit his resignation should the government resign (cf. Articles 9, 37 and 38 of the 1996 Act).

8. It amounts to an evasion of Article 103(1) of the Constitution to confer the rank of Secretary of State upon the holder of a particular office within government administration where such an office exhibits none of the aforementioned features, since the ultimate legal effect would merely be to exempt the holders of such offices from the constitutional prohibition on combining employment within government administration with the possession of a parliamentary mandate (i.e. the incompatibility of offices principle).

9. In respect of the conferral, by Article 14(1) of the 2002 Act, of the "rank of Secretary of State" upon the Chiefs of the Internal Security Agency and Foreign Intelligence Agency, who are defined by Article 3 of the Act as "central organs of government administration", the allegation is justified that this amounts to evasion of Article 103(1) of the Constitution in the meaning defined above (point I.1 of the ruling).

10. It stems from the principle of the rule of law, as expressed in Article 2 of the Constitution, that the legislator must observe the principles of correct legislation. One of these principles is the requirement that any interference in the sphere of the individual's constitutional rights and freedoms must be defined by statute. The legislator may not, through ambiguous formulation of provisions, grant excessive freedom to organs applying them when defining the subjective and objective scope of the constitutional limitations placed upon an individual's freedoms and rights. Where a legal provision exceeds a certain degree of ambiguity, this may constitute an autonomous justification for ruling that it does not conform to Article 2 of the Constitution and to the constitutional provision requiring statutory regulation of a particular area (so-called legal reservation, e.g. Article 31(3)).

11. The constitutional norm expressed in Article 31(3), by which any limitations placed

on the ability to exercise constitutional rights and freedoms may be introduced "only by statute" does not merely require the indication, within a normative act of this rank, of the extent to which the constitutional rights and freedoms shall be restricted. For the same reasons that it is impermissible to authorise regulation of these matters by executive acts, it must also be regarded as an infringement of constitutional requirements where statutory provisions are formulated in such an ambiguous and imprecise manner as to cause their addressees to be uncertain as regards their rights and obligations.

12. The authorisation, contained in Article 23(1) point 1 of the 2002 Act, for Internal Security Agency officers to issue "behavioural orders" within the scope of their activities, as defined in Article 21, constitutes a basis for interfering with the freedom of the person, protection of which is guaranteed by Article 30 and Article 31(1) and (2) of the Constitution. An analysis of the provisions of the Act indicates that such orders may in fact be directed to any person and in any situation, thereby permitting officers to arbitrarily use this authorisation. Whereas the Act does not provide for any procedure by which persons concerned by such orders may guard against any unjustified infringement of their personal interests. Concomitantly, the Act authorises officers to use physical, technical and chemical methods of direct coercion where a person fails to comply with a legally-issued order (Article 25(1)). Since the challenged provision endows officers with far-reaching freedom and the Act does not specify any procedures for the verification of orders issued thereby, it constitutes an infringement of the constitutional guarantee of freedom of the individual and of the principles of correct legislation (point I.2 of the ruling).

13. A similar conclusion must be reached in respect of the authorisation of ISA officers to observe and register images of public events, together with sounds accompanying these events, with the use of technical means, contained in Article 23(1) point 6, read in conjunction with Article 21, of the challenged Act (point I.3 of the ruling). Such authority constitutes a basis for interfering into the sphere comprised by constitutional guarantees protecting human dignity (Article 30), private life (Article 47), privacy of communication (Article 49) and personal data protection (Article 51 of the Constitution). Article 23(1) point 6 of the Act does not unequivocally determine in respect of whom, and in which situations, the limitations arising from application of this norm are permissible (the provision refers to observation of events, as opposed to persons). The Act does not state clearly whether registration of such images shall be classified or open to public inspection. The legislator did not introduce any guarantees to ensure that this provision will be applied only where necessary to realise goals defined in the Act (there are neither control mechanisms nor appeal procedures), nor did he include mechanisms to assess whether such activities are justified, nor did he define the method for utilising information gathered in the course of such activities. In practice, whilst undertaking inquiry-investigation activities, ISA officers may, in the absence of anyone's consent or control, observe and register images of events. With regard to the scope of freedom left to officers, the challenged provision differs from the regulation of analogous police activities (cf. Article 15(1) point 5 and Article 15(6)-(8) of the Police Act 1990).

14. Pursuant to Article 92(1) of the Constitution, it is impermissible for a statute to authorise the issuing of a regulation endowing the authorised subject with complete freedom to define the relevant legal matters, since such a regulation would not be is-

sued "for the purpose of implementation" of that Act. Similarly, it is impermissible to enact an authorisation, in relation to which no statutory contents fulfilling the role of "guidelines concerning the provisions of an [executive] act" may be identified.

15. Article 41(1) of the 2002 Act announces the existence of the "government's information community", understood as co-operation between organs of government administration in respect of exchanging information significant for internal security and the international position of the Republic of Poland, co-ordinated by the Chief of the Foreign Intelligence Agency. Besides such general formulations, the Act contains no other details regarding organisation of such co-operation or the principles for the functioning thereof. Accordingly, the authorisation for the Prime Minister to issue a regulation governing "the information exchange procedure" and "requirements in respect of organs participating in such co-operation", contained in section 2 of the aforementioned Article, fails to fulfil the requirements of Article 92(1) of the Constitution, in accordance with which regulations are only permitted to be acts of an executive character in relation to an authorising statute, the contents of which should be specified by guidelines defined by statute (point I.4 of the ruling).

MAIN ARGUMENTS OF THE DISSENTING OPINION

- The second sentence of Article 103(1) of the Constitution provides an exception, in respect of Members of the Council of Ministers and Secretaries of State, to the general prohibition preventing those holding a parliamentary mandate from simultaneously undertaking employment within government administration. The Constitution considers these offices to be political in nature and, as such, allows appointment to them to be consistent with parliamentary political composition.

- Contrary to the Tribunal's reasoning in relation to point 1 of the ruling, it is difficult to recognise the term of Secretary of State, in Article 103(1), as a pre-existing notion. This term has only appeared recently and its meaning has been the subject of evolutionary developments. The Constitution does not contain any prerequisites that must be fulfilled before a particular position may be credited with the rank of Secretary of State. Neither does the Constitution impose any limitations on the permissibility of creating, by way of statute, central administration organs led by a Secretary of State.

- In accordance with the legislator's will, which the Constitution does not make conditional upon the fulfilment of special conditions, the Chiefs of the Internal Security Agency and Foreign Intelligence Agency were endowed with the rank of Secretaries of State (Article 124(1) of the 2002 Act). They hold political offices with competences statutorily defined by State policy, exercised by the Council of Ministers (Article 146(4) points 7 and 8 of the Constitution). Agency Chiefs are directly subordinate to the Prime Minister (Article 3(2) of the 2002 Act) who defines the policies of these Agencies by way of guidelines (Article 7(1) of the 2002 Act). Accordingly, these Agencies may be said to have the character of a government department. Since it is only the Chiefs of these Agencies who are permitted to be politicians, this clearly specifies the borderline between the political and the professional factions within the functioning of the ISA and FIA.

- In accordance with Article 188 points 1–3 of the Constitution, the Constitutional Tribunal is a "court of law" and not a "court of fact". It adjudicates on the conformity of norms to the Constitution and also to the rules concerning legislative competencies and procedures, and does not examine the purpose of provisions nor their effectiveness in practice. *A fortiori* it may not assess the legislator's motives (political, economic or social).

- The principle of separation of powers (Article 10 of the Constitution) precludes the Constitutional Tribunal from participating in legislative authority. The Tribunal is merely a "negative" legislator. This requires restraint in assessing applications and complaints challenging normative solutions. The presumption of the legislator's rationality is binding, together with the presumption of constitutionality in relation to reviewed provisions.

- In point 5 of the ruling, the Tribunal ruled on the unconstitutionality of a transitional provision, such as Article 230(1) point 2 of the 2002 Act, following an evaluation of the reforms undertaken in relation to special

services, to which the entire Act is devoted. The Tribunal engaged in an assessment of the motives which ought to have been held by the legislative authority.

- In contrast to the Tribunal's opinion, expressed in its reasons concerning point 5 of the ruling, there is no norm in the Constitution protecting employment stability even within employment relationships. The first sentence of Article 24 of the Constitution ensures that work shall be protected by respective legislation. However, protection of work does not guarantee employment (the right to work), neither does it guarantee protection of employment stability. Protection of employment stability can neither be derived from Article 60 of the Constitution, which only concerns equal (i.e. non-discriminatory) access to the public service, nor from the principle of legality expressed in Article 7 of the Constitution.
- The legislator possesses the right to enact legislative reforms. It is not possible to derive from the principle of employment relationship stability a rule that reforms are only permissible when they guarantee continuing employment to each officer.

Provisions of the Constitution and the International Covenant on Civil and Political Rights

Constitution

Art. 2. The Republic of Poland shall be a democratic State governed by the rule of law and implementing the principles of social justice.

Art. 7. The organs of public authority shall function on the basis of, and within the limits of, the law.

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 24. Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work.

Art. 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Art. 31. 1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may by 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. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Art. 49. The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.

Art. 51. 1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.
2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic State ruled by law.
3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.
4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.
5. Principles and procedures for collection of and access to information shall be specified by statute.

Art. 60. Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.

Art. 92. 1. Regulations shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorisation shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

Art. 103. 1. The mandate of a Deputy shall not be held jointly with the office of the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the Commissioner for Children's Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This prohibition shall not apply to members of the Council of Ministers and secretaries of State in government administration.

Art. 108. The provisions of Articles 103-107 shall apply, as appropriate, to Senators.

Art. 146. […] 4. To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall:

[…]

7) ensure the internal security of the State and public order;
8) ensure the external security of the State;

[…]

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:

1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes
4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Article 79(1).

Art. 190. […] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

International Covenant

Art. 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
(c) To have access, on general terms of quality, to public service in his country.