

84/7/A/2012

JUDGMENT

of 26 July 2012

Ref. No. P 8/11*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Andrzej Wróbel – Presiding Judge

Zbigniew Cieślak

Małgorzata Pyziak-Szafnicka

Stanisław Rymar

Marek Zubik – Judge Rapporteur,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 26 July 2012, in the presence of the Sejm and the Public Prosecutor-General, joined questions of law referred by:

- 1) the Circuit Court in Szczecin, as to whether Article 8(2a) of the Act of 23 February 1991 on recognising the invalidity of rulings issued with regard to persons persecuted for their activity for the sake of the independence of the Polish State (Journal of Laws - Dz. U. No. 34, item 149, as amended), insofar as it specifies persons eligible to file a claim as persons who “currently reside in the territory of the Republic of Poland”, is consistent with Article 2, Article 32(1), Article 52(2) as well as Article 77(2) of the Constitution,
- 2) the Circuit Court in Warsaw, as to whether Article 8(2a) of the Act referred to in point 1, insofar as it correlates the granting of the right to claim compensation and seek redress for harm inflicted due to

* The operative part of the judgment was published on 3 August 2012 in the Journal of Laws - Dz. U. of 2012, item 887.

persecution by the USSR law-enforcement and judicial authorities, or non-judicial authorities, operating in the present-day territory of Poland during the period from 1 July 1944 until 31 December 1956 as well as in the territory of Poland within its borders set down in the Treaty of Riga during the period from 1 January 1944 until 31 December 1956 - in the context of persons acting for the sake of the independence of the Polish State or due to such activity - with the requirement of residing in the present-day territory of Poland currently or at the moment of their death, is consistent with Article 32(1) of the Constitution,

adjudicates as follows:

Article 8(2a) of the Act of 23 February 1991 on recognising the invalidity of rulings issued with regard to persons persecuted for their activity for the sake of the independence of the Polish State (Journal of Laws - Dz. U. No. 34, item 149, of 1993 No. 36, item 159, of 1995 No. 28, item 143, of 1998 No. 97, item 604, of 2002 No. 240, item 2055, of 2004 No. 273, item 2703, of 2007 No. 191, item 1372, of 2009 No. 14, item 74 as well as of 2011 No. 53, item 277), **insofar as it requires that a court examining a claim for compensation should determine the existence of a claimant's current connection with the Polish State, based on the claimant's fulfilment of the criterion that an eligible person should currently reside in Poland, is consistent with Article 32(1) and Article 2 of the Constitution of the Republic of Poland as well as is not inconsistent with Article 77(2) and Article 52(2) of the Constitution.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The admissibility and limits of substantive examination in the context of questions of law.

1.1. A prerequisite for conducting a constitutional review by the Constitutional Tribunal in accordance with Article 193 of the Constitution is the fulfilment of three premisses. The Tribunal states that, in the present case, two premisses have been fulfilled: a premiss concerning the scope *ratione personae* and a premiss concerning the scope *ratione materiae*. A separate analysis should be devoted to the question of the fulfilment of a functional premiss.

The functional premiss indicates that there needs to be a correlation between the Tribunal's adjudication and the application of the law by a court in an individual case. A question of law must be adequately related to the resolution of a case pending before the court. The Constitutional Tribunal has consistently been indicating that the legal institution of a question of law is based on an objectively existing need to determine whether a given provision which is to be applied in a case pending before a court is consistent with a normative act of a higher level. However, from the point of view of the requirements set out in Article 193 of the Constitution, it suffices when the resolution of a given case, pending before the court which has referred a question of law, depends on the Tribunal's adjudication, regardless of the fact which organ of public authority will ultimately resolve the case (see the judgment of the Constitutional Tribunal of 21 June 2011, Ref. No. P 26/10, OTK ZU No. 5/A/2011, item 43, Part III, point 1 of the statement of reasons).

1.2. The functional premiss sets a necessary connection between a ruling of the Constitutional Tribunal and the issuing of a judgment in an individual case. In the present case, there is such a connection with regard to the question of the admissibility of applying the residence criterion, by the legislator, in Article 8(2a) of the Act of 23 February 1991 on recognising the invalidity of rulings issued with regard to persons persecuted for their activity for the sake of the independence of the Polish State (Journal of Laws - Dz. U. No. 34, item 149, as amended; hereinafter: the February Act), as one of requirements for claiming compensation and seeking redress for harm inflicted due to persecution by the USSR law-enforcement authorities, in the context of persons persecuted for their activity for the sake of the independence of the Polish State. An answer to be given by the Constitutional Tribunal as to the admissibility of the indicated criterion will affect rulings in both cases pending before the courts referring the questions of law (the Circuit Court in

Szczecin and the Circuit Court in Warsaw). If the Tribunal declares the said criterion set out in Article 8(2a) of the February Act to be unconstitutional, the courts considering individual cases will be able to grant benefits to respective claimants, otherwise the courts may dismiss the claims.

1.3. In both cases considered by the courts referring the questions of law, there is no doubt that the claimants do not meet the criterion that an eligible person should currently reside in Poland, construed as a requirement of staying in a given village, town or city with the intention of permanent residence. In the first case, the claimant has been living in Canada since the 1970s, whereas during the time of claiming compensation and seeking redress, she was staying in Poland and she registered her residence here. In the second case, the claimant permanently resides in Belarus, but is registered as a resident in Warsaw and frequently stays in Poland.

Taking into account these circumstances, in the light of the two pending cases, it is of no relevance whether the term “currently” concerns the moment of the entry into force of the February Act, the moment of filing a claim or the moment of adjudication by the court. Indeed, at none of those times the claimants were residing in Poland. At the same time, it should be stressed that, in the context of the cases pending before the courts referring the questions of law, the adjudication of the Constitutional Tribunal may solely concern that part of the criterion set out in Article 8(2a) of the February Act which refers to a claimant who in person files a claim for the payment of the benefit provided for in the said Act. Indeed, the part of Article 8(2) of the February Act where the criterion that an eligible person should reside in Poland refers to the moment of the death of the person is of no relevance for the consideration of the cases pending before the courts referring the questions.

From the point of view of the functional premiss of a question of law, this means that, in the present case, the Constitutional Tribunal must limit its adjudication only to determining whether it is constitutionally admissible to correlate the payment of compensation with the fulfilment of the criterion expressed by the wording: “currently reside in Poland”.

2. The genesis of the challenged regulation.

2.1. The provision challenged in both questions of law, i.e. Article 8(2a), was included into the February Act as part of first amendments introduced into the Act by the

Act of 20 February 1993 amending the Act on recognising the invalidity of rulings issued with regard to persons persecuted for their activity for the sake of the independence of the Polish State (Journal of Laws - Dz. U. No. 36, item 159). In the course of the Sejm's work on the Senate's submission (the Sejm Paper of 28 July 1992 No. 416/the 1st term of the Sejm), the Sejm Deputies deliberated on a proposal made by Adam Strzembosz, the then First President of the Supreme Court, who, at one of committee meetings, drew attention to "a category of persons who were definitely aggrieved, and who were not included within the scope of the Act, due to the fact that rulings issued as part of persecution against those persons had not been issued by Polish courts, but by the courts or other non-judicial authorities of the USSR" (the Bulletin No. 810/the 1st term of the Sejm, p. 6). In the course of further work, it was emphasised that the recognition of a possibility of compensating harm inflicted on persons persecuted by the USSR authorities was extraordinary in character. Indeed, it entails paying benefits in the context of actions taken by the authorities of a foreign state.

2.2. An analysis of the legislative work on the Senate's submission gives rise to a number of general observations.

Firstly, the intention of the Sejm Deputies was not for the Republic of Poland to take responsibility, with regard to any persons, for harm inflicted by the authorities of foreign states acting in the Polish territory during the WWII.

Secondly, from the very beginning of that legislation, the Sejm Deputies recognised a need to restrict the right to claim compensation meant for persons persecuted by the USSR authorities. There was concern that the number of applicants would be too large, given the possibility of being awarded the benefits from the state budget. Also, the Deputies wished to avoid creating an impression – by expanding the category of eligible persons - that they were taking responsibility for the actions of the USSR authorities, thus ruling out the possibility of claiming compensation directly from the responsible state and its legal successors.

Thirdly, pursuant to opinions presented at the meetings of the Sejm committees, the proposal to restrict the right to claim compensation only to persons who "currently reside in Poland or lived there at the moment of their death" was made to deliberately rule out the possibility of any claims put forward by "Poles currently residing outside Poland" (the Bulletin No. 894/the 1st term of the Sejm, p. 10) or "the present-day citizens of, for instance, Ukraine who at that time were Polish citizens" (*ibidem* p. 11).

Fourthly, the Sejm Deputies strove to avoid a situation where the right to claim compensation would be available to all persons who “had in any way undertaken actions which could have led to the restoration of *status quo* or which had aimed at opposing the USSR authorities” (Bulletin No. 946/ the 1st term of the Sejm, pp. 5-6). The point was to correlate the introduced right to claim compensation with the requirement to prove the claimant’s connection with independent Poland. Therefore, it was a conscious decision to restrict the category of eligible persons. Alternatively, what was also considered – but ultimately was not followed through – was a number of proposals to limit the category of the subjects of the right to claim compensation only to “Poles” understood as persons who “considered themselves to be Polish citizens at that time”(*ibidem*, p. 5) or as “Polish citizens”(*ibidem*, s. 7)

Fifthly, regardless of the restrictions within the scope *ratione personae*, the Sejm Deputies also agreed that it was necessary to introduce restrictions related to a territory where the said persecution had taken place. They specified it as the area where the USSR authorities were active. The said issue aroused considerable controversy, due to the ambiguity of the phrase “area adjacent to the war front” and difficulties in determining the places of persecution that would entitle given persons to be awarded benefits.

2.3. The February Act and Article 8(2a), which is challenged by the courts referring the questions of law in the present case, have been amended three times so far. In the context of the present case, what is of significance is the modification of the content of Article 8(2a) of the February Act introduced by the Act of 16 July 1998 amending the Act on recognising the invalidity of rulings issued with regard to persons persecuted for their activity for the sake of the independence of the Polish State (Journal of Laws - Dz. U. No. 97, item 604). Indeed, the said amending Act changed a premiss concerning the territorial scope of activity conducted by the USSR authorities. The original wording – i.e. “acting pursuant to the Agreement signed on 26 July 1944 between the Polish Committee of National Liberation and the Government of the Union of Soviet Socialist Republics on relations between the Soviet Commander in Chief and the Polish administration after the invasion of the territory of Poland by the Soviet armed forces” – was replaced with the indication of the territory where the activity of the USSR authorities could be regarded as activity entitling certain persons to claim compensation due to persecution: “in the present-day territory of Poland during the period from 1 July 1944 until 31 December 1956 as well

as in the territory of Poland within its borders set down in the Treaty of Riga, during the period from 1 January 1944 until 31 December 1956”.

In the course of legislative work on the said amending bill, discussions also dealt with certain aspects which were generally concerning the compensatory liability of the State Treasury on the basis of Article 8(2a) of the February Act. In that context, the Sejm Deputies clearly pointed out that the use of dates marking the periods of persecution inflicted by the USSR authorities was, to some extent, symbolic (Bulletin No. 412/the 3rd term of the Sejm, the opinion of T. Liszcz). Also, it was indicated that extending the scope of the application of the Act would have financial effects on the state budget (*ibidem*, the opinions of M. Sadowski and M. Dyduch). What is worth pointing out is that, in the course of the Sejm’s work, a proposal was made to introduce a three-year time-limit for filing such claims for compensation. Eventually, the said proposal was not implemented. By means of the amendments introduced by the Senate to the amending bill passed by the Sejm, no time-limit was set for making such claims, which means that since 1998 the possibility of claiming compensation and seeking redress for persecution inflicted by the USSR authorities has not been limited in time.

3. Article 8(2a) of the February Act as a basis of claims for compensation.

3.1. The possibility of claiming compensation on the basis of Article 8(2a) of the February Act arises from the fact that the scope of the application of the Act was extended by means of the first amendments made to the February Act in 1993. Since its enactment in 1991, the February Act had provided for only one category of persons entitled to compensation and redress for harm they had suffered. The said category included persons with regard to whom it had been recognised that rulings issued by Polish law-enforcement and judicial authorities were invalid, provided that an action specified in such a ruling was related to activity undertaken for the sake of the independence of the Polish State, or possibly the ruling was issued due to such activity. The said invalidity might also refer to rulings issued due to particular persons’ resistance to the centralisation of agriculture and to the obligation to provide mandatory supplies of agricultural products. Rulings issued during the period from 1 January 1944 until 31 December 1989 (Article 8(1) in conjunction with Article 1(1) of the February Act) might be regarded as invalid.

Since 2007, the scope of the February Act has also comprised persons with regard to whom decisions were issued for detention due to the imposition of the Martial Law in

Poland on 13 December 1981. Also, such persons have been entitled to compensation and redress for harm inflicted due to the implementation of the said decisions, to be provided by the State Treasury, (Article 8(1) of the February Act).

3.2. The amendments made to the February Act in 1993 have resulted in the extension of the scope *ratione personae* of the said Act, as they have added a new category of persons who are eligible to receive compensation. Pursuant to the current wording of Article 8(2a) of the February Act, the right to claim compensation and seek redress, set out in Article 8(1) of the said Act, shall be granted to: “persons who currently reside in Poland or who resided in Poland at the moment of their death, and had been persecuted by the USSR law-enforcement and judicial authorities, or non-judicial authorities, which had operated in the present-date territory of Poland during the period from 1 July 1944 until 31 December 1956, as well as in the territory of Poland within its borders set down in the Treaty of Riga, in the context of persons acting for the sake of the independence of the Polish State or due to such activity (...)”. Pursuant to Article 8(2b) of the February Act, “activity for the sake of the independence of the Polish State, referred to in paragraph 2a, in the context of persons persecuted in the territory of Poland within its borders set down in the Treaty of Riga, which is outside the present-day territory of Poland, should be construed as activity undertaken during the period from 17 September 1939 until 5 February 1946”.

Before briefly analysing the above-mentioned regulations, the following should be pointed out.

Firstly, a claim for compensation for persecution inflicted by the USSR authorities may be filed by any person, regardless of the fact whether s/he holds Polish citizenship. Thus, the legislator has created a legal basis that makes it also possible for foreigners to put forward financial claims against the State Treasury. Moreover, in the event of the death of the said persecuted persons, claims for compensation and redress may be filed by the said persons’ spouses, children or parents (Article 8(2a) in conjunction with Article 8(1), second sentence, of the February Act). This means that the benefit provided for in Article 8(2a) of the Act is not assigned only to a person who in the past undertook activity for the sake of the independence of the Polish State, but it may also be claimed by the members of the closest family of the persecuted person.

Secondly, a person filing the claim must prove that s/he was subject to persecution inflicted by the USSR law-enforcement and judicial authorities, or non-judicial authorities.

However, at that stage the legislator has introduced two restrictions: a territorial restriction and a time restriction. The territorial restriction entails that persecution for which compensation is to be awarded could only be that inflicted by the USSR authorities which operated in the present-day territory of Poland or in the territory of Poland within its eastern borders set down in the Treaty of Riga. By contrast, the time restriction concerns the period of operation of the said authorities. With reference to the first group of authorities (acting in the present-day territory of Poland), this is the period from 1 July 1944 until 31 December 1956. As regards the other group (operating in the territory of Poland within its eastern borders set down in the Treaty of Riga), the period spans from 1 January 1944 to 31 December 1956.

Thirdly, a person claiming compensation must prove that persecution inflicted upon him/her by the USSR authorities resulted from his/her activity for the sake of the independence of the Polish State or was imposed due to such activity. Also, within the scope of that premiss, the legislator has used a time restriction that was closely connected with the indicated territory where the persecution took place. If a given person was persecuted in the territory of Poland within its borders set down in the Treaty of Riga, but outside the present-day territory of the Republic of Poland, then his/her activity for the sake of the independence of the Polish State must have taken place during the period from 17 September 1939 until 5 February 1946. However, if a given person was persecuted by the USSR authorities in the present-day territory of Poland, then the said activity must have taken place during the period from 1 July 1944 until 31 December 1956.

Fourthly, a person filing such a claim must fulfil the residence criterion, challenged in both questions of law. Indeed, persons eligible to receive compensation may only be the said persecuted persons who currently reside in Poland, or possibly – in the case where spouses, children or parents of those persons make the claims for compensation (Article 8(2a) in conjunction with Article 8(1), second sentence, of the February Act) – resided in Poland at the moment of their death.

3.3. Precise specification of the terms of filing a claim for compensation for persecution inflicted by the USSR authorities may, at the level of a linguistic analysis, pose certain difficulties. Being bound by the scope of the questions of law raised in the present case, the Constitutional Tribunal does not present its stance here on the legitimacy and fairness of adopting the criteria for claiming the said compensation, and as regards the very way of formulating particular premisses by the legislator. What remains the subject of the

Tribunal's review is only the issue of admissibility of the residence criterion. Regardless of this, one may draw a conclusion that claiming compensation and seeking redress due to persecution by the USSR authorities is, in the context of the above-mentioned provisions of the February Act, justified by the fulfilment of various – sometimes overlapping – premisses. They have been connected not only with a certain territory, specified by the legislator, but also with given periods during which activity for the sake of the independence of the Polish State was carried out as well as periods when the USSR authorities responsible for the said persecution operated. A catalogue of premisses set out this way manifests a certain choice made by the legislator, who – when deciding to introduce a legal basis of claiming compensation for the activity of the authorities of a different state, has used criteria related to certain historical events. As a result, the catalogue setting the terms of the effective exercise of compensatory rights is, in fact, complex, which may to some degree hinder its application.

3.4. Making reference to the above statutory premisses of claiming compensation and seeking redress on the basis of Article 8(2a) of the February Act, one should briefly characterise the benefit provided for in that provision. First of all, it should be emphasised that this is a one-time benefit. It may not, at least for that reason, be regarded as a type of a regular benefit that resembles social security benefits. Secondly, in no way is it contingent upon the financial situation of the applicant. The financial situation of a person claiming compensation and seeking redress on the basis of Article 8(2a) of the February Act, i.e. both the situation of the persecuted person, and after his/her death – the situation of his/her closest family, is of no relevance as regards the assessment of the fulfilment of the premisses which determine the award of the said benefit. Thirdly, the compensation arising from the cited provision of the February Act has not been linked with the occurrence of any actual circumstances which would cause a difficult financial or personal situation on the part of a given claimant. This entails that, in accordance with the legislator's original intention, the said compensation does not constitute a form of social security benefit granted to persons who in the past carried out activity for the sake of the independence of the Polish State. In that sense, it is clearly extraordinary in character in relation to the present model of social security benefits provided for citizens in the event of risks related *inter alia* to: an illness, disability, all types of work-related accidents, the loss of employment, or elderly age. The compensation arising from Article 8(2a) of the February Act may not be regarded as a type of a pension. Also, the granting of the said

compensation is not dependant on whether or not the claimant paid contributions to the Polish social security system.

The only prerequisite for claiming compensation and seeking redress on the basis of Article 8(2a) of the February Act is the fulfilment of all the above-mentioned statutory premisses (see point 3.2 of the statement of reasons). It should be stressed that claiming compensation for persecution inflicted by the USSR authorities is not related – as it has already been mentioned above – to the criterion of Polish citizenship. Nor is it limited by time, which means that claims made on the basis of Article 8(2a) of the February Act may be filed without any time-limit. The fact that the said benefit is not restricted by a time-limit is of special significance when the right to claim the said compensation is granted to the closest family of the persecuted person. Indeed, this may lead to situations where the financial responsibility of the Polish State for persecution inflicted by the authorities of a foreign state may in practice be stretched in time for a period which is difficult to assess, and which falls many decades after events with regard to which the compensatory claim was made.

Formulated in Article 8(2a) of the February Act, the residence criterion constitutes the only requirement for claiming the compensation, which in any way refers to a connection that a given claimant should have with Poland. Therefore, making reference to all the analysed premisses, it may be concluded that the concept of compensation for persecution inflicted by the USSR authorities relies on two basic assumptions. It takes into account activity undertaken in the past for the sake of the independence of the Polish State as well as a connection that a given person claiming the said compensation has with Poland, which is manifested by the fact of residing in Poland. Hence, the legislator had decided that the compensatory liability of the State Treasury may solely concern persons that undertook activity aimed at restoring independence (at a given time and in a given territory), and who were persecuted for those reasons by the USSR authorities, and who also maintain a connection with the Republic of Poland by the fact of residing in Poland.

4. The constitutional standard of the compensatory liability of the state.

The resolution of the constitutional issue formulated in the context of the two questions of law submitted to the Constitutional Tribunal should be preceded by a brief analysis of the existing standard of the state's compensatory liability, expressed in Article 77(1) of the Constitution. The indicated provision of the Constitution does not

constitute a higher-level norm for the review of the examined statutory solutions. The provision has been mentioned in order to indicate circumstances where nowadays – in the light of the binding constitutional regulation - the state is to take responsibility for the actions of the organs of public authority. This will allow to take account of an appropriately broad context for the assessment of the compensatory rights provided, by the legislator, in Article 8(2a) of the February Act.

Pursuant to Article 77(1) of the Constitution, everyone shall have the right to compensation for any harm done to him/her by any action of an organ of public authority that is contrary to law. Issues concerning the interpretation of the indicated provision and the ensuing delineation of the scope of compensatory liability on the part of public authority have constituted the subject of numerous judicial rulings issued by the Constitutional Tribunal (see *inter alia* the judgments of: 4 December 2001, Ref. No. SK 18/00, OTK ZU No. 8/2001, item 256, Part IV, point 3 of the statement of reasons; 23 September 2003, Ref. No. K 20/02, OTK ZU No. 7/A/2003, item 76, part III, point 2 of the statement of reasons; 23 May 2006, Ref. No. SK 51/05, OTK ZU No. 5/A/2006, item 58, part III, point 5 of the statement of reasons; 21 July 2010, Ref. No. SK 21/08, OTK ZU No. 6/A/2010, item 62, part II, point 4 of the statement of reasons; 12 July 2011, Ref. No. SK 49/08, OTK ZU No. 6/A/2011, item 55, part III, point 3.2. of the statement of reasons). Also, those issues have been addressed on a number of occasions in the doctrine of law (cf. *inter alia* M. Safjan, *Odpowiedzialność odszkodowawcza władzy publicznej (po 1 września 2004 r.)*, Warszawa 2004; J. J. Skoczylas, *Odpowiedzialność za szkody wyrządzone przez władzę publiczną*, Warszawa 2005; L. Bosek, *Bezprawie legislacyjne*, Warszawa 2007; B. Lewaszkiwicz-Petrykowska, *Prawo do wynagrodzenia szkody wyrządzonej przez niezgodne z prawem działanie władzy publicznej*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, M. Zubik (ed.), Warszawa 2006, pp. 503-521; M. Stębelki, *Artykuł 77 ust. 1 Konstytucji w orzecznictwie Trybunału Konstytucyjnego. Wybrane zagadnienia*, *Studia Iuridica*, Vol. XLVII, Warszawa 2007, pp. 277-294)

The compensatory liability provided for in Article 77(1) of the Constitution concerns the activity of the Polish organs of public authority. This implies both ‘actions’ as well as ‘negligence’ on the part of the said organs. By contrast, the term ‘public authority’, in the constitutional sense, comprises all authorities and other institutions – including those that are not state or local self-government entities – as long as they perform the duties of

public authority that have been assigned to them. The term ‘an organ of public authority’ denotes an institution, organisational body, or unit of public authority, whose activity has caused harm, and not an organ of a legal entity within the meaning of civil law. The original premiss of liability referred to in Article 77(1) of the Constitution is the occurrence of harm, construed as prejudice to the legally protected interests of a given subject of rights and obligations, both as regards the property and non-property aspects of the said interests. The said liability is objective in character and is solely based on the recognised illegality of actions taken by an organ of public authority in the Republic of Poland. What is regarded as inconsistent with the law is every action which is contrary to the model of conduct imposed by the law, where the term ‘law’ is understood in a strict way that corresponds to the constitutional rendering of the sources of law (Articles 87-94 of the Constitution). In addition, it is of relevance what circumstances coincided with the emergence of Article 77(1) in the Polish constitutional order. The said provision entered into force at the time of the enactment of the Constitution of 1997, which is currently binding. At the time of the persecution mentioned in the context of the present case, the standard of the state’s liability for the activity of its own organs was much lower. Such a lower standard was also binding at the moment of the entry into force of the February Act.

To sum up the above findings, it may be stated that Article 77(1) of the Constitution may in no way constitute a legal basis for the type of compensatory liability of the State Treasury which has been provided for in Article 8(2a) of the February Act. Thus, it means that the right to claim compensation and seek redress for persecution inflicted by the USSR authorities should, at present, be regarded as going beyond the minimal constitutional standard of the liability of the Polish State for the actions of its organs. Therefore, the right to compensation arising from the above-mentioned provision of the February Act constitutes the basis of obtaining benefits which are not required in the light of the binding constitutional solutions.

5. The constitutional issue.

The essence of the resolution of the allegations formulated in the questions of law amounts to providing an answer to the question whether the legislator could restrict the admissibility of claiming compensation for persecution inflicted by the USSR authorities by means of the residence criterion, expressed in Article 8(2a) of the February Act. The resolution of that issue requires assessment which takes into account the admissibility of

the application of the said criterion in the light of the principle of a democratic state ruled by law (Article 2 of the Constitution) as well as the principle of equality (Article 32(1) of the Constitution). In the context of the latter principle, the main issue concerns the fact whether, with regard to a group of persons persecuted in a given place and at a given time by the USSR authorities, due to activity undertaken by those persons for the sake of the independence of the Polish State, it is possible to introduce differentiation within the scope of the right to compensation, correlating the granting of the right with the criterion that the persecuted persons should “currently reside in Poland”.

6. The assessment of the conformity of Article 8(2a) of the February Act to Article 2 of the Constitution.

6.1. “The criterion that an eligible person should currently reside in Poland” is intended by the legislator to serve the purpose of restricting the category of persons who are potentially entitled to receive compensation, taking into account the special and extraordinary character of the liability of the State Treasury for the actions of the USSR authorities. Thus, the said criterion falls within a more general context of all determinants restricting the right to compensation on the basis of Article 8(2a) of the February Act. The aim of the legislator drafting the content of that provision was to restrict the scope *ratione personae* of compensatory liability. The said liability was not intended to refer to all persons opposing the new political situation in Poland and undertaking actions to restore the independence of the state. In that sense, the decision to restrict the category of potentially eligible persons was a conscious choice made by the legislator, who did not want to create a possibility of claiming compensation by all citizens of the Second Republic of Poland involved in the struggle for independence during the WW II, or even by those affected by persecution on the part of the foreign states carrying out military actions in the territory of Poland.

6.2. In the opinion of the Constitutional Tribunal, the legislator could specify the category of persons eligible to receive compensation in a way provided for in Article 8(2a) of the February Act, i.e. taking into consideration the involvement of persons persecuted for their struggle for the independence of the Polish State during the WW II and during a period after the end thereof, as well as the fact that subsequently the persons had a connection with Poland, which would be verified by means of the residence criterion. Such a solution, in an obvious way, excludes – from the scope *ratione personae* of the Act – a

certain group of persons who in the past undertook actions aimed at restoring independence. However, the Constitutional Tribunal is not authorised in the present case to verify the legitimacy of the legislator's decision in that regard, and also it has no possibility of potentially expanding the catalogue of persons who should be granted the right to compensation. Noticing significant difficulties related to the application of Article 8(2a) of the February Act in its present version, the Constitutional Tribunal may not, however, by means of measures falling within the scope of its jurisdiction, shape - in a new way - criteria for making claims for compensation which arise from the said provision. The Tribunal's role merely amounts to determining whether specifying the group of persecuted persons who are eligible to receive compensation by means of the residence criterion is not arbitrary in character, and thus whether it does not infringe the constitutional standard arising from the principle of a democratic state ruled by law (Article 2 of the Constitution), which has been indicated as a higher-level norm for the review in the present case.

6.3. The compensation which arises from Article 8(2a) of the February Act does not have the character of a regular benefit granted to a specific group of persons due to the occurrence of one of statutorily specified risks. This is a one-time benefit which is not contingent on the financial situation of a given claimant, and is paid out after more than 50 years since the said persecution was inflicted by the foreign state. In no way does the benefit constitute a form of social security for the claimant.

The payment of benefits due to persecution inflicted by the authorities of a foreign state goes beyond requirements determined by the principle of a democratic state ruled by law and the principle of social justice (Article 2 of the Constitution). It also goes beyond the requirements set out in Article 77(1) of the Constitution as regards the compensatory liability of the Polish State. In the light of the principles expressed in the Constitution of 1997, which is currently in force, the existence of a legal basis for compensation awarded by the State Treasury for the activity of the authorities of a foreign state is always an extraordinary situation. The Constitutional Tribunal (the bench adjudicating in the present case) maintains the view, presented previously, that a situation where the right to claim compensation is not granted to persons who were persecuted by the USSR authorities would not be contrary to the constitutional order (see the resolution of the Constitutional Tribunal of 30 April 1996, Ref. No. W 18/95, OTK ZU No. 2/1996, item 15, part II, point 1 of the statement of reasons; the judgment of 18 November 2003,

Ref. No. P 6/03, OTK ZU No. 9/A/2003, item 94, part III, points 2 and 3 of the statement of reasons).

Responsibility arising from Article 8(2a) of the February Act does not constitute compensatory liability within the meaning of the Constitution. It is only of an *ex gratia* character, constituting a form of moral redress for persons persecuted by the USSR authorities, due to their activity for the sake of the independence of the Polish State during the WW II and during a period after the war. Thus, it may be perceived in the context of the content of the Preamble to the Constitution, where there is an explicit mention of gratitude to “our ancestors for (...) their struggle for independence achieved at great sacrifice”. This vital correlation, which may serve as sufficient justification for the legislator’s decision to grant benefits due to the activity of the USSR authorities which in the past exercised actual authority over the territory of Poland, does not however rule out the introduction of certain restrictions of the liability of the State Treasury in that regard. Therefore, within the scope of the liability of an extraordinary character, the legislator may expect that there should be a certain degree of connection between the Polish State and persons who carried out activity for the sake of the independence of the state, and who therefore claim partial financial redress for the negative consequences of such activity, resulting from persecution inflicted by the authorities of the foreign state. At the same time, it should be emphasised here that, when specifying the criteria for awarding the said compensation, the legislator did not require a given claimant to be a Polish citizen. This means that the challenged residence criterion constitutes the only condition that in any way links a person claiming compensation with the entity in the name of which the said benefit is to be paid out.

In its previous jurisprudence, the Constitutional Tribunal has already indicated that the legislator’s use of a restriction which consisted in taking into account only such activity for the sake of the independence of the Polish State which was carried out in the present-day territory of Poland – in the context of filed claims – is consistent with the principle of social justice (see the above-cited judgment of the Constitutional Tribunal in the case P 6/03). Similar conclusions have been drawn with regard to the differentiation in the legal situations of persecuted persons, introduced by means of a time criterion concerning the activity undertaken by those persons for the sake of the independence of the Polish State outside the present-day territory of Poland. The Tribunal has concluded that such a restriction is rational, even though it provides for ruling out the payment of

compensation to persons persecuted by the USSR authorities in the territory of that state (see the quoted judgment of the Constitutional Tribunal in the case P 6/03, part III, point 4 of the statement of reasons). In the present case, the Constitutional Tribunal finds no grounds for departing from the indicated line of jurisprudence.

While assessing whether it was admissible to use the criterion of a connection between an eligible person and Poland in Article 8(2a) of the February Act, one should also consider an argument concerning the financial aspect of the compensation. Since the benefit for the said persecuted persons is to be paid out from the state budget, the legislator is obliged to take account of a need to balance the budget, when he specifies the group of eligible persons. Thus, he may not – in view of historical justice and the intention to provide moral redress to a give group of persons – adopt solutions which could constitute, in current circumstances, a significant burden for the State Treasury. Thus, this requires a certain compromise that would consist in balancing the noble aim of compensation based on the principle of equity with concern and responsibility for the state of public finances.

6.4. Gratitude to all persons who risked their lives in a struggle for the independence and sovereign existence of the Polish State at the times when “fundamental freedoms and human rights were violated in our Homeland” is not only natural, but also fully socially and constitutionally acceptable. However, it does not imply an automatic directive for the legislator to devise any legal solutions which would provide for financial gain to be awarded to persons who undertook actions aimed at restoring independence. Possible existence of such benefits may certainly be interpreted in the light of the principle of social solidarity as manifestation of society’s care for a certain group of persons – those fighting for independence, and in particular war invalids and veterans – who are nowadays struggling financially, and society’s intention not to live them without assistance. In the present legal order, there are several binding statutes concerning such issues, *inter alia*: the Act of 29 May 1974 on benefits for war and military invalids and their families (Journal of Laws - Dz. U. of 2010 No. 101, item 648, as amended), the Act of 24 January 1991 on war veterans as well as certain persons who were victims of war and post-war persecution (Journal of Laws - Dz. U. of 2012 item 400), or the Act of 31 May 1996 on financial benefits granted to persons deported to be subjected to forced labour and imprisoned in the labour camps of the Third Reich and the Union of Soviet Socialist Republics (Journal of Laws - Dz. U. No. 87, item 395, as amended). Even with regard to benefits, which are regularly paid out, it is admissible to rely on premisses that correlate the granting of the

right to particular benefits with the proof of a connection between a person applying for such a benefit and the state (see Judgment of the Court (Second Chamber) of 26 October 2006 in the case of *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, paragraphs 34 and 35; Judgment of the Court (Fourth Chamber) of 22 May 2008 in the case of *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, paragraphs 37 and 39). In the case under examination, the compensation arising from Article 8(2a) of the February Act, due to the character of that benefit, it is not at all related to the implementation of the principle of social solidarity within the indicated meaning. Thus, the challenged residence criterion is the only manifestation of an actual connection between a given claimant and society which finances such an extraordinary benefit, as well as the state which pays it out (cf. the above-cited judgment in the case of *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, paragraph 34).

6.5. To sum up the above findings, the Constitutional Tribunal states that the residence criterion, introduced in Article 8(2a) of the February Act, is not arbitrary in character. Indeed, there are reasons which justify why the legislator has used such a criterion. The introduction of compensation to be awarded for persecution inflicted by the authorities of a foreign state is extraordinary in the Polish legal order. This is not related to an obligation lying with the legislator and may be regarded as a special form of gratitude to persons who in the past undertook actions aimed at restoring independence. Therefore, by deciding to introduce compensatory benefits provided for in Article 8(2a) of the February Act, the legislator also had no obligation to determine their scope *ratione personae* in such a way so as to comprise all persons carrying out activity for the sake of the independence of the Polish State during the WW II, as well as during a period after the end thereof, and who were affected by persecution for that reason. In this state of affairs, it is admissible to correlate the possibility of claiming benefits that clearly go beyond the scope of the constitutional standard of compensatory liability on the part of the Polish State with the claimant's fulfilment of the requirement that an eligible person should have a current connection with Poland.

7. The assessment of the conformity of Article 8(2a) of the February Act to Article 32(1) of the Constitution.

7.1. The allegation of the non-conformity of Article 8(2a) of the February Act to the principle of equality (Article 32(1) of the Constitution) has been based in both questions of law on the statement that the residence criterion contained in that provision in an unjustified way introduces differentiation into the legal situations of persons claiming compensation provided for in the February Act.

The Constitutional Tribunal may assess the challenged regulations in the light of the principle of equality only when the recognised differentiation in the said legal situations occurs within the scope of the same categories of subjects of rights and obligations that share a certain relevant characteristic. Applying the well-known view in the context of the February Act, it should be emphasised that the legislator has provided for three grounds for claiming compensation in the said Act: 1) due to the invalidity of a ruling issued by Polish law-enforcement and judicial authorities, 2) due to the issue of a decision for detention due to the imposition of the Martial Law in Poland on 13 December 1981 as well as 3) due to persecution carried out by Soviet law-enforcement and judicial authorities, or non-judicial authorities. Cases in which the possibility of claiming compensation occurs are not singled out on the basis of the criterion of the type of activity carried out for the sake of the independence of the Polish State by persons eligible to receive the benefits. The right criterion characterising the three legal grounds for receiving the benefits provided for in the February Act is the source of persecution to which the said persons were subjected. The said source may be – first of all – the activity of Polish law enforcement and judicial authorities, or non-judicial authorities, during the period from 1 January 1944 until 31 December 1989 issuing a ruling or decision for detention due to the imposition of the Martial Law in Poland. Secondly, the activity of the USSR authorities, carrying out persecution in the territory of Poland within the borders indicated by the legislator as well as during a period set out by him. Therefore, this means that, in the context of the February Act, we may distinguish two categories of cases constituting the bases of claiming compensation. In accordance with the source of persecution, the said groups comprise persons eligible to receive compensation due to the activity of the Polish authorities as well as persons whose claims in that regard concern the activity of the authorities of the foreign state (the USSR).

Reviewing Article 8(2a) of the February Act, which has been challenged in the questions of law, in the light of the principle of equality may not consist in comparing the legal situation of persons persecuted by Polish authorities and the USSR authorities.

Indeed, the said persons constitute two separate categories of subjects of rights and obligations who do not share the same relevant characteristic specifying the source of persecution to which they were subjected. In such a situation, the Constitutional Tribunal may examine the admissibility of the legislator's use of the residence criterion, but only insofar as it refers to the persons persecuted by the USSR authorities. It should be emphasised that such an allegation has not explicitly been expressed in the questions of law lodged with the Constitutional Tribunal, although it was reflected in the stance presented by the Marshal of the Sejm. When assessing the residence criterion, as used by the legislator, in the light of the principle of a democratic state ruled by law, the Constitutional Tribunal (Article 2 of the Constitution – see point 6 of the statement of reasons) deemed that providing an answer to the question about the admissibility of restricting the scope of the right to claim compensation only to persons who “currently reside in Poland” requires analysing the challenged criterion from the point of view of the entire group of persons persecuted by the USSR authorities. Such formulation of the issue makes it possible to determine whether the legislator, acting in accordance with requirements set by the principle of equality – could restrict the right to claim compensation to be enjoyed only by persons persecuted by the authorities of the foreign state, correlating the right with the residence criterion, contained in Article 8(2a) of the February Act. The constitutional issue outlined here is clearly related to the previous rulings of the Constitutional Tribunal which assessed the admissibility of the legislator's use of other premisses determining the right to claim compensation due to persecution carried out by the USSR authorities (see the above-cited judgment in the case P 6/03).

7.2. The benefit provided for in Article 8(2a) of the February Act for persons persecuted by the USSR is extraordinary in character. Indeed, it goes beyond requirements set by the principle of a democratic state ruled by law as well as the principle of social justice, and exceeds the scope of constitutional requirements as regards the compensatory liability of the Polish State (see point 6.3 of the statement of reasons). Therefore, the right to claim compensation and seek redress exercised on the basis of the said provision of the February Act may not be considered in the context of the constitutional catalogue of subjective rights. As a result, the examination of the differentiation introduced in the legal situations of persons claiming compensation may not be carried out by fully relying on the rules for restricting constitutional rights and freedoms (Article 31(3) of the Constitution). The assessment of the existing differentiation - i.e. possible confirmation that it is

admissible to claim the compensation only by the persecuted persons who meet the residence criterion - depends on answering the question whether such a restriction is rational and whether it is not excessive (too intense) in a way that would imply the actual exclusion of the possibility of claiming the compensation by the persecuted persons.

7.3. The assessment of the rationality of using the residence criterion in Article 8(2a) of the February Act is closely related to the very character of the benefits provided for by the legislator as well as the previously-determined admissibility of limiting the group of persons eligible to claim compensation.

As part of the above-mentioned argumentation, there was a detailed analysis of the legal character of compensation provided for in Article 8(2a) of the February Act (see 3.4. as well as point 6.3. of the statement of reasons). Making reference to the said findings, it should be stressed that the legislator enjoys relatively considerable freedom when specifying premisses of granting benefits which fall outside the scope of the compensatory liability of the state within the meaning of the Constitution. Obviously, the said freedom does not imply permission for complete legislative arbitrariness, and thus one may not justify the introduction of irrational solutions from the point of view of objectives specified by the legislator. In the case under examination, the legislator had no obligation to introduce compensation for persecution inflicted by the USSR authorities or to grant such a benefit to all persons who suffered such persecution. Thus, he could limit the group of potentially eligible persons, which is manifested by the use of numerous premisses determining the effective claim for compensation on the basis of Article 8(2a) of the February Act (see point 3.2. of the statement of reasons). The residence criterion, challenged by the courts referring the questions of law, is rationally linked with the basic objective of the legislator, i.e. the restriction of the group of persons potentially eligible to claim compensation for persecution inflicted by the USSR authorities. Since the said compensation is granted merely to a certain group of persecuted persons, is not time-barred, is not restricted by the requirement to have Polish citizenship, and also is financed by the current taxpayer, hence the expectation that the eligible persons need to have a connection with Poland should be deemed rational. It is understandable and objectively justified to apply such a restriction with regard to the analysed compensatory benefits which will be linked with the claimant's obligation to indicate his/her connection with the state granting and funding such an extraordinary benefit. The residence criterion, expressed in Article 8(2a) of the February Act, at the same serves the purpose of more detailed

specification of the subjects of rights and obligations that are eligible to receive the compensation, thus becoming one of the components that delineate the scope of such benefits.

At this point, the Constitutional Tribunal does not state that the fulfilment of the residence criterion constitutes the only way of indicating an actual connection between a given persecuted person and Poland. In many cases, the existence of such a connection may also be manifested in a different way. The Tribunal only states that the fact of “currently residing in Poland” confirms that the person claiming compensation has a current connection with Poland. The requirement to prove the existence of such a connection is at the same time understandable and rational, taking account of both the extraordinary character of the compensation granted to persons persecuted by the USSR authorities, as well as the way of financing such compensation by the current tax-payer.

7.4. Examining the intensity of the restriction that consists in the granting of the right to compensation only to persons persecuted by the USSR authorities who fulfil the residence criterion amounts to answering the question whether the challenged criterion is so restrictive in character that it can actually rule out the possibility of claiming the benefit on the basis of Article 8(2a) of the February Act, as regards to persecuted persons who have a certain connection with Poland.

In this context, the Constitutional Tribunal states that when formulating the said provision, the legislator did not use the term “place of residence”, the meaning of which had been well-established in civil law (cf. Article 25 of the Act of 23 April 1964 – the Polish Civil Code, Dz. U. No. 16, item 93, as amended; hereinafter: the Civil Code). Nor did he allude to the wording of the Code, instead he used the term “currently reside”, which was pointed out by the Court of Appeal to one of the courts referring the question of law. Without carrying out a detailed semantic analysis of the two terms here, it is difficult to make a definite assumption here that the substantive differences between the terms stemmed merely from the lack of precision on the part of the legislator. Indeed, when formulating the content of the residence criterion in Article 8(2a) of the February Act, he could have made clear reference to the content of Article 25 of the Civil Code; yet, he did not do so.

Granting the right to compensation only to the persecuted persons who “currently reside in Poland” was aimed at restricting the category of eligible persons only to those who actually have a connection with the Republic of Poland. The existence of such a

connection in the case of a specific claimant is to be determined each time in the course of assessment carried out by a given court examining a given case. Thus, the role of the court is to assess to what extent a person claiming compensation has a connection with Poland, and a means of such assessment is the residence criterion expressed in Article 8(2a) of the February Act. The court is to determine not only whether, with reference to a particular claimant, one may at all speak of the existence of a connection with Poland, but also whether the said connection is up-to-date in character, which is stressed by the word “currently”. It should be emphasised that the legislator has not determined how the term “reside” should be interpreted, as well as he has not indicated one way of understanding the term “currently”. He has left a certain margin of freedom to courts when it comes to assessing if a given person – in the specific circumstances of a given case pending before a court – may prove his/her connection with Poland, which may be identified by means of the said requirement.

The formulation of the residence criterion, challenged in the questions of law, which is aimed at indicating the claimants’ up-to-date connection with Poland, enables courts to assess whether such a connection does exist in the specific case of a given persecuted person who is claiming the said compensation. By means of the wording of Article 8(2a) of the February Act, the legislator has left courts with a certain margin of freedom when they determine the existence of the claimant’s connection with the Polish State. In this state of affairs, a restriction imposed on claiming compensation within the same category of persons persecuted by the USSR authorities, which involves the use of the criterion that an eligible person should currently reside in Poland, is not excessive in character. Indeed, it does not determine that the right to compensation should not be granted to any of the said persecuted persons who do not reside in Poland, insofar as the said criterion is regarded as tantamount to the content of Article 25 of the Civil Code.

7.5. To sum up the finding presented in this part of the statement of reasons, the Constitutional Tribunal states that the residence criterion, construed as the requirement to prove the existence of an actual and current connection between a person claiming compensation on the basis of Article 8(2a) of the February Act and Poland does not infringe Article 32(1) of the Constitution. The challenged criterion is rational in character. The requirement to prove the existence of a current connection with Poland is justified by both the special character of the benefit provided for by the legislator as well as by the way of financing the benefit by the current taxpayer. In addition, the said restriction is not

excessive. It leaves some freedom of assessment to a court examining a given claim when it has to determine whether a given claimant has a current connection with Poland, which may be identified by means of applying the residence criterion, or not.

8. The inadequacy of Article 77(2) as well as Article 52(2) as higher-level norms for the review of the constitutionality of Article 8(2a) of the February Act.

The inadequacy of Article 77(2) as a higher-level norm for the review of Article 8(2a) of the February Act stems from the fact that there is no content relation between the scope of the regulation of the challenged provision of the Act and the guarantees arising from the indicated constitutional provision. The possibility of claiming compensation on terms provided for in Article 8(2a) of the February Act is by no means limited merely to the possibility of obtaining justice in court by the individual for the infringement of his/her rights or freedoms. This is confirmed by the pending court cases which became the basis of the questions of law considered by the Constitutional Tribunal in the present case.

The Constitutional Tribunal has deemed that Article 52(2) of the Constitution, which guarantees that everyone may freely leave the territory of the Republic of Poland, is an inadequate higher-level norm for the review of Article 8(2a) of the February Act. There is no content relation between the indicated provision of the Constitution and the challenged provision of the February Act. The possibility of claiming one-time compensation after fulfilling the premiss arising from Article 8(2a) of the February Act, within the meaning presented in the operative part of the judgment in no way limits the possibility of the individual's exercise of the guarantee provided for in Article 52(2) of the Constitution. The analysed residence criterion could be subject to possible review by the Tribunal in the light of the right of free movement and the right of stay (*vide*: the judgments of the CJEU cited in point 6.4. of the statement of reasons), which in the constitutional context would require the indication of a different higher-level norm for the review, namely Article 52(1) *in fine* of the Constitution.

Taking the above into consideration, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.