20/3/A/2010

JUDGMENT
of 10 March 2010
Ref. No. U 5/07*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Mirosław Granat
Marian Grzybowski
Wojciech Hermeliński
Adam Jamróz – Judge Rapporteur
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Andrzej Rzepliński
Mirosław Wyrzykowski,

Grażyna Szałygo - Recording Clerk,

having considered, at the hearing on 10 March 2010, in the presence of the applicant, the Council of Ministers and the Public Prosecutor-General, an application by the Polish Ombudsman (hereinafter: the Ombudsman) to determine the conformity of:

§ 6(1) and (2) of the Regulation of the Council of Ministers of 17 November 2006 on direct coercive measures used by the functionaries of the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 214, item 1575) to Article 15(3) of the Act of 9 June 2006 on the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 104, item 708, as amended), and thus to Article 92(1) as well as to Article 41(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.

adjudicates as follows:

§ 6(2) of the Regulation of the Council of Ministers of 17 November 2006 on direct coercive measures used by the functionaries of the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 214, item 1575) **is inconsistent with**:

a) Article 15(3) of the Act of 9 June 2006 on the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 104, item 708, No. 158, item 1122 and No. 218, item 1592, of 2008 No. 171, item 1056 as well as of 2009 No. 18, item 97, No. 85, item 716 and No. 157, item 1241),

*The operative part of the judgment was published on 24 March 2010 in Journal of Laws - Dz. U. No. 45, item 274.

b) Article 92(1) and Article 41(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 r. No. 169, item 1417 as well as of 2009 r. No. 56, item 459) **to discontinue the proceedings as to the remainder on the grounds that the application has been withdrawn.**

STATEMENT OF REASONS

(...)

III

The Constitutional Tribunal has considered as follows:

1. The challenged provision of § 6(2) of the Regulation in the context of the Central Anti-Corruption Bureau Act.

In a letter of 1 June 2007, the Ombudsman requested the Tribunal to determine the conformity of § 6(1) and (2) of the Regulation of the Council of Ministers of 17 November 2006 on direct coercive measures used by the functionaries of the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 214, item 1575; hereinafter: the Regulation) to Article 15(3) of the Act of 9 June 2006 on the Central Anti-Corruption Bureau (Journal of Laws - Dz. U. No. 104, item 708, as amended; hereinafter: the Central Anti-Corruption Bureau Act), to Article 92(1) as well as to Article 41(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.

In a letter of 25 February 2010, the Ombudsman withdrew the above-mentioned application, insofar as the application concerned § 6(1) of the Regulation. Pursuant to Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), the Tribunal has discontinued the proceedings as regards the examination of constitutionality of § 6(1) of the Regulation. The object of review in the case under examination has remained § 6(2) of the Regulation. The Tribunal has examined the conformity of the provision in the light of higher-level norms for constitutional review indicated by the Ombudsman.

The Central Anti-Corruption Bureau has been established as a secret service responsible for combating corruption in public and economic life, and in particular in state and local self-government institutions, as well as responsible for combating activity against the economic interests of the state (Article 1(1) of the Central Anti-Corruption Bureau Act). The tasks assigned to this secret service, falling within the above-indicated competence, have been enumerated in Article 2 in the Central Anti-Corruption Bureau Act. They include the following:

"1) identification, prevention and detection of offences against:

a) the activity of state and local self-government institutions; offences specified in Articles 228-231 of the Act of 6 June 1997 – the Penal Code, and referred to in Article 14 of the Act of 21 August 1997 on restrictions on the conduct of economic activity by

persons performing public functions (Journal of Laws - Dz. U. No. 106, item 679, as amended),

b) the administration of justice, offences specified in Article 233; elections and referenda, offences specified in Article 250a; the public order, offences specified in Article 258; the credibility of documents, offences specified in Articles 270-273; property, offences specified in Article 286; business transactions, offences specified in Articles 296-297 and Article 299; trading in currencies and securities, offences specified in Article 310 [the Penal Code], and also offences referred to in Articles 585-592 of the Act of 15 September 2000 – the Commercial Companies Code (Journal of Laws - Dz. U. No. 94, item 1037, as amended) as well as those specified in Articles 179-183 of the Act of 29 July 2005 on Trading in Financial Instruments (Journal of Laws - Dz. U. No. 183, item 1538) if they are related to corruption or activity against the economic interests of the state,

c) financing political parties, offences specified in Articles 49d and 49f of the Act of 27 June 1997 on Political Parties (Journal of Laws - Dz. U. of 2001 No. 79, item 857, as amended) if they are related to corruption,

d) tax obligations and settlements concerning subsidies and grants, offences specified in Chapter 6 of the Act of 10 September 1999 - the Penal Fiscal Code (Journal of Laws - Dz. U. No. 83, item 930, as amended), if they are related to corruption or activity against the economic interests of the state

– as well as prosecuting the perpetrators of those offences";

2) "exposing and counteracting the instances of breach of the provisions of the Act of 21 August 1997 on restrictions on the conduct of economic activity by persons performing public functions";

3) "documenting the grounds for and initiating the enforcement of the provisions of the Act of 21 June 1990 on the return of undue advantages gained at the expense of the State Treasury or other state legal entities (Journal of Laws - Dz. U. No. 44, item 255, as amended)";

4) "exposing the instances of breach of procedures, specified by legal provisions, for taking and implementing decisions with regard to: carrying out privatisation and commercialisation, providing financial support, awarding public procurement contracts, disposing of the property of entities or entrepreneurs referred to in Article 1(4), granting concessions, permits, and exemptions within the scope ratione personae and ratione materiae, as well as granting discounts, preferences, quotas, tariff ceilings, loan sureties and guarantees";

5) "verifying the correctness and truthfulness of asset declarations or declarations about conducting economic activity by persons performing public functions, who are referred to in Article 115(19) of the Penal Code, submitted pursuant to separate provisions";

6) "carrying out analytical activities concerning phenomena which fall within the scope of the CBA's competence as well as presenting information on the foregoing to the Prime Minister, the President of the Republic of Poland, the Sejm and the Senate".

The CBA may also carry out preliminary proceedings which would encompass all acts exposed in the course thereof, if they remain within the scope ratione personae or ratione materiae of conduct which constituted the basis for instigating the proceedings (Article 2(3) of the Central Anti-Corruption Bureau Act).

The powers of the CBA functionaries which are aimed at carrying out the above-mentioned tasks have been regulated in Chapter 3 of the Central Anti-Corruption Bureau Act. In accordance with Article 13(1) of the Central Anti-Corruption Bureau Act, "within the scope of the tasks set out in Article 2, the CBA functionaries shall conduct:

1) operational activities in order to prevent, identify and detect offences as well as – if there is a justified suspicion that an offence has been committed – investigative activities in order to prosecute the perpetrators of the offence;

2) surveillance activities in order to expose the cases of corruption in state and local self-government institutions as well as any breach of duties by persons performing public functions, and also activity against the economic interests of the state;

3) operational activities combined with information gathering and analysis activities in order to obtain and process information which is significant for combating corruption in state and local self-government institutions as well as activity against the economic interests of the state".

Moreover, in accordance with Article 13(2) of the Central Anti-Corruption Bureau Act, the CBA conducts activities on the order of a court or prosecutor within the scope set forth in the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws – Dz. U. No. 89, item 555, as amended) and in the Act of 6 June 1997 – the Executive Penal Code (Journal of Laws – Dz. U. No. 90, item 557, as amended).

Pursuant to Article 13(3) of the Central Anti-Corruption Bureau Act, as part of conducted activities falling within the scope of the CBA's competence, the CBA functionaries are entrusted with police procedural powers which arise from the provisions of the Code of Criminal Procedure. It follows from Article 13(4) of the Central Anti-Corruption Bureau Act that "while conducting the activities referred to in paragraphs 1 and 2, the CBA functionaries have the obligation to respect the dignity of the person and to observe and protect human rights".

As part of conducting activities aimed at carrying out the tasks referred to in Article 2(1)(1) of the Central Anti-Corruption Bureau Act, in accordance with Article 14(1) of the said Act, the CBA functionaries shall, in particular, have the right to:

1) give orders to individuals to act in a certain manner, where this is indispensable for conducting activities referred to in points 2-5 below;

2) check a person's ID documents to establish his/her identity;

3) detain persons in accordance with the procedure and in the cases specified in the provisions of the Code of Criminal Procedure;

4) search persons and premises in accordance with the procedure and in the cases specified in the provisions of the Code of Criminal Procedure;

5) conduct a body search, examine the contents of luggage, stop vehicles and other means of transport as well as check cargo in the means of transport by land, water and air, in the event of a justified suspicion of the commission of a criminal or fiscal offence.

In accordance with Article 15(1) of the Central Anti-Corruption Bureau Act: "In the case of the disregard for orders, issued on the basis of statutes and aimed at carrying out the tasks referred to in Article(2)(1)(1), the CBA functionaries are entitled to use physical, technical and chemical measures within the scope of direct coercive measures to overpower or escort persons as well as to stop vehicles". Article 15(2) of the said Act stipulates that: "Under the circumstances defined in paragraph 1, only direct coercive measures which correspond to the needs resulting from the existing situation and are indispensable to achieve submission to the issued orders can be used". By contrast, Article 15(3) of the said Act contains authorisation for the Council of Ministers to issue a regulation. On the basis of that authorisation, the aforementioned Regulation of 17 November 2006 was issued; § 6(2) of the Regulation has been challenged by the Ombudsman and constitutes the object of constitutional review in the present case.

2. The review of conformity of the challenged provision of § 6(2) of the Regulation to Article 15(3) of the Central Anti-Corruption Bureau Act and to Article 92(1) of the Constitution.

2.1. As higher-level norms for review of the challenged provision of the Regulation, the Ombudsman indicated the Article 15(3) of the Central Anti-Corruption Bureau Act and Article 92(1) of the Constitution, arguing that the challenged provision, issued on the basis of Article 15(3) of the said Act, breached constitutional requirements of statutory authorisation for legal acts of a lower rank than statutes; the requirements arise from Article 92(1) of the Constitution and specify formal and substantive relations between a statute and a legal act of a lower rank, issued on the basis thereof. In the Ombudsman's opinion, the challenged provision of the Regulation has infringed Article 15(3) of the Central Anti-Corruption Bureau Act, which specifies the statutory scope of authorisation for issuing the Regulation of 17 November 2006 by the Council of Ministers.

The challenged provision of § 6(2) of the Regulation, under review by the Tribunal, reads as follows: "handcuffs and single-wrist handcuffs are used: 1) on the order of a court or prosecutor; 2) with regard to persons suspected or accused of committing an offence against life or health or persons convicted of such an offence".

Despite the fact that the Ombudsman has not challenged Article 15(3) of the Central Anti-Corruption Bureau Act, which constitutes a formal basis for issuing the Regulation of 17 November 2006, Article 92(1) of the Constitution may still be the higher-level norm for review of the provision of the Regulation issued on the basis of that provision of the said Act. With regard to the case under examination, the Tribunal has recapitulated on its previous line of jurisprudence in that regard. In the judgment of 2 December 2009 (Ref. No. U 10/07, OTK ZU No. 11/A/2009, item 163), the Tribunal (full bench) stated, *inter alia*, that: "The analysis of the normative content of Article 92(1) of the Constitution reveals that, although this provision sets out the constitutional requirements concerning the statutory authorisation to issue a regulation, it refers not only to the statutory authorising provisions, but also to the regulations issued pursuant to statutes. In fact, Article 92(1) of the Constitution concerns not only the authorising provisions of a statute, but also the relations between the provisions of an authorising statute and the provisions of an "authorised" regulation. In the case of constitutional review of a challenged regulation, it is also necessary, even where the statutory provisions which authorise the issue of a regulation have not been challenged, to analyse the statutory provisions. However, the assessment of constitutionality of the statutory provisions, since they have not been challenged, is not possible. The Tribunal stresses that the constitutional review of a challenged regulation, from the point of view of its conformity to Article 92(1), is also possible when the statutory provisions which authorise the issue of a regulation have not been challenged in order to examine their compliance with the requirements of Article 92(1) of the Constitution."

Also, in the above-mentioned judgment, the Tribunal recalled its earlier judgment of 16 January 2007 (Ref. No. U 5/06, OTK ZU No. 1/A/2007, item 3), in which it drew conclusions which have already been cited in relation to the present case. In the judgment, the Tribunal, *inter alia*, emphasised that: "The Tribunal may not adjudicate about the unconstitutionality of an act which has not been challenged, which does not, however, preclude the assessment of the challenged act by means of the arguments arising from the statutory authorisation that has not been challenged".

With regard to the present case, maintaining its previous - above-mentioned - conclusions, the Tribunal has reviewed the constitutionality of the challenged provision of the Regulation, from the point of view of its conformity to Article 92(1) of the

Constitution. Moreover, the Tribunal has carried out an analysis related to the examination of conformity of the challenged provision to Article 15(3) of the Central Anti-Corruption Bureau Act, which constitutes a formal basis for issuing the Regulation.

The Tribunal points out that the examination of compliance of the challenged provision of the Regulation with the requirements arising from Article 92(1) of the Constitution is closely related to the examination of conformity of that provision to Article 15(3) of the Central Anti-Corruption Bureau Act. Indeed, in accordance with Article 92(1) of the Constitution, regulations "shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes". Also, one of the requirements contained in Article 92(1) of the Constitution is to fulfil the goal of a statute containing a provision which constitutes formal authorisation to issue a regulation by issuing the said regulation. Therefore, in the opinion of the Tribunal, from the point of view of higher-level norms for review which arise from Article 92(1) of the Constitution, the assessment of the constitutionality of the challenged provision of the Regulation requires an analysis of that provision to be carried out not only in the context of Article 15(3) of the Central Anti-Corruption Bureau Act, but also in the context of other provisions of the said Act.

Article 15(3) of the Central Anti-Corruption Bureau Act, which constitutes formal statutory authorisation to issue the Regulation, reads as follows: "The Council of Ministers shall define, by way of a regulation, the types of direct coercive measures, referred to in paragraph 1, as well as the circumstances and the manner of their use, and also the manner of documenting the instances of their use, taking into consideration the protection of the interests of the persons subjected to such measures". The statutory authorisation specified in this way is directly referred to in § 1 of the Regulation. The provision reads as follows: "The Regulation specifies types of direct coercive measures, the circumstances and the manner of their use, as well as the manner of documenting the instances of their use by the functionaries of the CBA, hereinafter referred to as «the functionaries»".

The Tribunal points out that the provisions of Article 15(1) and (2) of the Central Anti-Corruption Bureau Act contain premisses which specify the term "instances" of the use of direct coercive measures. It follows from Article 15(1) of the said Act that what is meant here are the cases of "disregard for orders, issued on the basis of statutes" and given by the CBA functionaries so that the tasks set out in Article 2(1)(1) of the Central Anti-Corruption Bureau Act can be implemented. The above-cited provision of Article 15(1) of the said Act stipulates that: Q "In the case of the disregard for orders, issued on the basis of statutes and aimed at carrying out the tasks referred to in Article(2)(1)(1), the CBA functionaries are entitled to use physical, technical and chemical measures within the scope of direct coercive measures to overpower or escort persons as well as to stop vehicles". By contrast, Article 15(2) of the said Act reads as follows: "Under the circumstances defined in paragraph 1, direct coercive measures which can be used are only those which correspond to the needs arising in a given situation and are indispensable for achieving submission to the issued orders".

The Constitutional Tribunal states that Article 15(3) of the Central Anti-Corruption Bureau Act, which contains authorisation to issue the Regulation, neither clearly specifies the scope of matters assigned to be regulated in a regulation, nor contains guidelines as to the content of a regulation, which is required by Article 92(1) of the Constitution. Also, such guideline may not be derived from other provisions of the Central Anti-Corruption Bureau Act. This particularly concerns the lack of guidelines which would specify the term "instances" of using various types of direct coercive measures.

Article 15(3) of the Central Anti-Corruption Bureau Act, which contains authorisation to issue the Regulation, has not been properly edited as it provides authorisation to specify – by way of a regulation of the Council of Ministers – the premisses of "instances" where direct coercive measures are to be used; whereas specifying the said "instances" is the subject matter of regulation in Article 15 of the Central Anti-Corruption Bureau Act. The interpretation of Article 15 of the said Act reveals the intention of the legislator: the provisions of paragraphs 1 and 2 of that Article set forth the premisses of use which are common to all direct coercive measures, whereas a regulation is to specify the premisses regarding the circumstances and the requirements concerning the manner of using particular types of direct coercive measures enumerated in the regulation. According to the legislator's intention, the regulation was to specify – "more precisely" – the premisses regarding the circumstances, and the requirements concerning the manner, of using particular types of direct coercive measures. As regards handcuffs and single-wrist handcuffs, § 6 of the Regulation was intended to specify – "more precisely" - the premisses concerning the circumstances and manner of using the measures. The Tribunal has established that the provisions of § 6(1)-(4) of the Regulation were not limited to specifying the statutory premisses "more precisely", but also specified the premisses concerning circumstances and persons in the context of the use of handcuffs and single-wrist handcuffs; whereas the provisions of § 6(5)-(7) set out the manner of using handcuffs and single-wrist handcuffs.

Due to the fact that the term "instances" of using particular types of direct coercive measures has not been specified in the Central Anti-Corruption Bureau Act, it is not clear - either in the light of Article 15(3) of the said Act or in the light of any other provision of the Act – what the Act authorises to, with regard to the "instances" of using direct coercive measures, as referred to in the title of the Regulation concerning the CBA. In particular, what is unclear is the statutory authorisation to specify, by way of a regulation, the "instances" of using handcuffs and single-wrist handcuffs. The Tribunal points out that the challenged provision of the Regulation – unlike some other provisions of the Regulation – does not indicate whether it concerns an "instance" or a manner of using handcuffs or single-wrist handcuffs. The analysis of the Regulation under discussion, issued on the basis of Article 15(3) of the Central Anti-Corruption Bureau Act, indicates that some of the provisions of the Regulation refer to the authorisation contained in Article 15(3) of the said Act, by specifying either the types of direct coercive measures (§ 4) or the manner of using them (§ 2, § 3, § 5, § 6(3)-(7), § 7, § 8, § 9, § 10, § 12), or the way of documenting the use of direct coercive measures (§ 13), or the instances of using (chemical incapacitating agents – § 11).

The Tribunal has not reviewed the constitutionality of Article 15(3) of the Central Anti-Corruption Bureau Act as it has not been challenged by the Ombudsman. However, the vagueness of that provision authorising the issue of the Regulation, in the case where the Tribunal does not adjudicate on the unconstitutionality of that provision, does not constitute a premiss to rectify the provisions of the Regulation, which have been issued on the basis of a vague authorising provision. On the contrary, it may be a basis for declaring the non-conformity of the provision of the Regulation to the Act which provided authorisation to issue the provision, and consequently to declare the non-conformity of the provision of Article 92(1) of the Constitution. In compliance with the requirements of Article 92(1) of the Constitution, regulations are issued "on the basis of specific authorisation contained in (...) statutes"; the authorisation should specify not only the organ appropriate to issue a regulation, but also "the scope of matters to be regulated as well as guidelines concerning the provisions of such act".

With regard to the present case, the Tribunal draws attention to the fact that such is the line of the Tribunal's jurisprudence, based on the normative content of Article 92(1) of the Constitution. In this context, the Tribunal mentions the judgment of 5 November 2001 (Ref. No. U 1/01, OTK ZU No. 8/2001, item 247), in which the Tribunal stated, *inter alia*, that: "Therefore, without explicit statutory authorisation, a regulation may not interfere with the realm of legal matters regulated by other statutes. It may not transform or modify the substance contained therein; in fact, it should not even repeat it. Any breach of these requirements may constitute the basis for putting forward an allegation of non-conformity of a regulation to a statute (cf. the ruling in the case U. 3/97). It should also be remembered that regulations are issued on the basis of statutes and for the purpose of implementing them. Such a character of regulations determines and limits their content at least at three levels. Firstly, by way of statutory authorisation, administrative law-making authorities should not be authorised to change statutory provisions. Secondly, statutory authorisation may not delegate the power to interfere with the subject matter which is reserved solely for statutory provisions. Thirdly, executive provisions which have been issued on the basis of statutory authorisation should constitute the content of statutory guidelines and be used for their implementation. If such requirements are not met, then the provisions of a lower rank than statutory provisions should be regarded as unconstitutional".

In the present case, despite the vagueness of the statutory provision of Article 15(3) of the Central Anti-Corruption Bureau Act, the Tribunal stated that the challenged provision of § 6(2) of the Regulation had touched upon the subject matter reserved for statutes, since the premisses specifying the instances of the use of direct coercive measures, including handcuffs and single-wrist handcuffs, were specified in the provisions of Article 15 of the said Act. This was a preliminary conclusion which mainly arose from the analysis of the statutory provision which authorised the issue of the Regulation in the context of other provisions of the said Act, and particularly in the context of the other provisions of Article 15 of the said Act. The Tribunal moved on to a detailed analysis of the normative content of the challenged provision of § 6(2) of the Regulation, in the context of the provisions of the Act and the other provisions of the Regulation.

With regard to the above preliminary analysis of the challenged provision of § 6(2) of the Regulation, the Tribunal has mentioned that the fact that the Ombudsman has not addressed the issue of vagueness of Article 15(3) of the Central Anti-Corruption Bureau Act - at the same time requesting the Tribunal to determine the non-conformity of the challenged provision of the Regulation to the above-mentioned provision of the said Act authorising the issue of the Regulation and to Article 92(1) of the Constitution – has considerably limited the argumentation of the Ombudsman. This is, in particular, visible in the light of the above conclusions by the Tribunal which concern authorisation, by Article 15(3) of the Central Anti-Corruption Bureau Act, as regards specifying the "instances" of using handcuffs and single-wrist handcuffs.

2.2. The Ombudsman has argued that § 6(2) of the Regulation, which stipulates that handcuffs and single-wrist handcuffs are to be used "on the order of a court or prosecutor", leaves "the decision about the use of handcuffs or single-wrist handcuffs to the organ of public authority which is not, in principle, present at the place where activities are carried out by the CBA functionaries (except for those situations where a prosecutor is present at the time when such activities are carried out)"; whereas "the Central Anti-Corruption Bureau Act does not provide for the possibility of transferring the power to decide about the use of coercive measures to a different official or authority than a CBA functionary".

"Such powers of courts and prosecutors do not arise from other [statutory] provisions [either]," the Ombudsman has stated.

The Prime Minister has explained that the provision of § 6(2) of the Regulation is a "result" of the statutory provision contained in Article 13(2) of the Central Anti-Corruption Bureau Act, in accordance with which, within the scope specified in the Code of Criminal Procedure and the Executive Penal Code, the CBA also conducts its activities on the order of a court or prosecutor. It follows from the above explanation that the general provision contained in Article 13(2) of the said Act, which makes reference to the Code of Criminal Procedure and the Executive Penal Code, constitutes a sufficient basis for the use of handcuffs or single-wrist handcuffs on the order of a court or prosecutor.

At first, the Constitutional Tribunal draws attention to the fact that § 6(2) of the Regulation governs the use of handcuffs and single-wrist handcuffs in a different way than the provisions of the Central Anti-Corruption Bureau Act.

In the view of the Tribunal, what follows from the provision of § 6(2)(1) of the Regulation is the obligation to use handcuffs or single-wrist handcuffs on the order of a court or prosecutor, which is inconsistent, in particular, with Article 15(1) of the Central Anti-Corruption Bureau Act. By contrast, it follows from the interpretation of the provision of Article 15(1) of the said Act – which specifies the premiss of using direct coercive measures which is common to all types of those measures – that the functionaries "may", in the case of disregard for orders "issued on the basis of statutes", use direct coercive measures, also including handcuffs and single-wrist handcuffs, which are applied to "overpower or escort persons as well as to stop vehicles".

As it can be concluded from the aforementioned letter by the Head of the CBA, the above interpretation is also accepted by the CBA as regards applying § 6(2) of the Regulation. Unlike in the case of § 6(1), pursuant to which the CBA functionaries may use handcuffs and single-wrist handcuffs, what follows from § 6(2) of the Regulation – in the opinion of the Head of the CBA – is "the obligation (and not merely a power) to put handcuffs on a detained person". As the Head of the CBA explains, "within the meaning of § 6(2), in accordance with the semantic interpretation of that provision, they should always do so with regard to persons suspected or accused of committing an offence against life or health or persons convicted of such an offence".

The Constitutional Tribunal explains that Article 13(2) of the Central Anti-Corruption Bureau Act, which the Prime Minister refers to, mentions conducting activities also on the order of a court or prosecutor, within the scope specified in the Code of Criminal Procedure and the Executive Penal Code, and only within the scope of competence of the CBA. However, the term "activities" and the conduct thereof, within the scope of the tasks referred to in Article 2 of the Central Anti-Corruption Bureau Act, has been specified in Article 13(1)(1)-(3) of the said Act. What is meant here is the following:

1) operational activities in order to prevent, identify and detect offences as well as – if there is a justified suspicion that an offence has been committed – investigative activities in order to prosecute the perpetrators of the offence;

2) surveillance activities in order to expose the cases of corruption in state and local self-government institutions as well as any breach of duties by persons performing public functions, and also activity against the economic interests of the state;

3) operational activities combined with information gathering and analysis activities in order to obtain and process information which is significant for combating corruption in state and local self-government institutions as well as activity against the economic interests of the state.

The Tribunal points out that, in the context of the Central Anti-Corruption Bureau Act, the use of handcuffs and single-wrist handcuffs is not among the "activities"; these are direct coercive measures, and the premisses of their use are set out, in particular, in Article 15 of the said Act. Therefore, the challenged provision of § 6(2)(1) of the Regulation does not concern the activities referred to in Article 13(2) of the Central Anti-Corruption Bureau Act, but direct coercive measures referred to in Article 15 of the said Act, which are used pursuant to Article 15(1) of the said Act, in the case of disregard for orders of the CBA functionaries, issued "on the basis of statutes".

It follows from Article 13(2) of the Central Anti-Corruption Bureau Act as well as from the provisions of the Code of Criminal Procedure and the Executive Penal Code, which the above-mentioned provision of the said Act refers to, that the CBA conducts its activities on the order of a court or prosecutor in situations specified by statutes. Determining the formal powers and substantive scope of activity with regard to the organs of the state falls within the scope of statutory subject matter. The Constitutional Tribunal emphasises that § 6(2) of the Regulation has infringed that principle, by specifying the powers of a court and prosecutor to issue orders concerning the use of handcuffs and single-wrist handcuffs. The Constitutional Tribunal also emphasises that none of the provisions of the Central Anti-Corruption Bureau Act, or of any other statute, has provided authorisation for the issue of the provision of the Regulation specifying that handcuffs and single-wrist handcuffs are to be used on the order of a court or prosecutor. Thus, the said provision does not specify the use of handcuffs and single-wrist handcuffs more precisely, but – without statutory authorisation – it specifies a "new" premiss.

The Tribunal also wishes to mention that the analysis of the provisions of the Code of Criminal Procedure and the Executive Penal Code indicates that these statutes do not contain any provisions which would suggest that a court or prosecutor may order the CBA functionaries to use direct coercive measures in the form of handcuffs or single-wrist handcuffs. Also, such provisions are not included in other statutes, and in particular in the Act of 20 June 1985 on the Public Prosecutor's Office (Journal of Laws - Dz. U. of 2008 No. 7, item 39, as amended). This entails that, without statutory authorisation, § 6(2)(1) has introduced the powers of courts and prosecutors as regards issuing orders to use handcuffs and single-wrist handcuffs, and thus it has touched upon the subject matter reserved for statutes.

The Tribunal underlines that the challenged provision of § 6(2) of the Regulation is inconsistent with Article 15(3) of the Central Anti-Corruption Bureau Act and with Article 92(1) of the Constitution – not only due to the fact that it regulates the matters addressed therein in a way which is contrary to statutory authorisation, which the Ombudsman has mentioned, but also because, without statutory authorisation, it touches upon the subject matter reserved for statutes, regulating the said subject matter on its own (independently). It follows from the above findings of the Tribunal that the Ombudsman's allegations have not addressed the essence of the non-conformity of challenged § 6(2) of the Regulation to Article 92(1) of the Constitution.

In the context of the present case, the Tribunal draws attention to the judgment of 31 March 2009, Ref. No. K 28/08 (OTK ZU No. 3/A/2009, item 28), in which the Tribunal stated, *inter alia*, that:

"What is characteristic of a regulation, apart from the fact that it is issued on the basis of particular authorisation, is its executive character. This means that the provisions of that normative act must remain in a substantive and functional relation to statutory solutions (cf. the judgment of 12 July 2007, Ref. No. U 7/06, OTK ZU No. 7/A/2007, item 76). Issuing a regulation in order to implement a statute, and on the basis of particular authorisation granted by statute, means that the task of a regulation is to

specify statutory norms in a more detailed way. If a regulation is issued on the basis of carte blanche statutory authorisation and it independently regulates the subject matter reserved for a statute, then it does not bear the characteristics of an executive act, and consequently it becomes inconsistent with Article 92(1) of the Constitution. Even when the previous Constitution was in force, such a state of affairs led to the lack of a sufficient bond between an executive act and a statute. The said lack is even more striking in the light of Article 92(1) of the present Constitution (cf. the judgments of: 6 November 2007, Ref. No. U 8/05, OTK ZU No. 10/A/2007, item 121, and 16 September 2008, Ref. No. U 5/08).

The Ombudsman argues that the challenged provision of § 6(2)(2) of the Regulation, which stipulates that handcuffs and single-wrist handcuffs are used with regard to "persons suspected or accused of committing an offence against life or health or persons convicted of such an offence", goes beyond the scope of authorisation contained in the Central Anti-Corruption Bureau Act, since "Article 2 of the Central Anti-Corruption Bureau Act does not provide for the Bureau's power to identify, prevent and detect offences against life and health".

In a letter of 31 August 2007, the Prime Minister stressed that the use of handcuffs or single-wrist handcuffs with regard to the persons enumerated in § 6(2)(2) of the Regulation had a characteristic of a guarantee, not only for a CBA functionary detained a person, but also for person being detained. At the same time, he explained that the above-mentioned provision of the Regulation concerned a situation where a person detained by a CBA functionary, in relation to offences prosecuted within the scope of the CBA's tasks, may also prove to be suspected, accused or convicted of offences against life or health.

The Tribunal established that the Ombudsman's allegations, with regard to the provision of § 6(2)(2) of the Regulation, concern two issues. Firstly, the Ombudsman indicates that the above-mentioned challenged provision of the Regulation extends the scope of tasks arising from Article 2(1) of the Central Anti-Corruption Bureau Act as regards the use of handcuffs and single-wrist handcuffs, by adding offences against life or health. Secondly, the Ombudsman argues that the challenged provision concerns the use of handcuffs or single-wrist handcuffs with regard to persons suspected or accused (of committing an offence against life or health) or persons convicted (of such an offence) – which goes beyond the scope of the subject matter of a regulation. The Prime Minister has addressed only the second allegation.

The Tribunal has established that the challenged provision of § 6(2) of the Regulation has introduced a category of offences against life and health, as regards the use of handcuffs and single-wrist handcuffs, which does not at all follow from statutory authorisation and which, at the same time, entails going beyond the scope of the subject matter regulated by the Central Anti-Corruption Bureau Act.

The Constitutional Tribunal stresses that the introduction of a category of offences against life and health, as regards the use of handcuffs and single-wrist handcuffs, by the challenged provision of § 6(2) of the Regulation constitutes an infringement of Article 15(3) of the Central Anti-Corruption Bureau Act and Article 92(1) of the Constitution. The provision of § 6(2) of the Regulation is inconsistent with the above-mentioned higher-level norms for review also due to the fact that, without statutory authorisation, it has introduced the obligatory use of handcuffs and single-wrist handcuffs.

The Constitutional Tribunal has, on a number of occasions, emphasised in its rulings that the requirement of including all basic elements of legal norms in a statute is particularly significant in the context of the subject matter regulating the place of the individual in democratic society, especially as regards relations between the individual and public authorities. A normative act issued on the basis of a statute, and within the

scope of its authorisation, must implement that authorisation with particular precision. At this point, the Tribunal notes that the above-mentioned view concerning relations between an authorising statute and an executive act issued on the basis thereof has been presented on a number of occasions in the judgments of the Tribunal. In the judgment of 26 April 2004 (Ref. No. K 50/02, OTK ZU No. 4/A/2004, item 32), the Tribunal stated, *inter alia*, that: "In the legal system which recognises the division of powers, and is based on the primacy of a statute as a basic source of domestic law, the parliament may not, within an arbitrary scope, «cede» legislative functions to the organs of the executive branch of government. The fundamental regulation may not be the domain of executive provisions, issued by the organs of the state which do not belong to the legislative branch. Indeed, it is inadmissible to leave determining the fundamental elements of legal regulation to law-making decisions of the organs of the executive branch".

With regard to the present case, in the context of the normative content of Article 92(1) of the Constitution which has been established in the Tribunal's jurisprudence, the Tribunal points out that a regulation does not stand on its own, but is issued on the basis of explicit authorisation contained in a statute and for the purpose of the implementation thereof.

Also, the Ombudsman has indicated that the challenged provision of § 6(2)(2) of the Regulation specifies the categories of persons with regard to whom handcuffs or single-wrist handcuffs are to be used, within the scope of offences against life and health, namely: persons suspected or accused of committing an offence against life or health or persons convicted of such an offence. In the opinion of the Tribunal, by specifying the group of persons with regard to whom handcuffs or single-wrist handcuffs are to be used, the challenged provision of the Regulation, without statutory authorisation, has also touched upon the subject matter reserved for statutes.

As it has already been mentioned, it follows from the analysis of Article 15 of the Central Anti-Corruption Bureau Act that the legislator intended that the premisses which were the same for the use of all coercive measures were specified by statute, whereas the premisses of using particular direct coercive measures, also including the premisses of using handcuffs and single-wrist handcuffs, were specified in a regulation issued on the basis of Article 15(3) of the Central Anti-Corruption Bureau Act.

The Tribunal draws attention to the fact that, in the light of the normative content of Article 92(1) of the Constitution, which has been determined by the jurisprudence of the Tribunal, it is inadmissible that some premisses specifying the instances of using handcuffs and single-wrist handcuffs are included in a statute, and the other premisses are included in a regulation issued on the basis of the statute. It follows from the very of Article 15(1) and (2) that this is statutory subject matter. Consequently, it is inadmissible for the organs of the state using handcuffs or single-wrist handcuffs to do so on the basis of norms derived from elements contained in statutory provisions and elements contained in the provisions of a regulation issued on the basis of the statute.

The Tribunal stresses that, in the present case, the point is not only the interpretation of relations between the provisions of the Act and the provisions of the Regulation, but also the observance of constitutional requirements which arise from Article 92(1) of the Constitution by a norm-giver issuing provisions on the basis and within the scope of statutory authorisation. The result of issuing a regulation on the basis of formal authorisation provided in a statute, and within the scope of substantive statutory provisions, may not be a situation where the organs of the state (in this case: the CBA) act pursuant to legal norms derived from the elements of statutory provisions and sub-statutory provisions, with the latter being issued on the basis of the former. From the point of view

of vertical legal order, this is inadmissible. The interpretation of the provisions of the Act and of the Regulation issued on the basis thereof – which has been proposed by the Prime Minister, which leads to deriving and, consequently, applying statutory and regulation norms specifying the situations where handcuffs and single-wrist handcuffs may be used – confirms the fact that the challenged provisions of the Regulation deal with statutory subject matter, thus infringing on Article 92(1) of the Constitution. The Tribunal points out that that a regulation is not an independent legal act, but – on the basis of explicit and detailed statutory authorisation – it regulates the subject matter specified in the authorisation. No statutory provision has provided authorisation for specifying, by way of a regulation, the group of persons with regard to whom handcuffs and single-wrist handcuffs shall be used. This premiss has been independently introduced in the challenged provision of § 6(2) of the Regulation, infringing the requirements arising from Article 92(1) of the Constitution.

With regard to the present case, the Tribunal points out that it has drawn attention in its rulings to the fact that the requirement to include all fundamental elements of legal provisions in a statute, combined with the prohibition against regulating them in a regulation, as a sub-statutory act, concerns primarily matters related to the individual's rights and freedoms or to the actions of public authorities which have legal effects for citizens. In the aforementioned judgement of 26 April 2004, Ref. No. K 50/02, the Tribunal has stressed the above thesis in the following way: "The requirement that all fundamental elements of legal provisions should be included directly in the text of a statute must be applied in a particularly stringent way where the said provisions concern the actions of public authorities which have legal effects for citizens, and also the rights and obligations of an organ of administration as well as civil rights and obligations within the scope of public law relations or within the scope of citizens' exercise of their rights and freedoms (cf. the rulings of the Constitutional Tribunal of: 5 November 1986, U. 5/86, OTK in 1986, item 1; 30 November 1988, K. 1/88, OTK in 1988, item 6; 25 February 1997, K. 21/95, OTK ZU No. 1/1997, item 7 as well as the judgement of 22 September 1997, K. 25/97, OTK ZU No. 3-4/1997, item 35)".

Confirming the above line of the Tribunal's jurisprudence, the Tribunal emphasises that it entirely refers to the challenged provision of § 6(2) of the Regulation.

Therefore, the Tribunal has concluded that § 6(2) of the Regulation is inconsistent with Article 15(3) of the Central Anti-Corruption Bureau Act and Article 92(1) of the Constitution.

3. The review of the challenged provision of § 6(2) of the Regulation, in the light of Article 41(1) in conjunction with Article 31(3) of the Constitution.

3.1. As a higher-level norm for constitutional review of the challenged provision, the Ombudsman has also indicated Article 41(1) in conjunction with Article 31(3) of the Constitution. "The use of handcuffs and single-wrist handcuffs constitutes far-reaching interference with the realm of personal inviolability and personal liberty. This realm remains under the protection of Article 41 of the Constitution of the Republic of Poland," the Ombudsman argues. In the Ombudsman's opinion, it follows from the interpretation of Article 41(1) of the Constitution that any restriction of liberty, and hence also the use of handcuffs and single-wrist handcuffs, must be provided for entirely in a statute. As the applicant emphasises, it is inadmissible to impose restrictions on personal liberty or personal inviolability in a legal act of a lower rank than a statute. The Ombudsman holds the view that the premisses set out in Article 31(3) of the Constitution refer to the restriction of personal liberty.

By way of introduction, the Tribunal wishes to stress that the Constitution, being based on contemporary standards of mature European democracy, regards the individual's freedom as a fundamental value of democratic society, which is inherent, indisputable and inalienable, being the source of the individual's personal development and happiness as well as the source of social development. The prototype of the concept of the individual's freedom, understood this way, may be found in the Declaration of the Rights of Man and of the Citizen of 26 August 1789 (which constitutes the Preamble to the French Constitution of 3 September 1791), which - in its Article 1 - stipulates that people "are born and remain free and equal in rights". Discussing the nature of freedom and the principle of the presumption of the individual's freedom in society (Article 4), the Declaration also emphasises that the restriction of the individual's freedom may take place only by means of a statute which, in accordance with Article 6 of the Declaration, "is the expression of the general will".

Contemporary standards which determine the individual's status in a democratic society, and specify the catalogue of fundamental rights and freedoms of the individual as well as the principles of restricting them by statute, are included, in particular, in such acts of international law as: the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention) as well as the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977, No. 38, item 167; hereinafter: the ICCPR). The above-mentioned acts of international law were inspired by the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, which emphasised the concept of inherent dignity of the person as well as the individuals' equal and inalienable rights as the bases of freedom, justice and peace in the world. The above acts are based on the same natural law concept of human rights which stems from the idea of uniqueness of human nature, the centre of which is human freedom derived from the person's inherent dignity.

The above-mentioned acts of international law have been included in the legal order of the Republic of Poland, in the form of ratified international agreements. Elaborating on the concept of freedom of the person in the context of various aspects of that freedom, which are particularly related to various spheres of human activity, the acts specify a standard catalogue of the individual's fundamental rights and freedoms. The primary place in the said catalogue, considered to constitute a necessary and fundamental part of the model of a mature democratic state, is occupied by "the right to liberty and security of person", enjoyed by "everyone", specified in Article 5(1) of the Convention as well as in Article 9 of the the ICCPR. Also, Article 5(1) of the Convention stipulates that no one shall be deprived of his/her liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Provisions of Article 5(2)-(5) of the Convention set out the necessary requirements which need to be met in the cases of deprivation of liberty due to detention or arrest, i.e. the right of detained or arrested persons to be brought promptly before the competent legal authority and the right to take proceedings by which the lawfulness of their detention shall be decided speedily by a court as well as the right to trial "within a reasonable time" or the right to release pending trial. Article 5(5) of the Convention stipulates that everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 of the Convention shall have an enforceable right to compensation. Article 5 of the Convention and the rulings of the European Court of Human Rights (hereinafter: the ECHR) have shaped the standards of protection of personal liberty and security in the context of European democracy.

In the Constitution of 2 April 1997, which reflects the standards of mature European democracy within the scope of protection of the individual's rights and freedoms, the protection of personal liberty is discussed, in particular, in Article 41, included in Chapter II of the Constitution in the section entitled "Personal Freedoms and Rights". The normative structure of Article 41 of the Constitution differs from the normative structure of Article 5 of the Convention; the differences concern some concepts contained in the two legal acts and the normative content related thereto.

The most striking differences, with regard to the normative content and the structure of provisions, arise from the comparison between Article 41(1) of the Constitution, indicated by the Ombudsman as a higher-level norm for constitutional review in the present case, and Article 5(1) of the Convention. Pursuant to Article 41(1) of the Convention, personal inviolability and personal liberty shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. The first sentence of that provision deals with guarantees from the realm of personal inviolability and personal liberty; whereas Article 5(1) of the Convention specifies that everyone has the right to liberty and security of person. With regard to the present case, the Tribunal points out that the term "right to security" is understood in the light of the Convention as the right not to be deprived of liberty in an unlawful way. By means of that term, the Convention introduces a special form of prohibition against arbitrariness as regards any form of detention. It is stated in the doctrine that "the right to liberty, within the meaning of Article 5(1) of the Convention, must be referred to the Convention itself and means that no one may be deprived of liberty in situations other than those set out in that provision, whereas the right to security must be referred to national law, with which every decision about imposing the deprivation of liberty must be consistent. By contrast, as regards the term "liberty", included in Article 5(1) of the Convention, it should be interpreted in a narrow sense, "which means that it does not imply a general freedom of action. Article 5 of the Convention concerns personal liberty only as the freedom of the body, the freedom of movement and the freedom of decision in that respect (the so-called freedom of locomotion). It is assumed that Article 5 of the Convention does not guarantee the freedom of self-development or the right to personal inviolability (P. Hofmański, *Konwencja Europejska a prawo karne*, Toruń 1995, pp. 175-176). Article 5(1) of the Convention exhaustively specifies the cases of "legal" deprivation of liberty (points (a)-(f) of the provision), whereas Article 41(1), second sentence, of the Constitution makes general reference to a statute, stipulating that

"any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute". It should also be noted that Article 5 of the Convention does not use the term "limitation of liberty". In the light of that Article, both arrest and detention are forms of deprivation of liberty.

Presenting the above analysis concerning Article 5 of the Convention, the Tribunal points out that the said Article differs as regards its structure, normative content as well as some basic terms from Article 41(1) of the Constitution; in particular, as it has already been mentioned, what does not follow from Article 5 of the Convention, unlike from Article 41(1) of the Constitution, is the right to personal inviolability. Therefore, one must be careful while making reference to the above-mentioned provision of the Convention and the relevant jurisprudence of the ECHR. However, comparison of the regulation of personal liberty in a broader context, namely the provisions of Article 41(2)-(5) of the Constitution and the provisions of Article 5(2)-(5) of the Convention, confirms - what the Tribunal wishes to emphasise – that the constitutional regulation follows the example of the Convention and the jurisprudence of the ECHR, which set the standards of protection of the individual's rights.

3.2. The section entitled "Personal Freedoms and Rights", Chapter II of the Constitution, contains provisions concerning various aspects of personal rights and freedoms as well as particular rights and freedoms which may be categorised as personal rights or freedoms, although only Article 41(1) of the Constitution contains the term "personal liberty". Pursuant to the provision of Article 41(1) of the Constitution, personal inviolability and personal liberty shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute. In the literature on the subject which places the concept of personal liberty in the context of the general concept of human freedom, it is aptly emphasised that "personal liberty, as referred to in Article 41(1) of the Constitution is «the first consequence or the first manifestation of the individual's freedom expressed in Article 31(1)» and constitutes «the individual's freedom to determine his/her conduct and actions both in public and in private life; the said freedom is not restricted by any other human factor» (P. Sarnecki, commentary to Article 41, [in:] *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, Vol. 3, L. Garlicki(ed.), Warszawa 2003).

In the light of Article 41(1) of the Constitution, personal inviolability remains closely linked to personal liberty. It is defined as "a guarantee that the individual may maintain his/her identity and integrity both physical and mental as well as the prohibition of any interference, be it direct or indirect, from the outside which would infringe that integrity" (P. Sarnecki, *op.cit.*).

The Tribunal wishes to emphasise that the essence of personal inviolability is not merely related to the inviolability of the body, but comprises the physical and mental integrity of the individual, whose identity is determined not only by his/her body, but also by his/her psyche. Therefore, the personal inviolability of the individual as a human being is a special value particularly strongly related to the dignity of the person, which – according to Article 30 of the Constitution - is "inherent" and "inalienable" as well as constitutes "a source of freedoms and rights of persons and citizens".

The Tribunal points out that also Articles 39 and 40 of the Constitution (in the light of the systemic interpretation of the Constitution) refer to personal inviolability, specifying the prohibitions against infringing personal inviolability. In accordance with Article 39 of the Constitution, "no one shall be subjected to scientific experimentation, including medical experimentation, without his voluntary consent"; and Article 40 of the Constitution stipulates that: "No one may be subjected to torture or cruel, inhuman, or

degrading treatment or punishment. The application of corporal punishment shall be prohibited." It is aptly indicated in the doctrine that personal inviolability, i.e. the inviolability of physical and mental integrity of the individual may be infringed by beating, injury, physical torture or mental abuse (P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 60).

When showing the connection – arising from Article 41(1) of the Constitution – and personal inviolability, in the judgment of 18 February 2004, the Constitutional Tribunal stated that: "the positive aspect of «the individual's freedom» is that the individual may freely determine his/her conduct in a given realm, by choosing such forms of activity which s/he finds most suitable, or may refrain from taking any actions. The negative aspect of «the individual's freedom» consists in a legal obligation to refrain oneself – anybody – from interfering with the realm reserved for the individual. Such an obligation rests with the state and with other persons or entities". When freedom is understood this way, "personal inviolability" constitutes its negative aspect, guaranteeing "freedom from" interference with the realm of internal and external integrity of every individual, whereas the term "personal liberty" overlaps with its positive aspect, which protects the individual's possibility of carrying out his/her will and undertaking actions, construed in the broadest sense (Ref. No. P 21/02, OTK ZU No. 2/A/2004, item 9).

The Tribunal points out that the close relation between personal liberty and personal inviolability, arising from the normative content of Article 41(1), first sentence, of the Constitution, constitutes – in the context of democratic standards of protecting the freedom of the person – special regulation of fundamental rights and freedoms; the regulation is special due to its structure and the significance of protecting personal liberty for the protection of all fundamental rights and freedoms. In the light of the interpretation of Article 41(1) of the Constitution, personal inviolability constitutes a necessary and particularly important prerequisite for the exercise of the individual's personal liberty in a democratic state; respect for personal inviolability is at the same time a guarantee of the exercise of personal liberty.

The Tribunal underlines that a close relation between respect for personal liberty and respect for personal inviolability, in the context of the Constitution, entails that the restriction of personal liberty is subject to particular constitutional protection. The restriction of personal liberty requires the fulfilment of requirements which arise from Article 31(3) of the Constitution and which concern any limitation upon the exercise of any constitutional rights or freedoms, but also requires respect for personal inviolability. Personal liberty may be subject to restriction only by statute, and the premisses of statutory restriction of freedom, set out in Article 31(3) of the Constitution, also refer to the restriction of personal liberty. However, the provision of Article 41(1) of the Constitution "adds" one more requirement to the statutory premisses allowing for the restriction of personal liberty, set out in Article 31(3) of the Constitution, namely: absolute respect for personal inviolability.

The provision of Article 41(1), second sentence, of the Constitution stipulates that the deprivation or restriction of liberty may be imposed only in accordance with principles and under procedures specified by statute. The Tribunal notes that the interpretation of that provision should also take into account – as in the case of Article 41(1), first sentence – systemic relations to other provisions of the Constitution. Pursuant to Article 31(3) of the Constitution, which specifies constitutional requirements as regards imposing restrictions on the exercise of constitutional rights and freedoms; such restrictions may only be introduced by statute. This means that any restriction of personal liberty may be regulated only by statute, with absolute respect for personal inviolability and the observance of other requirements set out in Article 31(3) of the Constitution.

However, the Tribunal points out that Article 41(1) of the Constitution does not merely repeat the provisions of Article 31(3) of the Constitution, as regards the requirement that personal liberty should be restricted only by statute. A general requirement that constitutional rights and freedoms, including also personal liberty, should be regulated solely and entirely by statute arise from Article 31(3) of the Constitution; by contrast, what arises from Article 41(1), second sentence, of the Constitution is a specific requirement that statutory provisions imposing restrictions on personal liberty should contain principles and procedures concerning the said restrictions. In the opinion of the Tribunal, the last requirement, arising from Article 41(1), second sentence, of the Constitution complements – in the context of the restriction of personal liberty – the requirements of the restriction of personal liberty which arise from Article 31(3) and Article 41(1), first sentence, of the Constitution.

In the view of the Tribunal, the principles for the restriction of personal liberty, which are regulated by statute and which are referred to in Article 41(1), second sentence, of the Constitution, include all premisses that directly specify the restriction of personal liberty, and in particular the authority which decides about the restriction of personal liberty, persons with regard to whom a decision on the restriction of personal liberty may be taken as well as the premisses related to those persons e.g. their legal status, conduct and circumstances. By contrast, procedures for the restriction of personal liberty, a referred to in Article 41(1), second sentence, of the Constitution, should be understood – in the light of the Constitution – as measures (a procedure) regulated by statute and applied by the authority competent to decide about the imposition of the restriction of personal liberty, which has been granted authorisation to do so by statute. What follows from Article 41(1), second sentence, in conjunction with Article 31(3) of the Constitution is the requirement addressed to the legislator that – when restricting personal liberty in given provisions (this is admissible only by statute), he should always include therein the principles and procedures concerning the restriction of personal liberty. The Tribunal draws attention to the fact that Article 41(1), second sentence of the Constitution does not merely introduce prohibition against the restriction of personal liberty in legal acts of a lower rank than statutes, which arises from Article 31(1) of the Constitution with regard to all constitutional rights and freedoms. What also follows from Article 41(1), second sentence, of the Constitution is the requirement that a statute providing for the restriction of personal liberty should take into account all premisses specifying the principles and procedures concerning the restriction of personal liberty.

The term “principles for the restriction of personal liberty” does not refer to the category of legal principles, i.e. particularly important legal provisions (norms) of legal regulation. The necessity of specifying the principles for the restriction of personal liberty by statute entails that statutory regulation should contain all direct substantive premisses concerning the restriction of personal liberty. By contrast, the requirement to specify, in given statutory regulation which impose restrictions on personal liberty, a procedure for restricting that liberty means that the statutory restriction of that liberty should also contain all premises directly specifying measures (a procedure) for restricting personal liberty. In the opinion of the Tribunal, what follows from Article 41(1), second sentence, of the Constitution is the requirement that all substantive and procedural premisses directly specifying the restriction of personal liberty should be included in such regulation.

As it has been pointed out, in the light of the systemic analysis of the normative content of Article 41(1) of the Constitution, the legislator may impose restrictions on personal liberty, provided that all requirements arising from Article 31(3) of the Constitution have been met, and that absolute respect for personal inviolability is guaranteed. This entails that, in the context of particular statutory regulation of personal

liberty, the legislator should take into account the above-mentioned requirement of absolute respect for personal inviolability, regarding it as a fundamental prerequisite for the restriction of the individual's personal liberty. The Tribunal points out that, in the context of specific statutory regulation which imposes restrictions on personal liberty of the individual, it can be assessed what requirements are to be met so that the restriction of that liberty can be imposed with respect for the individual's personal inviolability. Therefore, it is not accidental that, in accordance with Article 41(1), second sentence, of the Constitution, one more requirement concerning the statutory restriction of personal liberty needs to be fulfilled, namely: all substantive and procedural premisses which directly specify the restriction of personal liberty should be included in a statute. Interpreted in the context of other provisions of the Constitution, and in particular in the context of Article 31(3) of the Constitution, Article 41(1), second sentence of the Constitution, adds – to the aforementioned requirements concerning the restriction of rights and freedoms, which arise from Article 41(1), first sentence, and Article 31(3) of the Constitution – one more requirement: the provisions of a statute which impose restrictions on personal liberty should also contain the principles and procedures for restricting that liberty (as defined above).

With regard to the present case, the Tribunal has referred its conclusions primarily to the concept of restriction of personal liberty. It should be noted that the issue of deprivation of liberty is regulated, more broadly, in Article 41, also in its paragraphs 2, 4 and 5.

3.3. The Constitutional Tribunal points out that the use of handcuffs and single-wrist handcuffs restricts the freedom of liberty, as referred to Article 41(1) of the Constitution. The use of handcuffs or single-wrist handcuffs is to force a given person to obey the orders of a functionary. Thus, the purpose of using handcuffs or single-wrist handcuffs is the physical restraint of freedom of movement and action in the case of a given person, in order to make his/her obey – within the scope permitted by law – the orders of a functionary, to force the person to be submissive. However, the restriction of personal liberty, resulting from the use of handcuffs or single-wrist handcuffs, is aimed not only at restraining physical activity of a given person, but also at achieving mental submission of the person to the orders of a functionary. It may even be stated that the restraint of physical capabilities of a given person is only a means to achieving mental submission of the person towards a functionary; and therefore, it must be applied in a way which is adequate to a given situation so that the negative impact of mental coercion, affecting the realm of the dignity of the person, as a result of the use of handcuffs or single-wrist handcuffs, or in fact any other direct coercive measure, would be the least possible if it is necessary in a given case (proportionate). The use of handcuffs and single-wrist handcuffs, which restricts the freedom of personal liberty, inevitably affects the realm of personal inviolability.

The use of handcuffs or single-wrist handcuffs may not be at all needed if a person requested to obey the order of a functionary obey the order. Hence, it is not accidental that, in Article 15(1) of the Central Anti-Corruption Bureau Act, disregard for a functionary's order constitutes a basic and necessary premiss of using any direct coercive measures, including handcuffs and single-wrist handcuffs. Indeed, in the light of Article 41(1), second sentence of the Constitution, this is one of principles restricting personal liberty. Obviously, every decision about the use of a direct coercive measure must be taken by a functionary, but all the premises specifying the use of such measures must be precise and must arise only from a statute. All these premises belong to "principles" or "procedures"

for the restriction of personal liberty, as referred to in Article 41(1), second sentence, of the Constitution.

The Tribunal wishes to emphasise that the challenged provision infringes Article 41(1) of the Constitution, as it regulates the subject matter reserved for statutes, and in particular the subject matter concerning the principles and procedures for the restriction of personal liberty. The Central Anti-Corruption Bureau Act does not set out all premisses concerning the principles and procedures for the restriction of personal liberty by means of handcuffs and single-wrist handcuffs. As it has been determined above, the legislator specified only premisses which were common to the use of all direct coercive measures in the Central Anti-Corruption Bureau Act, assuming that the premisses of the use of particular types of coercive measures would be set out in a regulation, issued on the basis of Article 15(3) of the Central Anti-Corruption Bureau Act. The Tribunal emphasises that assigning the subject matter reserved for statutes to be regulated in a regulation is inconsistent with Article 41(1) in conjunction with Article 31(3) of the Constitution. All the premisses concerning the use of particular types of direct coercive measures should be included in a statute, since they regard either principles or procedures for the restriction of personal liberty, as referred to in Article 41(1), second sentence, of the Constitution.

In the challenged provision of § 6(2) of the Regulation, contrary to Article 31(3) and Article 41(1), second sentence, of the Constitution, the norm-maker "has added" – to the general (common) premisses of using direct coercive measures, set out in Article 15(1) and (2) of the Central Anti-Corruption Bureau Act – specific provisions concerning the use of handcuffs and single-wrist handcuffs, set out in the challenged provision of the Regulation. The said specific provisions concern the principles for the restriction of personal liberty, and therefore they are also inconsistent with Article 41(1), second sentence, of the Constitution.

The Tribunal points out that § 6(2)(1) of the Regulation specifies the premiss of using handcuffs and single-wrist handcuffs which is, in the light of Article 41(1), second sentence, of the Constitution, a "principle" and an element of a "procedure" for the restriction of personal liberty; the above provision reads as follows: "Handcuffs and single-wrist handcuffs shall be used on the order of a court or prosecutor". By contrast, § 6(2)(2) of the Regulation, by introducing a supra-statutory category of offences against life or health and by specifying a group of persons with regard to whom handcuffs or single-wrist handcuffs are used infringes not only Article 31(3), but also Article 41(1), second sentence, of the Constitution as it concerns the principles for the restriction of personal liberty, which – pursuant to Article 41(1), second sentence, of the Constitution - should be set out in a statute.

Constitutional Tribunal has adjudicated that the challenged provision of § 6(2) of the Regulation is inconsistent with Article 41(1) in conjunction with Article 31(3) of the Constitution since – in the light of the higher-level norms for constitutional review, arising from the above-mentioned constitutional provisions – all the premisses of using handcuffs and single-wrist handcuffs included in the challenged provision of the Regulation should be specified by statute. Indeed, they concern the restriction of personal liberty of the individual, and in particular they regard the principles or procedures for the restriction of that liberty. The Tribunal points out that the challenged provision is inconsistent with entire Article 41(1) of the Constitution. Although the infringement of the Constitution, in particular, concerns the infringement of Article 41(1), second sentence, of the Constitution, the challenged provision has infringed special constitutional guarantees referred to in Article 41(1) of the Constitution.

The Constitutional Tribunal notes that the review of the challenged provision of the Regulation has revealed that most of the other provisions of the Regulation also directly concern the restriction of personal liberty, which – pursuant to Article 41(1) of the Constitution – constitutes statutory subject matter. The above-mentioned remaining provisions of the Regulation include provisions specifying the types of directive coercive measures as well as the circumstances and way of using them – within the meaning of Article 15(3) of the Central Anti-Corruption Bureau Act, which authorises the issue of the Regulation – which have been assigned to be governed by a regulation. The Constitutional Tribunal will submit a signalling decision to the Sejm, indicating that the subject matter governed by the Regulation, which – within the meaning of Article 41(1) of the Constitution – constitutes statutory subject matter, should be included in a statute, and Article 15(3) of the Central Anti-Corruption Bureau Act, which authorises the issue of the Regulation should be adjusted to constitutional requirements, arising from Article 92(1) and Article 41(1) of the Constitution. The signalling decision will also regard the following: issued on the basis of Article 16(4) of the Act of 6 April 1990 on the Police (Journal of Laws - Dz. U. of 2007 No. 43, item 277, as amended), the Regulation of the Council of Ministers of 17 September 1990 specifying the circumstances, requirements and ways of using direct coercive measures by the Police (Journal of Laws - Dz. U. No. 70, item 410, as amended); issued on the basis of Article 25(3) of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Journal of Laws - Dz. U. No. 74, item 676, as amended), the Regulation of the Council of Ministers of 25 March 2003 on direct coercive measures used by the functionaries of the Internal Security Agency (Journal of Laws - Dz. U. No. 70, item 638) as well as, issued on the basis of Article 24(3) of the Act of 12 October 1990 on the Border Guard (Journal of Laws - Dz. U. No. 78, item 462, as amended), the Regulation of the Council of Ministers of 17 February 1998 specifying the requirements and ways of using direct coercive measures and firearms by the functionaries of the Border Guard and by reserve sub-units of the Border Guard (Journal of Laws - Dz. U. No. 27, item 153). The above-mentioned Regulations, by analogy to the Regulation concerning the CBA, govern the use of direct coercive measures within the scope which is reserved for statutes.

4. The consequences of the judgement.

Declaring the challenged provision of § 6(2) of the Regulation to be no longer legally binding will not preclude the CBA functionaries from using handcuffs and single-wrist handcuffs where necessary, pursuant to the provisions of the Central Anti-Corruption Bureau Act, as well as pursuant to other provisions of the Regulation which the Tribunal has not declared to be no longer binding in the judgement in the present case, although the Tribunal notes that they should be set out in a statute. The premisses of using direct coercive measures, which also refer to the use of handcuffs and single-wrist handcuffs, as well as the other provisions of the Regulation which have not been declared to be no longer legally binding sufficiently specify the situation where the CBA functionaries may use handcuffs and single-wrist handcuffs; in particular, as one of the necessary premisses of using handcuffs and single-wrist handcuffs, the above provision of the Central Anti-Corruption Bureau Act indicates a situation where a given person disregards the orders of a functionary, which have been issued on the basis of statutes. The possibility of using handcuffs and single-wrist handcuffs depends on the assessment of a particular situation which is related to the conduct of a person whom a functionary carrying out activities set out in Article 14 of the Central Anti-Corruption Bureau Act may order to act in a certain way. In accordance with Article 14(1)(1) of the Central Anti-Corruption Bureau Act, the

above orders, "where this is indispensable for conducting activities", regard the activities enumerated in Article 14(1)(2)-(5), *inter alia*: checking a person's ID documents to establish his/her identity in the cases specified in the provisions of the Code of Criminal Procedure, detaining persons in accordance with the procedure and in the cases specified in the provisions of the Code of Criminal Procedure, searching persons and premises in accordance with the procedure and in the cases specified in the provisions of the Code of Criminal Procedure, conducting a body search, examining the contents of luggage, stopping vehicles and other means of transport as well as checking cargo in the means of transport by land, water and air, in the event of a justified suspicion of the commission of a criminal or fiscal offence. Pursuant to the provisions of the Central Anti-Corruption Bureau Act, in the case of carrying out the above activities in order to perform the tasks referred to in Article 2(1)(1) of the said Act, the functionaries may give the said orders concerning certain conduct. In the case of disregard for those orders, in accordance with Article 15(1) of the Central Anti-Corruption Bureau Act, the functionaries may direct coercive measures, including also handcuffs and single-wrist handcuffs. They may be used while carrying out the activities specified by the said Act, in the case a given person refuses to obey orders. It is worth emphasising that, within a relatively short period, the legislator may assign a statutory rank to the provisions of the Regulation which directly concern the restriction of personal liberty, making reference to the principles and procedures for restricting that liberty.

The Tribunal draws attention to the fact that the Regulation concerning the CBA mentions the types of direct coercive measures (§ 4), and specified the premisses of using direct coercive measure (§ 2), including also handcuffs or single-wrist handcuffs, related to the case of disregard for orders given by the CBA functionaries, as set out in Article 15(1) of the Central Anti-Corruption Bureau Act.

§ 2 of the Regulation stipulates that:

"§ 2. 1. The functionary may use direct coercive measures after ordering a person to act in accordance with the law, and seeing no effect, and after warning the person with regard to whom the measures could be used about the possibility of using such measures.

2. The functionary may refrain from ordering a person to act in accordance with the law and warning the person about the possibility of using direct coercive measures, if a delay in the use of a direct coercive measure would pose a threat to someone's life or health or property".

Moreover, § 3 of the Regulation specifies the use of direct coercive measures more precisely in relation to the statutory premiss of "disregard for orders", making reference to the principle of proportionate use of direct coercive measures, including also handcuffs and single-wrist handcuffs.

§ 3 of the Regulation reads as follows:

„§ 3. 1. The functionary should use direct coercive measures in such a way that submission to orders issued on the basis of the law could be achieved at the minimal negative impact caused to the person with regard to whom the measures have been used.

2. The functionary is obliged to refrain from the further use of direct coercive measures when a person with regard to whom the measures have been used has obeyed given orders.

3. Where this is necessary for achieving submission to given orders, the functionary may use various direct coercive measures".

By contrast, § 6(5)-(7) of the Regulation specifies a particular way of using handcuffs and single-wrist handcuffs, and § 6(3)-(4) of the Regulation sets out the premisses of using handcuffs and single-wrist handcuffs with regard to underage persons.

The Tribunal wishes to emphasise that declaring § 6(2) of the Regulation to be no longer binding restores the legal order which is consistent with the Constitution and the Central Anti-Corruption Bureau Act within the scope of the allegations, without making it impossible to use handcuffs and single-wrist handcuffs, in accordance with the above-mentioned provisions of the said Act, as regards the CBA's tasks and competence which arise from the said Act.

Taking the above into consideration, the Tribunal has concluded that there are no grounds for postponing the moment when § 6(2) of the Regulation will cease to be binding.

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