

## Judgment

dated 16 March 1999 (SK 19/98)

The Constitutional Tribunal sitting with the bench composed of the Chairman Jadwiga Skórzewska-Łosiak, Lech Garlicki and Janusz Trzciniński (Reporting Judge)

After reviewing on 16 March 1999 the constitutional complaint at a hearing: (...)

held

**1. paragraph 54, section 2 of the regulation issued by the Minister of Justice dated 14 November 1996 in the matter of the disciplinary bylaws for Prison Service officials (Journal of Laws, Number 135, Item 635) contravenes article 77, section 2 of the Constitution of the Republic of Poland in that it impairs the pursuit of violated rights by way of litigious proceedings.**

**2. pursuant to article 190, section 3 of the Constitution, the Constitutional Tribunal has established that § 54, section 2 of the regulation cited in item 1 above shall forfeit its binding force as of 1 January 2000.**

Moreover, it has resolved

**to discontinue the proceedings in this area pursuant to article 39, section 1, subsection 2 of the Constitutional Tribunal Act dated 1 January 1997 (Journal of Laws, Number 102, Item 643), as a consequence of the retraction of the constitutional complaint in the part pertaining to the request of investigation into the conformity of § 54, section 2 of the regulation cited in item 1 of this judgment above with article 133 of the Prison Service Act dated 26 April 1996 (Journal of Laws, Number 61, Item 283, amended in Number 106, Item 496; 1997, Number 133, Item 883) and with article 77, section 1, article 78 and article 176, section 1 of the Constitution of the Republic of Poland.**

Reasoning

(...)

(...)

## IV

1. In the Polish legal system disciplinary liability applies to many professional groups. The absence of a uniform regulation pertaining to this liability and the existing differentiation give an impression of arbitrariness. From the point of view of access to courts, disciplinary proceedings may be divided into those that envisage and those that do not envisage such access. In the group of proceedings which envisage access to courts the ones which only permit the opportunity for authorized entities to submit an extraordinary appeal should be distinguished. With respect to barristers, legal counselors, public notaries and physicians, the Supreme Court considers extraordinary appeals. The doctrine does raise the issue that the requirement of access to courts is not met even in this instance since an authorized body, and not the party, may submit the appeal; for this reason, this opportunity does not constitute the realization of civil access to courts. In proceedings in which the party's right to appeal to the court has been envisaged, generally this is possible only in the instance that the disciplinary body has adjudicated the most severe punishment of expulsion from the profession (legal counselors, physicians, teachers, certified auditors). It is possible to appeal to the universal court in every case only with respect to court bailiffs. The second group is comprised by those proceedings in which there is an absence of access to the courts. This situation concerns the

employees of state offices, prosecutors, police officials, officials of the UOP State Protection Agency, officials of the Border Guard and officials of the Prison Service.

The regulation issued by the Minister of Justice dated 14 November 1996 in the matter of the disciplinary bylaws for Prison Service officials was issued on the basis of the delegation incorporated in article 133 of the Prison Service Act dated 26 April 1996. Pursuant to the contents of this provision the Minister of Justice was obligated to issue by means of a regulation disciplinary bylaws specifying the „detailed principles and course of disciplinary proceedings, of meting out and executing disciplinary sanctions, of suspending, expunging, pardoning and appealing against the sanctions meted out, the specific organization of disciplinary courts, their jurisdiction, the course for selecting their members and the principles and course of proceedings before these courts.”

The foregoing provision was situated in chapter 8 of the statute concerning the disciplinary liability of Prison Service officials, most generally defining the subject matter scope of the disciplinary liability of officials, the types of disciplinary sanctions, the principles for initiating disciplinary proceedings and meting out disciplinary sanctions as well as the general status of disciplinary courts.

Pursuant to the contents of the statute (article 125) disciplinary liability is a particular kind of liability which an official bears for criminal offences and misdemeanors committed notwithstanding criminal liability. In addition, a Prison Service official is subject to disciplinary liability for violating professional discipline, failing to adhere to professional ethics, especially the honor, dignity and reputation of the service and in the other instances prescribed by the statute.

The statute defines the sanctions which may be meted out to an official under disciplinary liability (article 126) as well as the entities authorized to mete them out. These entities, according to article 130, section 1 of the statute, are the superiors with jurisdiction over the personal affairs of the officials or higher ranking superiors, while with respect to inflicting the punishment of expelling an officer from the service – it shall be the General Director of the Prison Service. The sanction of lowering rank or stripping someone of Prison Service rank shall be meted out by the superior with the jurisdiction to award such rank, while the Minister of Justice shall do so with respect to an officer.

Pursuant to article 136 of the statute, both the official and the higher ranking superior may avail themselves of a means of appeal in the form of a grievance to the disciplinary court with jurisdiction against the inflicted disciplinary sanction. Only with respect to an inflicted sanction entailing a ban against driving mechanical vehicles or other vehicles may a grievance be lodged with the universal court with jurisdiction according to location.

Disciplinary courts discharging the function of the instance of appeal with respect to a disciplinary sanction meted out by a superior adjudicate pursuant to article 132 on the grounds of their conviction based on a free evaluation of the evidence gathered. Their members are elected and are independent in issuing decisions. The Minister of Justice may, however, repeal the decision of a disciplinary court if it is grossly inequitable and remand the case to be reconsidered. Analysis of the contents of the regulation issued by the Minister of Justice in the matter of the disciplinary bylaws for Prison Service officials shows that the norm-giver, in discharging the disposition embodied in article 133 of the statute regulated the principles for inflicting disciplinary sanctions (chapter 2), the course of disciplinary proceedings (chapter 3), the organization and jurisdiction of disciplinary courts and the course for selecting the members thereof (chapter 4), appellate proceedings on the inflicted disciplinary sanctions (chapter 5), the principles for carrying out the disciplinary sanctions (chapter 6), the principles

for expunging and pardoning a disciplinary sanction (chapter 7) as well as the course for reinstating disciplinary proceedings (chapter 8).

Pursuant to the contents thereof, the superior initiates disciplinary proceedings, while they are conducted by the superior, an official or a team of officials designated by the said superior. After conducting the evidence-gathering proceedings the person conducting the proceedings drafts a report concluding the disciplinary proceedings which shall entail *inter alia* a precise specification of the deed with which the defendant is accused along with the consequences thereof, a description of the factual state of affairs which has been established on the grounds of the evidence collected and the conclusions pertaining to terminating the disciplinary proceedings or the infliction of a sanction along with a reasoning showing mitigating and incriminating circumstances (§ 20 of the regulation). A decision shall be made to discontinue the proceedings or to recognize the guilt of the defendant for having committed the infraction and to inflict punishment on the grounds of the evidence gathered in the case and after having heard the defendant.

A grievance may be submitted against the foregoing decision to the disciplinary court with jurisdiction which in keeping with the status of an appellate body may adjudicate on maintaining the validity of the decision, amending the decision, or repealing the decision and remanding the case for reconsideration by the superior concurrently listing the errors (§ 52, section 1 of the regulation).

The challenged § 54, section 2 of the regulation is situated in chapter 5 referring to the appellate proceedings against decisions to inflict a disciplinary sanction. The contents thereof („No means of appeal is due against decisions made by a disciplinary court”) leave no doubts about the finality of a disciplinary court's decision.

Based on the regulation depicted above pertaining to disciplinary proceedings, the complainant received a disciplinary sanction expelling him from the prison service on the basis of the decision made on 28 January 1998 by the General Director of the Prison Service (file number NK. 288/98). The complainant submitted a grievance against the decision to inflict the foregoing sanction to the Disciplinary Court at the Central Management Board of the Prison Service. The Disciplinary Court in its decision dated 3 March 1998 (file number SD/CZSW/1/98) upheld the validity of the ruling which was the subject of grievance concurrently asserting that no means of appeal are due against this decision. The subject of the constitutional complaint is the regulation embodied in § 54, section 2 of the regulation issued by the Minister of Justice, according to which no means of appeal are due against decisions made by a disciplinary court. The complainant was personally affected by the contents of the said regulation for the Disciplinary Court at the Central Management Board of the Prison Service upheld the validity of the decision made by the General Director of the Prison Service against which a grievance was lodged thereby adjudicating with finality about his rights prescribed in the Constitution.

The complainant pointed to article 77, section 2 of the Constitution as the grounds of his rights having been violated by the provision against which a grievance was lodged.

2. Article 77, section 2, indicated by the complainant as the grounds for a constitutional complaint, entails a ban against closing the judicial path to pursue violated freedoms and rights and is an element of constitutional access to courts whose basic normative part has been embodied in article 45, section 1 of the Constitution. The organic tie between these two provisions of the Constitution has been universally perceived in academic literature simultaneously showing that article 77, section 2 of the Constitution „constitutes the completion of the constitutional jurisdiction of access to courts” and that in essence access to

courts and not a ban against closing the judicial path is the means for protecting freedoms and rights.

Access to courts deduced from the democratic rule of law before the Constitution of the Republic of Poland was ratified has currently found expression directly in the provisions of the Constitution referred to above. The basic regulation providing for its identification, set out in article 45, section 1 of the Constitution, stipulates that „Everyone has the right to the fair and public consideration of his/her case without undue delay by the court with jurisdiction, which is independent and impartial.” The contents thereof, inspired by opinions in the doctrine of law, the international standards of human rights included in article 14 of the International Pact on Civil and Political Rights and article 6, section 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms as well as by the Constitutional Tribunal's collection of hitherto decisions are comprised, in particular, by 1) access to court, i.e. the right to launch a procedure before the court – an organ with a specific nature (independent and impartial), 2) the right to shape litigious proceedings appropriately in compliance with the requirements of justice and public disclosure and 3) the right to a court judgment, i.e. the right to trial to obtain a binding decision from the court.

In reference to the opinions of the doctrine the Constitutional Tribunal has previously defined and characterized the so-understood contents of access to courts in several of its deductions (decision dated 8 April 1999, file number K.14/96, judgment dated 9 June 1998, file number K. 28/97), judgment dated 8 December 1998, file number K. 41/97).

In the cases cited above the Constitutional Tribunal asserted that those provisions are unconstitutional which deprive a citizen of the protection of the court, whether that be in cases derived from an official relationship or in disciplinary matters and that neither a peculiarity of the official relationship nor the particular course of proceedings, such as the disciplinary proceedings (conducted within specific corporations or services) may justify the exclusion in these instances of access to courts.

In particular, the Constitutional Tribunal would like to cite the most recent decision from among the ones mentioned above (file number K. 41/97) in which it stated that the provisions on disciplinary proceedings against bailiffs do not violate the constitutional principle of access to courts since the right to appeal to a district court against the decisions of the disciplinary commission in the first instance is vested thereunder, and thus to the court of labor and social security. In this manner the Constitutional Tribunal wanted to indicate the possible direction for regulating cases in the field of disciplinary proceedings in the future.

According to the Constitutional Tribunal, the will of the creator of the system follows unequivocally from article 45, section 1 of the Constitution that the widest possible range of matters should encompass access to courts, while the interpretational directive banning a narrower interpretation of access to courts flows from the democratic rule of law. The Constitution has introduced the presumption of the judicial path, with respect to which all restrictions and limitations upon the judicial protection of an individual's interests must follow from the provisions of the fundamental statute. In the event of a collision between access to courts and some other constitutional norm protecting values of equal or even greater importance for the operation of the State or the development of an individual and the necessity to take into consideration both constitutional norms, this may lead to the introduction of certain restrictions and limitations upon the subject matter scope of access to courts. Such restrictions and limitations, however, are permissible to the absolutely necessary extent if the realization of a given constitutional value is not possible in any other manner. The Constitutional Tribunal drew attention to this in its judgment dated 9 June 1998, file number K. 28/97. These restrictions and limitations may be instituted only by statute and only if they

are necessary in a democratic state for its safety or public order, or for the protection of the environment, health and public morality or the freedoms and rights of other persons (article 31, section 3 of the Constitution of the Republic of Poland). Nor can they violate the essence of the freedoms and rights which they constrain. Referring to article 77, section 2 of the Constitution this means that the restrictions and limitations (described in article 31, section 3 of the Constitution) cannot in general exclude the judiciary path since that would obviously contravene article 77, section 2 of the Constitution, where such restrictions and limitations, which would actually close the citizen's path to the court, should be recognized as unconstitutional.

The evaluation of the regulation under grievance embodied in § 54, section 2 of the regulation issued by the Minister of Justice through the prism of the findings pertaining to the disciplinary proceedings for Prison Service officials and the evaluation of constitutional access to courts point to the substantiation of the allegation about its nonconformity with the constitutional ban against closing the judicial path to a person pursuing his/her constitutional freedoms or rights. Concurrently, it should be noted that, according to article 77, section 2 of the Constitution, this ban refers to the content of statutes. All the more impermissible is a regulation closing the judicial path to pursue violated rights which is based on a sub-statutory act. This simultaneously constitutes, as the Prosecutor General notes, a violation of the exclusivity of statutes to regulate the subject matter in article 31, section 3 of the Constitution.

Disciplinary liability, as the Prosecutor General notes, arises as a result of Prison Service officials not adhering to the bans and orders prescribed in the Prison Service Act, but where everyone of these orders and bans constitutes a restriction and a limitation of human freedom. The means to protect freedom is access to courts. In turn, closing the judiciary path in cases referring to human freedoms, according to article 77, section 2 of the Constitution, is impermissible. The lawgiver should therefore mold the scope of the jurisdiction of the courts in such a manner such that some court would have the jurisdiction to consider a case on the violation of freedoms and human rights.

Moreover, disciplinary liability is repressive in nature. The Constitutional Tribunal in its judgment dated 8 December 1998 (file number K. 41/97) drew attention to this nature of disciplinary proceedings and their proximity to state penal law, reasoning for the necessity of providing all the guarantees prescribed in chapter II of the Constitution to disciplinary proceedings, too.

The collection of disciplinary decisions, as a rule, is exercised by specialized extra judiciary organs: disciplinary commissions or disciplinary courts. In the case under consideration referring to Prison Service officials, it is exercised by the superior in the first instance and the disciplinary court with jurisdiction acting in the instance of appeals. In the event that extrajudiciary organs are charged with making decisions on legal conflicts, access to courts, according to the opinions of the doctrine, should be realized by providing for the opportunity for a court to verify the rectitude of the decision made by every extra judiciary organ.

The provision of the regulation, against which a grievance was lodged, closed however the path to review these decisions by any court whatsoever. Hence its contravention of article 77, section 2 of the Constitution is manifest.

3. At the hearing the representative of the Prosecutor General declared that an initiative has already been undertaken at the Ministry of Justice to amend the Prison Service Act and the regulation issued by the Minister of Justice in the matter of the disciplinary bylaws for Prison Service officials and that this initiative aims to ensure that complainants will have access to courts in disciplinary proceedings. Taking into consideration this information as

well as faced with the fact that the abatement of paragraph 54, section 2 of the regulation mentioned above would lead with immediate effect to a gap in the law and an inability to conduct disciplinary proceedings against Prison Service officials, the Tribunal determined that paragraph 54, section 2, cited above, shall forfeit its binding force not on the date of publication but at a later date, facilitating the amendment of the legal situation in such a way so as to ensure simultaneously access to courts to all those persons whose proceedings are currently underway, including those which are being conducted before the Constitutional Tribunal. (...)