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Extract from the IHF report

Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005 (Events of 2004)

Poland¹

IHF FOCUS: good governance; freedom of expression, free media and information; peaceful assembly; fair trial and effective remedies; anti-terrorism measures; torture, ill-treatment and police misconduct; arbitrary arrest and detention; conditions in prisons; right to life; respect of private life; security services; rights of the child; property rights; national and ethnic minorities; asylum seekers and refugees; trafficking in human beings.

In 2004, some significant improvements took place in the field of human rights. A major accomplishment was the long-awaited adoption of the National and Ethnic Minorities and Regional Language Act, originally prepared by the Helsinki Foundation for Human Rights (HFHR) in 1993, which provide for better protection of minority group languages both in private and public life.

Another positive development was the ratification of the 1997 EU convention on the fight against corruption. However, with corruption on the constant rise, additional anti-corruption legislation is necessary.

Additionally, an act was passed in September to support the right to fair trial by making it possible for parties to file for monetary compensation upon undue delay of proceedings. In addition, the European Court of Human Rights (ECtHR) ruled against Poland in dozens of cases for violations of a right to a fair trial within a reasonable time. Yet, protracted court proceedings remained a central human rights problem.

Independent local media outlets were increasingly subjected to political pressure and economic sanctions in 2004, and journalists continued to be accused of slander.

Another cause for grave concern was continued reports of torture and ill-treatment by the police, as well as numerous instances of arbitrary arrests and detention, especially regarding pre-trial detention. Prison conditions remained unsatisfactory and prisons were seriously overcrowded.

Other topics which deserved urgent attention were the protection of the rights of the child, asylum seekers and of victims of human trafficking.

¹ As reported by the Helsinki Foundation for Human Rights. This contribution was prepared by Magdalena Kmak, Andrzej Krempleski, Karolina Oponowicz and Krzysztof Wilamowski.

Good Governance

Poland ratified the Convention on the Fight against Corruption Involving Officials of the European Communities or officials of Member States of the European Union (of 26 May 1997). In addition, amendments to the Penal Code, which took effect on 1 July 2003, set forth regulations aiming to combat corruption.² Within one year of the newly effective anti-corruption regulations, which warrant impunity to those informing on cases of bribery, two hundred corruption cases came to light. Previously, corruption was hardly detectable.³

In June 2004, the CBOP polling company published the results of a survey on how the Polish population perceived corruption in Poland. The survey indicated that 95% of Poles believed that corruption was a serious problem. Seventy-seven percent of the respondents thought that many state officials took advantage of the positions they held, and 71% percent were of the opinion that when “money talks,” even a law may be enacted or amended in Poland.

Poland was the scene of many corruption scandals in 2004. The problem was most prominent in the public procurements market, where most tenders were conducted. In order to win tenders, participants frequently manipulated the technical parameters, set conditions that could only be satisfied by certain companies, and tampered with cost estimate figures and payment deadlines.⁴

The Public Procurements Act of March 2004 imposed more stringent criteria for participating in bidding procedures. Still, the law does not work well in practice. Despite having various legal instruments at hand, parties to tenders have not been keen to use them, because, among other things, the law is highly controversial.⁵

- One of the recent corruption scandals involved Lew Rywin,⁶ a well-known film producer, who extended a corruption proposal to Agora, a Polish media group. This happened on the occasion of pending amendments to the Media Act. Rywin offered a scheme to quash the anti-concentration clauses in return for taking a top management position in a TV station. In April 2004, a court of first instance sentenced Lew Rywin to 2.5 years in prison for fraud. He appealed, and the case was pending in the second instance as of the end of 2004.
- Another widely covered, albeit obscure, case was the corruption affair related to PKN Orlen, Poland’s largest petroleum group, which involved politicians, business people and the secret service. At the instigation of state authorities, secret service agents unlawfully arrested PKN Orlen’s president of the board of. As of the end of the year, the case was being screened by a parliamentary inquiry committee whose work in progress increasingly revealed that the scandal involves an expanding number of individuals in top state positions and business figures.

In addition to the already taken legal measures to fight against corruption, some Polish politicians wished to go further and append the existing body of legislation. Some members of parliament tabled a bill to amend the law to restrict the pursuit of business activity by persons in high public positions. The bill aims to impose a mandatory disclosure of the sources of funds of their business activities, and to make

² Article 230a of the Penal Code of 6 June 1997 (*Journal of Laws* of 1997, number 88, pos. 553, as later amended).

³ *Rzeczpospolita*, No. 228, 28 September 2004, p. C1.

⁴ *Rzeczpospolita*, No. 162, 13 July 2004.

⁵ Interview with Grażyna Kopińska, head of the “Against Corruption” program run by the Stefan Batory Foundation and member of the Public Procurements Board, *Tygodnik Powszechny*, No. 33, 15 August 2004, p. 3.

⁶ See IHF, *Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2004 (Events of 2003)*, http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860.

politicians and officials submit information on separate property of spouses, siblings, ancestors and descendants. The proposals are found to be controversial.⁷

Freedom of Expression, Free Media and Information

Independent local media outlets were increasingly subjected to political pressure and economic sanctions in 2004. In addition to harassment and insults, another method used frequently by local politicians to exert pressure on journalists and publishers was threatening to get advertisers to cut their advertising budgets with the media.

- Following unflattering reports on the chief of the Kowiesy municipality in the local newspaper *Głos Skierniewic i okolic*, the paper's advertisements disappeared from billboards.
- As soon as the local newspaper *Fakty* featured reports of the mayor of Bełchatów (central Poland) employing his friends and family, the town stopped placing its ads in the newspaper.
- In Szczytno, a local councilor criticized in the *Kurek Mazurski* threatened the newspaper's publisher and owner that he would have the newspaper bankrupt.⁸

Increasing numbers of criminal and civil defamation lawsuits were filed against reporters⁹ who had criticized public officials for their poor performance of duties. The Polish law still stipulates criminal liability for slander, and prosecutors initiated penal proceedings against journalists in 2004, which resulted in self-censorship and restricted the freedom of expression.

- Andrzej Marek, editor-in-chief of the *Wieści Polickie* weekly, described a case in which the Police Council's media officer urged the town's advertisers to collaborate with the advertising agency he had worked for and dissuaded them from advertising with *Wieści Polickie*. The court of first instance found that the official was slandered, sentenced the journalist to three months of suspended imprisonment and ordered him to apologize to the "slandered" official. The court of second instance upheld the verdict and adjudicated that the suspended penalty be enforced. This did not happen, however. On 22 June, the Supreme Court of Justice upheld the sentence. The general prosecutor initiated a pardon procedure, and the journalist had his punishment deferred again.
- Marian Maciejewski, working at the regional Lower Silesian edition of the *Gazeta Wyborcza* nationwide daily, was found guilty of reporting that could result in the loss of public confidence in the judiciary. On 25 November 2000, Maciejewski criticized the operation of judges of the Wrocław Regional Court and District Court at the Wrocław-Krzyki borough. The article was entitled "False Look of the Wrocław Temida" and it was published in the Wrocław-based *Gazeta Wyborcza - Gazeta Dolnośląska*. Maciejewski cited demeaning conduct on the part of the judges, referring to them as "the thieves in the judiciary" and citing "mafia-type dealings" between prosecutors and judges. In addition, Maciejewski was found guilty of unjustifiably imputing undue pursuit of the investigation in one case to the regional Wrocław prosecutor. The District Court at Brzeg, Lower Silesia, sentenced Maciejewski to a fine of PLN 1,800 (approximately

⁷ Amendment to the law restricting the pursuit of business activity by persons in public positions. The Sejm Papers No. 3017 [Ustawa o zmianie ustawy o ograniczeniu prowadzenia działalności gospodarczej przez osoby pełniące funkcje publiczne. Druk sejmowy nr 3017], www.sejm.gov.pl.

⁸ "Małym trudniej pisać prawdę," *Rzeczpospolita*, No. 258, 3 November 2004.

⁹ "Złe sygnały dla dziennikarzy," *Rzeczpospolita*, No. 266, 13-14 Nov. 2004.

EUR 450) and compensatory damages of PLN 1,000 (EUR 250). On appeal, the case was referred to the Opole Regional court.

The HFHR acts in the case of Maciejewski as a representative of society and it petitioned to the court in an *amicus curiae* brief stating that the decision of the court is to be based on standards, which provide for the protection of human rights. It will also take up the constitutionality of the Polish Penal Code article 212(2) that provides for criminal liability for slander, and article 213(1) that lays down the premises for relieving oneself of such liability.

The HFHR noted that these provisions of the Criminal Code are grossly at variance with article 54(1) of the Constitution, as they seriously restrict the right of journalists to enjoy freedom of expression. Moreover, these provisions stipulate that in order to relieve oneself of criminal liability, a journalist must prove the veracity of his/her reports, while the standards of the ECtHR merely require that journalists maintain professional integrity in soliciting information. Further, the provisions set forth grossly disproportionate penalties (of up to two years of imprisonment) vis-à-vis the interest at stake. The HFHR pointed out that people's reputations also can be protected by less onerous methods, such as civil lawsuit. The HFHR suggested that the Opole Regional Court address a legal query to the Constitutional Court so that the court may take a position on what is a particularly important issue from the freedom of expression perspective. A possible Constitutional Court ruling, which would deem the aforementioned Penal Code provisions unconstitutional, might not only bring about the acquittal of Marian Maciejewski, but also put an end to all other pending criminal proceedings in similar cases.¹⁰

Confidentiality of Journalistic Sources and Access to Information

In a corruption scandal involving Andrzej P., a member of parliament, the local prosecutor in Kalisz demanded that a telephone operator disclose information on the telephone conversations of investigative journalists working for *Gazeta Wyborcza* and *Rzeczpospolita*, Poland's key dailies. The two journalists were collecting information on Andrzej P.'s alleged corruptive practices.

The prosecutor's decision violated the confidentiality of journalistic sources, and therefore violated the freedom of the media. The Helsinki Committee in Poland and the HFHR stated that the prosecutor's decision was yet another example of attempts to limit press freedoms. They noted that using penal law provisions to stop journalists from researching issues that are of vital public importance is a practice totally alien to the spirit of the rule of law. They continued: "Such practices break the fundamental laws on the freedom of expression and the right to good administration."¹¹

In late 2004, work was underway in the *Sejm* (lower house of parliament) on government-submitted amendments to the Classified Information Protection Act of 22 January 1999.¹² According to the HFHR and to the Monitoring Centre for the Freedom of the Press, the proposed amendments intend to overly restrict access to information of public importance of interest and allow for undue interference by security agencies in private and business life. They maintain and even extend the inadequate regulations concerning protection of classified information; consolidate the discretionary practice of giving access to public information; further increase the powers of the state security services; broaden the scope of interference by law enforcement agencies in the operation of agencies and entrepreneurs; and enhance surveillance and restriction of private life.¹³

¹⁰ Communication of the HFHR related to acting in Marian M.'s case as a representative of society.

¹¹ *Gazeta Wyborcza*, No. 280, 30 November 2004, p. 6.

¹² The Sejm papers No. 2165, <http://www.sejm.gov.pl>.

¹³ See <http://www.freepress.org.pl/old/Wyklad.doc>.

The Constitution of Poland grants all citizens the right to seek information on the operation of public authorities and people in public functions.¹⁴ Pursuant to the Freedom of Information Act,¹⁵ all public institutions and organizations performing tasks and purposes of public nature must provide access to official documents (public information). In practice, however, public offices frequently barred access to information in 2004 under various excuses. They did not make their decisions available and sometimes failed to reply to queries or responded with general, rather than specific documents.¹⁶

Problems in accessing public information were also encountered by the media, chiefly local, who in most cases were able to obtain information only after a court judgment was promulgated.

Peaceful Assembly

In April 2004, the *Sejm* enacted the government's amendment of the law on public assemblies. The lawmakers carried out the mandatory consultation, but NGOs were not consulted about the bill.

The central objective of the amendment was to tighten the regulations concerning public assemblies. Had the amendment become effective, any assembly including a person "whose external appearance would prevent their identification" would be illegal. In addition, the assembly's leader would have been personally liable for damage caused by the participants.

Human rights NGOs found both amended provisions to run counter to article 57 of the Constitution, which safeguards the freedom of holding peaceful assemblies and participating in them, and appealed to President Kwaśniewski not to sign the bill. The president referred it to the Constitutional Court, which ruled in November that both provisions are too restrictive for the constitutionally guaranteed freedom of assembly.¹⁷

- In 2004, the freedom of a peaceful assembly was violated on the occasion of the "Equality Parade" intended to be organized by the International Lesbian and Gay Association in Warsaw on 11 June.¹⁸ The League of Polish Families (Liga Polskich Rodzin, a radical right wing political party represented in the *Sejm*) and the All-Polish Youth (Młodzież Wszechpolska, the league's junior arm) announced their plan to hold a march on the same day. The Warsaw Council asked mayor Lech Kaczyński not to give his assent to the parade, i.a., due to the date chosen – which was the day after Corpus Christi, an important religious holiday – and the fact that the parade's route was close to church buildings. The parade's organizers modified the route accordingly, and the All-Polish Youth opted to follow in a procession behind the gay parade. As a result, the mayor of Warsaw banned both parades, claiming that they could cause "hazards to human health, life or property."¹⁹ However, the head of the Mazowsze province administration overruled the decision, after which the mayor re-issued the ban, this time justifying it by declaring the gay parade as "offending public morals by flaunting attitudes of sexual minorities regarding their sexual behavior" and offending "religious sensitivities of parts of the general public."²⁰ The head overruled the mayor's decision again. In the face of the mayor's third ban, the "Equality Parade" was replaced by the "Equality Rally" on 11 June.

¹⁴ Article 61 of the Constitution of the Republic of Poland.

¹⁵ Public Information Access Act of 6 September 2001, *Journal of Laws* 2001, No. 112, pos. 1198 and *Journal of Laws* 2002, No. 153, pos. 1271.

¹⁶ *Rzeczpospolita*, No. 260, 5 November 2004

¹⁷ Judgment of the Constitutional Court No. Kp 1/04, 10 Nov. 2004, www.trybunal.gov.pl.

¹⁸ E. Siedlecka, "Grają paradą w ping-ponga," *Gazeta Wyborcza*, No. 123, 6 June 2004.

¹⁹ *Ibid.*

²⁰ *Ibid.*

Fair Trial and Effective Remedies

Between 1 January and 14 December 2004, the ECtHR found violations of article 6(1) (right to a fair trial within a reasonable time) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 56 cases against Poland due to protracted court proceedings.²¹ The cases concerned complaints lodged with the ECtHR in 1997-2003. A few hundred similar cases are still pending before the court. Two cases have been struck off the list following friendly settlements.²² In two other cases, the ECtHR also found breach of article 13 (effective remedy before a national authority) due to absence of the right to effective remedy.²³

On 17 September, an act came into force that makes it possible to complain against violations of the right of a party to adjudge a case before the court without undue delay. The law was enacted in implementation of the obligation imposed on Poland by the ECtHR as an aftermath of the case of *Kudla v. Poland*.²⁴ A court of appeal may rule a compensation for delay in judicial proceedings of maximum PLN 10,000 (EUR 2,500).

In the first month of the law's effective operation, courts were addressed with several hundred complaints of which only few were granted. The plaintiffs waited two weeks for the initial batch of rulings to come through. Financial compensation was awarded in just a few cases and never exceeded PLN 300 (EUR 75) which – given the weight of breaches of law (negligence on the part of the judiciary resulting in uncertainty and other damages to parties to the proceedings) – should be considered as a less-than-token sum.

Several complaints against the violation of the right to fair trial were pending in Polish courts.

- In one complaint, the HFHR represents 19 individuals who were accused of being part of a criminal organization. The case of defendant Grzegorz R. was dealt with in separate proceedings. The Regional Court in Płock found him guilty. In its substantiation, the court pointed out that the defendant committed crimes jointly with individuals subject to the main trial. In this instance, breach of the right for the case to be examined by an impartial court consists in the fact that the case will be examined in the main trial by the court of the same constitution, which had sentenced Grzegorz R. (and developed confidence in the guilt of the remaining 18 defendants) and thus cannot act unbiased. As of the end of 2004, the HFHR was preparing a legal opinion on the matter, which concerns the possible violation of the right to fair trial by infringing the impartiality principle.

Access to Legal Counsel

In its consideration of the fifth periodic report of the Republic of Poland on implementation of the International Covenant on Civic and Political Rights (ICCPR), the UN Human Rights Committee addressed the issue of access to legal aid by detainees. In its Recommendation C-14: “the Committee notes the State Party’s intention to undertake a comprehensive reform of the Polish legal aid system, but

²¹ For the list of all these cases, www.hfhrpol.waw.pl.

²² *Sobczuk v. Poland*, 25 May 2004, Appl. No. 51799/99; *Ostrowski v. Poland*, 28 September 2004, Appl. No. 63391/00.

²³ *Lislawaska v. Poland*, 13 July 2004, Appl. No. 37761/97; *Zynger v. Poland*, 13 July 2004, Appl. No. 63389/00.

²⁴ *Kudla v. Poland*, 26 October 2000, Appl. No. 30210&96. The complaint concerned violations of number of rights guaranteed in the ECHR, the most important of which was a violation of article 6 by Poland (right to a fair trial within a reasonable time). The ECtHR, among other things, obliged Poland to introduce an effective remedy to for the applicants for a violation of this right.

regrets that persons detained cannot at this time enjoy their right to legal aid from the beginning of their detention (Article 14). The State party should take measures to ensure that all persons, including those in detention, have access to legal aid at all times.”²⁵

The possibility of detainees exercising their right to defense was also subject of a Constitutional Court verdict. In early December, the court ruled that provisions of the Criminal Procedure Code are unconstitutional as they do not warrant detainees, their counsels or attorneys the right to partake in a court sitting aimed to examine their complaints against detention. In practice, the detainees’ right to partake in the sitting has been granted purely at the discretion of the courts. The Constitutional Court stressed that the decision to detain concerns fundamental personal freedoms guaranteed by article 41(1) of the Constitution, which states: “Personal inviolability and security shall be ensured to everyone.”

The Constitutional Court underlined the fact that the constitutional right to defense should be understood broadly. It covers various criminal proceedings stages such as preparatory, executory and interlocutory proceedings, such as the examination of the complaint against the detention decision. In the Constitutional Court’s view, the Criminal Procedure Code did not guarantee that citizens may exercise the right to a hearing, which entails the right to partake in a court sitting. The code therefore breaches the constitutional principle of fair trial (article 45 of the Constitution).²⁶

Access to legal counsel in general, an issue expounded on in the IHF previous report,²⁷ has since not been resolved. On the contrary, the situation has worsened due to the actual barring of access to the professions of advocate (*adwokat*)²⁸ and legal counsel (*radca prawny*).²⁹ The Constitutional Court ruled that the Bar Act and the Legal Counsel Act were unconstitutional insofar as they pertained to recruitment into legal training to become an advocate or legal counsel. Yet, a new law has not been enacted, which has practically caused a void.

In 2004, some regional Bar and Counsel Associations opted for recruiting pursuant to the unconstitutional regulations thereby risking the allegation of acting without a legal basis. In most cases, however, associations did not recruit at all. There is no indication when the *Sejm* will adopt amendments to both acts. Given the reticence of both professions, it is very likely that no recruitment will ensue in 2005 either, or will proceed pursuant to unconstitutional regulations.

Anti-Terrorism Measures

In August 2004, the aviation law, state borders protection law and several other laws were amended. Under the amended regulations, a passenger or other civilian aircraft may be destroyed with no prior warning if required by state security concerns and if the air defense command authority finds that the aircraft is used for illegal purposes, in particular as a means of airborne terrorist attack. Moreover, determination of the exact procedure for taking actions in this respect has been left to the Ministry of National Defense and the minister relevant for transportation. Detailed regulations in this matter may

²⁵ *Concluding Observations of the Human Rights Committee: Poland. 02/12/2004. CCPR/CO/82/POL. (Concluding Observations/Comments),*

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/66db176cab27b16c1256f43005ba2e7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/66db176cab27b16c1256f43005ba2e7?Opendocument).

²⁶ Press release regarding the verdict in case no. SK 29/04 of 6 Dec. 2004; www.trybunal.gov.pl.

²⁷ See, IHF, *Human Rights in the OSCE Region: Europe, Central Asia and North America. Report 2004 (Events of 2003)*, http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=3860.

²⁸ Barrister (UK), attorney-at-law (US).

²⁹ Roughly corresponding to *solicitor* (UK), or *jurisconsult* (EU).

therefore require only a joint implementing regulation by both ministers and need not necessarily be approved by the *Sejm*.

The new regulations resulting from the war on terrorism thus vest enormous powers with the decision makers and may lead to serious human rights violations, including the violation of the right to life.

Torture, Ill-Treatment and Police Misconduct³⁰

A recent report by the HFHR implied that Poland had no effective and independent system for examining complaints against human rights violations by police officers.³¹ Inquiry procedures were conducted by and within internal police structures and in principle were based on findings communicated to higher echelons by the unit in which the incriminated officers worked.

In addition, NGOs did not have any instrument to hold people accountable of violations of which they were effectively guilty.

Preparatory procedures in criminal cases were normally conducted by local prosecutors whose jurisdiction covered that of the police precinct in question. This bred situations in which prosecutors conducted proceedings against officers with whom they collaborated on a daily basis, as illustrated below.

- In the case of Kamil P., accused of mugging, his father notified the district prosecutor's office in Legionowo, north of Warsaw, that his son had been beaten by police officers during an interrogation at the local police department. The prosecutor initiated investigation into the case but discontinued it despite visible traces of beating on Kamil P.'s body during the meeting designed to administer pre-trial detention, at which the Legionowo prosecutor was present. Kamil P.'s father filed a complaint against the local prosecutor's decision, but the prosecutor refused to accept it as purportedly filed by a person who was not party to the proceedings. Consequently, Kamil P., who continued to be temporarily detained, applied to the prosecutor for reinstating the deadline for complaining against the decision to discontinue the proceedings. The request was rejected by the Legionowo prosecutor. Due to the intervention of the HFHR and other organizations, the court examined Kamil P.'s application. However, the court did not concur with his request or the HFHR's position and upheld the prosecutor's decision.

Just as with the police, there was no independent and effective system of examining complaints against human rights violations by prison guards. Regardless of whether a complaint was addressed to the Central Prison Administration or to the Regional Prison Service Inspectorate, on principle it would be forwarded for consideration and addressing of the allegations by the administration of the penal institution concerned.³²

Arbitrary Arrest and Detention

Courts almost routinely ordered suspects to be held in pre-trial detention, a practice therefore unconstitutional (article 41 of the Constitution) and non-compliant with the ICCPR (article 9). Frequently, the initial arrest was justified, albeit for a period shorter than the three months commonly applied. Despite

³⁰ See also the section on the Right to Life.

³¹ *Sprawozdanie z działań przeprowadzonych w ramach programu "Zapobieganie torturom w instytucjach izolacyjnych Europy Centralnej i Wschodniej" w okresie od 1.06.2003 do 30.04.2004 roku. Grupa polska; nie publikowane*, s. 10 [Activity report within the scope of the program "Prevention of Torture in Confinement Institutions in Central and Eastern Europe" between 1 June 2003 and 30 April 2004. Polish Group; unpublished, p. 10].

³² *Ibid.* p. 10.

this, the prosecutor or the police often failed not to conduct the investigation in the meantime, and detention was automatically extended by another three months.

- Kamil P. (case described above) spent 11 months in pre-trial detention (from December 2003 to November 2004). During the first police interrogation, his alleged victim stated that he did not recognize Kamil P. as the perpetrator of the mugging. Initially, Kamil P. confessed to the charge. Still, as early as at the first session held to apply the pre-trial detention measure, both the judge and the prosecutor should have noticed traces of beating on the suspect's face and body, which showed that he had been ill-treated while in police custody. Kamil P. was first afraid to retract his statements but finally did so after being transferred from the Legionowo police station to the remand facility at Warszawa Grochów in January 2004. He then stated that his initial confession was extracted under beating by the police. Despite this fact, pre-trial detention was still applied – the court disregarded the HFHR's opinion that a continuation of pre-trial detention would be ill-grounded. Kamil P. was released from detention in November only after hearing the aggrieved party, who had previously not turned up for the hearing twice.
- Krzysztof S., charged with murder, asked the HFHR to intervene in his case because he found that the time he had been held in pre-trial detention was excessive – 16 months as of that time. The HFHR submitted a legal opinion to the District Court of Bielsko-Biała. It stated, *inter alia*, that the necessity to apply arrest as the only effective preventive measure was not in any way substantiated. In addition, the HFHR found the application of the most severe preventive measure for such a long period solely on the premise of “impending severe punishment” to be inadmissible. The district court did not concur with the HFHR's opinion and, as of January 2005, Krzysztof S. was still being held in pre-trial detention, and the HFHR was considering submission of another legal opinion.

The UN Human Rights Committee has also pointed to the automatic fashion in which prolonged pre-trial detention has been unduly applied in Poland. In its recommendations, the committee stated: “While welcoming recent changes in legislation designed to reduce pre-trial detention, the Committee is concerned that the number of persons in pre-trial detention remains high (Article 9). The State party should take further steps to reduce the number of persons in pre-trial detention”(C-13).³³

Between 1 January and 31 October 2004, in three cases against Poland, the ECtHR found breaches of article 5(1) of the ECHR (right to liberty and security of person).³⁴ The court found that article 5(3) (right to be brought promptly before a judge) was breached in six cases,³⁵ with another three cases of violating article 5(4) (speedy decision by a court on lawfulness of detention) of the ECHR.³⁶

- In the case of *G.K. v. Poland*, the ECtHR ruled that Poland breached article 5(1, 3 and 4) of the ECHR due to detaining the complainant unlawfully for 24 days, imposing an excessive three-year

³³ *Concluding Observations of the Human Rights Committee: Poland. 02/12/2004. CCPR/CO/82/POL. (Concluding Observations/Comments),* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/66db176cab27b16c1256f43005ba2e7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/66db176cab27b16c1256f43005ba2e7?Opendocument).

³⁴ *D.P. v. Poland*, 34221/96; *G.K. v. Poland*, 20 January 2004, Appl. No. 38816/97; *Ciszewski v. Poland*, 13 July 2004, Appl. No. 38668/97.

³⁵ *D.P. v. Poland*, f 34221/96; *G.K. v. Poland*, 20 January 2004, Appl. No. 38816/97; *J.G. v. Poland*, 6 April 2004, Appl. No. 36258/97; *M.B. v. Poland*, 27 April 2004, Appl. No. 34091/96; *Wesolowski v. Poland*, 22 June 2004, Appl. No. 29687/96; *Paszkowski v. Poland*, 28 October 2004, Appl. No. 42643/98.

³⁶ *G.K. v. Poland*, 20 January 2004, Appl. No. 38816/97; *M.B. v. Poland*, 27 April 2004, Appl. No. 34091/96; *Wesolowski v. Poland*, 22 June 2004, Appl. No. 29687/96.

pre-trial detention and depriving the complainant of legal instruments for lodging a complaint against the detention decision.³⁷

In another case, the ECtHR ruled that pre-trial detention was unjustified while the preparatory proceedings were underway, which was in breach of article 5(3) of the ECHR.³⁸

Conditions in Prisons

Conditions in Polish prisons did not improve during the course of 2004. Prisons continued to contend with financial and staffing problems. Overcrowding remained the key issue, however. On 30 December, Polish penitentiary institutions held a total of 80,356 inmates. One month earlier, there were another 31,017 lawfully sentenced persons waiting for the execution of their prison service (for 27,605 of whom the deadline for turning up to serve the sentence had lapsed).

According to the Central Prison Administration, prisons were overcrowded by 15–17%.³⁹ Yet, in reality, overcrowding was even worse than the statistics showed. While official statistics were based on 3-3.5 square meters per inmate, in reality the entire usable prison area was used as the basis for the calculations, thus making overcrowding an even more serious problem. The European Committee against Torture (CPT) and the UN Committee against Torture (CAT) demand at least four square meter per inmate in European countries. Due to the growing overcrowding in the past five years, areas such as common rooms and workout rooms have been converted into cells. Combined with the aforementioned over 30,000 convicts awaiting to serve their term, the prison system may be said to fall short of some 60,000 places, and overcrowding overshoots the 200% mark across the country.

Overcrowding was not so much due to negligence on the part of the prison service as to Poland's penal policy of the past few years. The UN Human Rights Committee also commented on this by noting: "While taking note of measures to address overcrowding in prisons, the Committee remains concerned that many inmates still occupy cells which do not meet the requirements established by the UN Standard Minimum Rules of Treatment of Prisoners. It is also concerned that judges do not make full use of alternative types of punishment available under the law (Article 10). The State Party should take further measures to address overcrowding in prisons and to ensure compliance with the requirements of article 10. It should also encourage the judiciary to impose alternative forms of punishment more frequently" (C-12).⁴⁰

The stringent penal policy was shown in the case of Rajmund Z., an inmate at the Wronki Penitentiary, who complained to the HFHR that, despite serving 11 out of 15 years of his sentence, he was not given a pass to visit his dying mother or to attend her funeral. The court did not rule an early release of Rajmund Z. despite several years of commendations from the penitentiary in his favor.

Right to Life

In less than a fortnight, Poland witnessed three deaths due to serious police misconduct, with another several dozen cases of bodily injuries. These cases ruthlessly laid bare the loopholes in the procedures by

³⁷ *G.K. v. Poland*, 20 January 2004, Appl. No. 38816/97.

³⁸ *J.G. v. Poland*, 6 April 2004, Appl. No. 36258/97.

³⁹ *Podstawowe problemy więziennictwa* [Key Issues of Prison System], Centralny Zarząd Służby Więziennej [Central Prison Administration], Warsaw, April 2004, p. 5; www.czsw.gov.pl.

⁴⁰ *Concluding Observations of the Human Rights Committee: Poland. 02/12/2004. CCPR/CO/82/POL. (Concluding Observations/Comments)*, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/66db176cab27b16c1256f43005ba2e7?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/66db176cab27b16c1256f43005ba2e7?Opendocument).

which Polish police may resort to use of arms. Inquiries into the cases in which police used firearms were too general in nature, and consequently police officers did not feel accountable for overstepping their powers in this respect.

In mid-2004, the Ministry of Internal Affairs and Administration was drawing up a new draft Police Act, which aimed to provide for a major increase of police powers in using firearms. It included a general provision whereby a police officer would have the right to shoot to kill if, given the circumstances, this were to be the only effective way of repulsing an assault that constitutes a clear and imminent danger to human life. In addition, the draft assumed that warning of the possible use of firearms by the police would be optional (currently, police officers must do so). A further precept of the draft law was that the police would have been allowed to use firearms to stop a vehicle if a driver did not stop as instructed, regardless of whether the police officer would be uniformed or in plainclothes. Due to the HFHR representative's efforts, work on the draft has been suspended for an indefinite period.

- On 29 April, Łukasz T. and Daniel L., both aged 19, were on their way back from Swarzędz to Poznań. As they stopped at a red traffic light, four armed men jumped out of the two cars in front of and behind theirs. Just as Łukasz T., the driver, was trying to maneuver his way out from between the two jamming cars, the men opened fire. The vehicle hit the fence of a nearby property. Łukasz T. was killed, and Daniel L. was shot in the spine, paralyzing him. The car's bonnet was perforated with 20 bullet holes. The firing men were plainclothes police officers who believed that the car was being driven by a dangerous criminal they were chasing. Witnesses said that the policemen fired without warning. The family of the deceased Łukasz T. concluded an out-of-court settlement and received compensation. The police did not agree to grant compensation to the paralyzed Daniel L., and the case was filed with the court of law.
- On the night of 8 May in Łódź, a gang of hooligans with clubs and sticks attacked a student festival. The intervening policemen shot and killed a 19-year-old man and a 23-year-old woman during the disturbances. Some 70 people were wounded.⁴¹ The accident resulted from a mistake at a police magazine: the rubber bullets distributed to the policemen and used to disperse riots also included 25 pieces of live ammunition. The prosecutor established that the duty officer knew of the mistake but took no action to inform other policemen about it. Proceedings for negligence being pending as of the end of 2004. The regional and city chiefs of police resigned.

Respect of Private Life

In one case, the ECtHR ruled that Poland was in breach of article 8 of the ECHR (respect for private and family life) due to censoring the correspondence of remand prisoners with the ECtHR.⁴²

The Polish law contains regulations obliging telephone operators to make all personal information available at the request of secret services. The operators referred this obligation to the Constitutional Court.⁴³

⁴¹ *Zamieszki w Łodzi. Policja przyznała się do winy*, 9 May 2004, www.onet.pl.

⁴² *G.K. v. Poland*, 20 January 2004, Appl. No. 38816/97.

⁴³ Rozporządzenie Ministra Infrastruktury z dnia 24 stycznia 2003 roku w sprawie wykonywania przez operatorów zadań na rzecz obronności, bezpieczeństwa państwa oraz bezpieczeństwa i porządku publicznego, (Dz.U. 2003 r., nr 19, poz. 166) [Regulation of the Minister of Infrastructure on performance by operators of tasks for the benefit of defence, security of state as well as public security and order of 24 January 2003], *Journal of Laws*, No. 19 pos. 166, 2003.

The Telecommunications Act of 16 July 2004, that came into force on 3 September 2004,⁴⁴ is not in line with the European Commission's Directive 2002/58/WE. In violation of the directive, the act allows persons other than the sender and addressee of a message/communication to familiarize oneself, record, store, transmit or otherwise use the content or this data that should be subject to telecommunications secret.⁴⁵

Security Services

In April 2004, the Constitutional Court questioned several provisions of the National Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*, ABW) and Intelligence Agency (*Agencji Wywiadu*) Act.

There were two salient issues from the human rights perspective. The Constitutional Court ruled that a legal instrument allowing for agency officers to instruct or order specific types of conduct (article 23.1.1 of the act) runs counter to the principle that no one may be forced to do what he/she is not legally obliged to do (article 31 of the Constitution). The court stressed that an act of parliament may not be a sufficient basis for determining the admissible extent of interference with civil rights and responsibilities. Likewise, the act in question does not set forth the procedure for defending oneself against excessive officer interference with one's personal interests.

The way the provision has been formulated also contradicts the rules of adequate legislation (article 2 of the Constitution). The Constitutional Court also ruled that a provision empowering ABW officers to monitor and record events in public places without the knowledge or consent of those concerned severely interferes with civil rights and freedoms. The court indicated that the act did not stipulate a procedure by which to ascertain whether monitoring and recording are necessary. Hence, article 23.1.6 violates the Constitution.⁴⁶

Rights of the Child

Polish authorities do not keep statistics on the number of children who are not schooled. Parents who do not send children to school are hardly ever subject to administrative penalties. The situation described in a HFHR report published in 2002⁴⁷ has since remained unchanged.

School authorities frequently refuse to admit children of foreigners residing illegally in Poland. In the school year 2003/2004, the Education Desk of the Warsaw Council recommended to schools that they not admit children with unregulated residence status in Poland. Owing to the intervention by HFHR lawyers, the case has been clarified and the recommendation was cancelled.⁴⁸

The ombudsman stated that the number of special rehabilitation centers for disabled children should be reduced for the benefit of setting up specialized rehabilitation and resocialization institutions providing professional aid to disabled children. The 2004 CRC's survey indicated that the existing centers' operating expenses were high and caused fund shortages for professional rehabilitation.⁴⁹ The ombudsman has also

⁴⁴ *Journal of Laws* 2004, No. 171 pos. 1800.

⁴⁵ Article 159.2 item 4 of the Act.

⁴⁶ Press release concerning the verdict in case K 8/03 of 20 April 2004; www.trybunal.gov.pl.

⁴⁷ *Prawo do nauki. Raport z monitoringu [Right to education. A Monitoring Report.]*, Helsinki Foundation for Human Rights, 2002, pp. 126-127.

⁴⁸ Information obtained by the Helsinki Foundation for Human Rights.

⁴⁹ A statement from the Ombudsman to the Minister of National Education and Sport of 4 May 2004, No. RPO/470256/04/XI.

stated that many of the children should be learning in regular schools close to their residences or in social integration schools. Placing children in dedicated rehabilitation centers for handicapped children, away from their homes, should be the last resort.

Across Poland, 30,000 children who were in a special school regime designed for mentally disabled children were in boarding schools in 2004.⁵⁰ Frequently, local authorities refused to set up a social integration class or to finance the cost of commuting to another town or village for such a class. The minister of national education and sports did not concur with the ombudsman's observations.⁵¹

In many cases, due to the shortage of places in social rehabilitation facilities, underage youths were placed in police-operated child shelters, which constitutes unjustified confinement. However, confining an underage youth should only be used as a measure of last resort and for the shortest period of time possible. Therefore, holding youths in police operated child shelters in order to wait for a place in social rehabilitation facilities is illegal because such confinement does not fulfill the established legal provisions spelled out in article 41(1) of the Polish Constitution.⁵²

Although anticipated, in reality the effects of several years of childcare system reform were hardly visible across the country. There was a lack of funds to develop programs to genuinely assist children and families. In the face of fund shortages, several local programs were gradually terminated in 2004.⁵³ Additionally, despite a drop in the birth rate, the number of children committed to care in facilities outside of the family has significantly increased.

On 13 January 2004, within the framework of the National Program for Preventing Juvenile Social Maladjustment and Crime, the Council of Ministers adopted the Rules of Conduct for Teachers and Cooperation Methods for Schools and the Police in Cases of Juveniles Threatened by Crime, Depravity, Drug Abuse, Alcoholism and Prostitution. The document's fundamental drawback stems from excessive interference by the police in school life, with absence of adequate protection of the pupils', students' and parents' rights. The HFHR stated that procedures provide by the rules make little mention to cooperation between schools and parents – a fact that should be the most important factor when dealing with problems with school children.⁵⁴

Property Rights

In June 2004, the ECtHR ruled on the case of *Broniowski v. Poland* regarding the property left in Poland's pre-WW2 eastern territories that now belong to Lithuania, Belarus and Ukraine. The ECtHR ruled that preventing the exercise of the right to equitable compensation for immovable property left beyond the Bug River after WW2 is a violation of the right to property as construed by article 1 of Protocol 1 to the ECHR. The court stated that Poland had not established an effective mechanism for the pursuit of claims by former owners from the Eastern marches.⁵⁵

⁵⁰ Ibid.

⁵¹ Reply of 4 August 2004.

⁵² A statement from the Ombudsman to the Minister of Justice of 9 January 2004, No. RPO/434183/XI.

⁵³ A statement from the Ombudsman to the Minister of National Education and Sport of 30 July 2004, No. RPO/479916/04/XI.

⁵⁴ A statement from the Ombudsman to the Minister of National Education and Sport of 25 May 2004, No. RPO/439954/03/XI.

⁵⁵ *Broniowski v. Poland*, 22 June 2004, Appl. No. 31443/96.

National and Ethnic Minorities

After eleven years of work, the *Sejm* adopted on 4 November the National and Ethnic Minorities and Regional Language Act. The first draft of this act was prepared by the HFHR in 1993.

Most of the rights enshrined in the act are already referred to in other legal acts, such as the right to education in the minority language; the right to use first and family names in the original form; the right to access to the public media; the right to state support for minority languages and cultures; the right to freely use the minority language in public and private life; and the right to disseminate and exchange information in the minority language. Forced assimilation of minority representatives is prohibited.

As of the end of the year, the final text of the bill was pending in the *Sejm*, following Senate (upper house of parliament) amendments of 3 December to introduce a new entitlement to use the minority language as the auxiliary language in offices, a right sought for years by minorities in Poland. After approval by *Sejm*, the president needs to sign the act into law.

The act defines a national and ethnic minority and lists minority groups that are currently protected in Poland. Pursuant to the act's provisions, a national minority is a group that has lived in Poland for over 100 years and that stems from a nation having its statehood (Belarusian, Czechs, Lithuanians, Germans, Armenians, Russians, Slovaks, Ukrainians, Jews), while an ethnic minority is different from a national minority in that it does not stem from an officially recognized nation-state (Karaim, Lemko/Ruthenians, Roma, Tartars). In addition, special language protection rights are granted to the Kashebe/Kashubians, indicated in the act as Poland's sole language minority. Responsibility for the act's implementation is vested with the minister of home affairs and the Joint Government and Ethnic and National Minorities Committee.

Asylum Seekers and Refugees

Only about 5% of all asylum seekers were granted political asylum in Poland in 2004. NGOs' lawyers providing legal aid to foreigners and refugees believe that more people should have been granted the status. In Poland, this applied chiefly to Chechens who were citizens of the Russian Federation and who were not awarded the refugee status in Poland despite complying in most cases with the requirements set out in the Geneva Convention and the New York Protocol, i.e., persons who harbor a reasonable fear of persecution on account of nationality and political views. Chechens who applied for political asylum enjoyed a subsidiary form of assistance, such as the assent to "tolerated" stay, which, despite lawful residence and work permits, does not provide them with sufficient means to live in Poland.

At the Polish-Belarusian border crossing point in Terespol, foreigners were prevented from submitting an asylum application and the applicants could not be guaranteed access to the necessary interviews. This meant that the insufficient number of officers and lack of adequate premises might have hindered the procedure to award them refugee status. Foreigners were frequently held in conditions that were degrading.

Foreigners seeking refugee status who were detained with the intent of expulsion or placed in a high security center did not receive the necessary information on their legal status, nor did they have the possibility to seek legal aid from NGOs. Also, the living conditions at the high security center in Lesznawola and detention centers with for people these people were unsatisfactory.

The right to seek refugee status was also violated by the fact that the negative decision was issued in the Polish language to foreigners who were detained with an intent of expulsion and held in the high security

center. This severely restricted their ways for appealing from the negative decision.⁵⁶ Under the Polish law, foreigners are in principle placed in a dedicated high security center. Detention with an intent of expulsion may be applied solely in specific cases strictly defined by law. As Poland in 2004 only had only one such center for some 200 foreigners, and the number of those detained was much greater, courts routinely confined foreigners to detention facilities with an intent of expulsion. This happened in violation of article 102(2) of the Foreigners Act of 13 June 2003 and article 41 of the Law on Granting Protection to Foreigners in Poland of 13 June 2003.⁵⁷

Major reservations were spurred by the practice of reassigning foreigners to detention who had been placed in deportation custody for one year and released thereafter due to the impossibility of expelling them from Poland. In many cases, such foreigners were not granted “tolerated” status despite this being provided for them by effective regulations;⁵⁸ instead, they were re-arrested or placed in the high security center.

Polish regulations do not grant the right to stay/residence to a foreigner cohabiting with a Polish national if they are not formally married. Frequently, such foreigners with illegal alien status were issued a deportation decision. Such practice raises reservations when considered from the perspective of article 8 of the ECHR (respect for private and family life).

Trafficking in Human Beings

Poland remained a major transit route for trafficking of humans, chiefly from the Commonwealth of Independent States to Germany and other EU countries. Estimates⁵⁹ speak of over 15,000 victims per year, of which some 40 cases have been detected annually in Poland.

Despite sanctions in the Polish Penal Code, the *de facto* perpetrators were rarely prosecuted also in 2004, and punished to an even lesser extent. Effective protection of the victims was missing. One impediment to the prosecution of this crime is that fact that the Polish law does not include a definition on human trafficking.⁶⁰

Public services such as the police and border guards were not trained to work with victims; consequently, officers were not able to recognize victims. The lack of an effective state system for protection of and assistance to victims was worsened by the fact that victims were treated as illegal aliens in the Polish territory and threatened with expulsion. There was no intrinsic basis for the victims to obtain the right to stay within the territory of Poland.

⁵⁶ *Raport, Prawa Cudzoziemców umieszczonych w aresztach w celu wydalenia i strzeżonym ośrodku*, Helsińska Fundacja Praw Człowieka, [*Rights of Foreigners Detained with a View to Expulsion and Placed in the High Security Centre*, a HFHR Report], Warsaw 2004, pp. 93-98

⁵⁷ *Comments by the Helsinki Foundation for Human Rights to the 5th Periodic Report of the Republic of Poland on Implementing Provisions of the International Covenant on Civic and Political Rights*, January 1995 – 1 October 2003, October 2004

⁵⁸ Article 97.2 of the law of 13 June 2004 on Protecting Foreigners in the Polish Territory (*Journal of Laws* 2003, No. 128, pos. 1176).

M. Wiśniewski, *Zjawisko handlu kobietami w świetle ustawodawstw w wybranych krajów europejskich oraz standardów międzynarodowych*, [*Trafficking in women in light of selected European national legislations and international standards*], Warsaw 2004.

⁶⁰ Article 204 and 253 of the Penal Code.