

Warsaw, on 08 June 2010

**Mr Thomas Hammarberg
Commissioner for Human Rights
of the Council of Europe**

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FRANCE**

Dear Mr Commissioner for Human Rights of the Council of Europe

In the name of and authorised by Związek Byłych Funkcjonariuszy Służb Ochrony Państwa (Association of Former Officers of State Protection Services), a voluntary association gathering positively verified retired officers of the Republic of Poland special services, people who were on duty in the democratic Poland and received police pensions after the system transformation of our country, I hereby advise the Commissioner for Human Rights of the Council of Europe that the Polish Government does not fulfil its duty pursuant to article 3 of the Statute of the Council of Europe (J. of Laws, Dz. U. from 1994 No. 118, item 565).

The Statute of the Council of Europe, article 3, states: “Every member of the Council of Europe must accept the principles of the rule of law and of the all persons within its jurisdiction should be the beneficiaries of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council”. The Republic of Poland was pronounced, in accordance with article 4 of the Statute of the Council of Europe, a state able and intending to fulfil the provisions of article 3 of the Statute; consequently, the state was invited to be a member of the Council.

On the contrary – the Sejm of the Republic of Poland, supported by the Government of the Republic of Poland, adopted, through votes of right-wing MPs, the Act of 23rd January 2009 (J. of Laws, Dz. U. No. 24, item 145), on the basis of which it drastically decreased pensions of retired officers of Służba Bezpieczeństwa (Safety Services) and Milicja Obywatelska (Civic Militia), who were declared to have been workers of the state safety organs in the People’s Republic of Poland. In many cases the reduction of pensions exceeded 2/3 of the hitherto paid amounts. The aforesaid Act violates the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; it is also in contradiction with the Resolution of the Parliamentary Assembly of the Council of Europe of 1996 (no. 1096). The radical reduction of pensions introduced by this legal act also applies to, which is hard to understand, the officers who were positively verified, who had trusted the Republic of Poland and agreed on the proposition to remain on duty; it also applies to members of our association – former officers of Urząd Ochrony Państwa (Office for State Protection), Agencja Bezpieczeństwa Wewnętrznego (Internal Security Agency) and Agencja Wywiadu (Foreign Intelligence Agency).

20 years ago the Resolution of the III democratic Republic of Poland’s Council of Ministers No. 69 from 21st May 1990 (M.P. No. 20, item 159), issued on the basis of article 132 paragraph 2 of the Act from 6th April 1990 on Urząd Ochrony Państwa (State Protection Office) (J. of Laws, Dz. U. No. 30, item 180 with further amendments) authorized the Central qualification commissions of the President of the Council of Ministers (Central Qualification Commission, Qualification Commission for Central Personnel, as well as voivodship qualification commissions) to conduct the verification process of former officers of the People’s Republic of Poland. At the same time the resolution stipulates the mode and

conditions of hiring former officers of Służba Bezpieczeństwa to work in the Urząd Ochrony Państwa and other organizational units subject to the Minister of Internal Affairs. A positive opinion of the Qualification Commission meant, based on the provisions of paragraph 8 of the Resolution of the Council of Ministers, that the assessed person had all moral qualifications to further serve in the Republic of Poland; it specifically meant that the positively evaluated officer during his hitherto service:

- never acted against the law;
- performed his duty in a manner that never affected other people's rights and dignity;
- never used his vocational position for other purposes.

Positively verified officers, claimed to be people of immaculate moral and patriotic condition (pursuant to article 5 on Urząd Ochrony Państwa), obliged, according to the text of the oath, to "...faithfully serve the Nation, to protect the laws established by the Constitution of the Republic of Poland, to guard the safety of the state and citizens". The democratic Republic of Poland guaranteed them to recognize the continuity of their service (by the article 133 of the Act on Urząd Ochrony Państwa), which should be accompanied – as we deeply believed and were assured – by the continuity (excluding discrimination of any kind) of the rules of obtaining pension rights.

The Act of 23rd January 2009 on the decrease of pensions of former officers of the state safety organs in the People's Republic of Poland was claimed to the Constitutional Tribunal by a Group of RP Sejm Deputies as an act that infringed the Constitution of the Republic of Poland (file no. K 6/09), exposing the violation of the provisions of the Constitution by subjecting to the claimed Act the officers who serve in the democratic Republic of Poland and had the status of morally flawless patriots. The Tribunal, judging in the composition of 14 judges, with 5 separate opinions, in its sentence of 24th January 2010 (J. of Laws, Dz. U. of 2010., No. 36, item 204) recognized the consistence of the claimed Act with the RP Constitution. In the same sentence (whose justification is of a settlement-political nature) the Constitutional Tribunal redeemed the proceedings on the inconsistency of the preamble to the claimed Act with the Polish Constitution.

There is still a motion waiting for the Constitutional Tribunal review, namely the motion of an Independent Policemen Trade Union (file no. K 36/09), on the 23rd January 2009 Act's inconsistency with the Polish Constitution and a European Convention on the protection of human rights and basic freedoms of 1950 (J. of Laws, Dz. U. of 1993, No. 61, item 284).

In the pending legislative proceedings over a parliamentary draft that later became an Act dated January 23rd 2009, there was criticism from a number of entities, including the First Presiding Judge of the Supreme Court, Office of Studies and Analyses of the Sejm Office, the Legislative Bureau of the Senate. The authors of these opinions pointed to the contradictions between the Act and the Constitution of the Republic of Poland. They especially claimed that the Act infringed the rule of protecting the duly acquainted rights and legal subjectivity of the persons harmed and collectively punished all persons who used to be the officers of the state safety authorities of the People's Republic of Poland, without the individual recognition of the activities of particular officers. . In that last issue the Supreme Court evaluated in its opinion that the legislator, when adopting the Act of 23rd January 2009 exceeded his rights, because while fulfilling the legislative functions he also acted in the role of the court. Moreover the Supreme Court made one more legal evaluation of the act of 23rd January 2009 when giving the opinion on the parliamentary draft of the Act on the change of the RP Constitution. In the legal opinion aired on 21st January 2009 the Supreme Court pointed out that the "basic failures of the 23rd January 2009 Act include, among other things, the infringement of art. 10 of the Constitution that consists in the legislative power excess in the scope of rights, as in fact, that is the legislative power, not the judicial power, that punishes that particular professional group by decreasing their pensions. The infringement of the rule

of acquired rights due to a lack of option to implement the concept of inappropriately acquired law, as there is no relation between the unacceptable conduct (the fact of being a former safety organs officer) and the rights that they are to be deprived of (police pension)”.

On 29th September 2008 the former Ministers of Internal Affairs – Krzysztof Kozłowski, Jan Widacki and former chief of the Office of State Protection and at the same time the former Minister of Internal Affairs Andrzej Milczanowski, addressed a protest to the President of the Council of Ministers in relation with the Act that takes back the existing pension rights from the officers of the national safety organs, including former officers of the State Protection Office who were positively verified. The officers, after the system transformation in 1990:

- prepared, implemented and legally ensured new organization structures of special services;
- trained and introduced many new officers into the secrets of those services;
- lead to the conclusion of a couple of agreements on substantial cooperation – within the country and with the services of other countries;
- caused the Office of State Protection to participate in the Intelligence Commonwealth of the Western countries even before Poland accessed the NATO;
- achieved success in many prominent affairs of exceptional national and international prominence.

It must be noted that the aforesaid achievements of the key creators of the III RP special services would be, of course, impossible without the effective use of their very specific, almost unique substantial qualifications, the acquisition of which before the system transformation, today punished by the pension reduction ACT, was extraordinarily valuable for securing the safety and prestige of the democratic Poland of 1990. It was these substantial qualifications that constituted – in accordance with article 15 of the Act on State Protection Office – an indispensable requirement for being admitted into UOP.

The aforesaid former Ministers of Internal Affairs (known opposition activists in the times of the People’s Republic of Poland) addressed their strong objection also on 14th December 2009 to the President of the Constitutional Tribunal in relation to claiming the 23rd January 2009 Act as inconsistent with the Polish Constitution, supporting the accusations of the Group of deputies. In the opinion of the former Ministers the 23rd January 2009 Act introduces the rule of collective liability, its nature is oppressive, despite the fact that the crucial system transformations occurred 20 years ago, it infringes the rule of keeping the acquired rights, and also the rule of trust to the state and the law that it adopts.

In the aforementioned transformation period the Ministers also observed that they guaranteed, acting within the powers of their former positions, that the officers who, after being positively verified, were admitted to the service in the State Protection Office and other Ministry of Internal Affairs institutions, would acquire specific pension conditions, secured by the Act of 18th February 1994 on officers’ pension rights (J. of Laws, Dz. U. No. 53, item 214 with further amendments) – a legal act adopted by the Sejm of the democratic Republic of Poland. The discriminating change of those conditions is thus, as emphasized by K. Kozłowski and A. Milczanowski, wrongful and unfair; it also affects the credibility and honor of the Polish State.

The Judges of the Constitutional Tribunal, when airing their separate opinions against the sentence dated as 24th February 2010 pointed out to numerous infringements of the Polish Constitution, included in the Act decreasing the size of pensions of former officers of state safety organs of the People’s Republic of Poland. They pointed out to the fact that the law

does not correspond to the rules of reliable legislation and proportionality, there is no coherence between the aim of the Act quoted in its preamble and the further content.

The Preamble of the 23rd January 2009 Act unambiguously matches the negative consequences with legal and moral discredit of the Act addressees - pensioners. It infringes the personal dignity of a human being, as it stigmatizes negatively the persons suffering from the pension decrease. The preamble also includes accusations with a strong load of emotional, moral and legal condemnation. Due to the fact that such an accusation is made in a global manner – it grounds the charge of humiliation (content of the separate opinion of the Judge of the Constitutional Tribunal – E. Łętowska, p. 106). Moreover the preamble to the Act, when assigning the ratio of its adopting may be understood as pointing out, in the effect of applying the Act, to an individual group of crime perpetrators exempted from the liability and rigours of law. The assumed legislative solutions concerning the decrease of pensions are a kind of liability for not discovered criminal acts committed by wrongdoers exempted from the liability and rigours of law (content of the separate opinion of the Judge of the Constitutional Tribunal M. Wyrzykowski, p. 123). The preamble introduces a specific version of history and derives moral evaluation out of it, thus ascribing them the legally binding evaluations; it creates a normative basis for a dramatic decrease of the so far collected pensions of former officers of safety organs in the People's Republic of Poland. The Preamble is in opposition with its character and content of the Polish Constitution Preamble. The Preamble of the Polish Constitution in the name of the Polish Nation guarantees for all and forever the citizens' rights and freedoms, care to keep the inborn human dignity; it also introduces the obligation of a common solidarity. There are no elements in it that would allow to penalize the past in relation to the deeds and events that are not crimes. The Preamble to the 23rd January 2009 Act contains a supposition of lawlessness of a specific part of the legal order binding until 2010. Such a form of knocking down the presumption of constitutionality of binding provisions is not allowed by the Polish legislation. The indicated formulation of the preamble of the 23rd January 2009 Act infringes art. 7 of Constitution (the rule of legalism) in relation to art. 2 of Constitution (rule of democratic legal state, rule of social justice) – content of the separate opinion of the Judge and President of the Constitutional Tribunal – B. Zdziennicki, p. 127 – 128).

The Act infringes the constitutional rule of citizens' trust to the state and established law. The legal status related to fulfilling the service covers also the retirement regime of those persons. The Republic of Poland, in its Act of 18th February 1994 on the officers' pensions, confirmed the right to equal level of pensions for all of them. The 23rd January 2009 Act omits the requirement of a court establishment of guilt and punishment for committed crimes as prerequisites of changes of rules of establishing pensions to officers, implemented by the already democratic legislator, in 1994 (content of a separate opinion of Judge of the Constitutional Tribunal M. Mazurkiewicz).

The resolutions of the 23rd January 2009 Act, as well as the content of the preamble to this Act point out that the legislator quashed his obligations to concrete officers of former safety organs of the People's Republic of Poland, undertaken based on legal provisions issued by him, based on legally stipulated procedure. The legislator quashed his obligations in a collective manner, without recognizing the activity of particular officers, without any procedure in this scope and charging all officers working in the structures of safety organs of the People's Republic of Poland, including the ones, who had earlier received positive professional and moral certificate for service in the democratic Poland. By the same the legislator infringed the rule of citizens' trust to the state and to the law it stipulates, as one of fundamental rules of a democratic legal state. By creating a collective responsibility of former officers of state protection organs of the People's Republic of Poland, the Act negates by the same its legal subjectivity, as natural persons and citizens. It constitutes an important

infringement of the rule of a democratic legal state (content of a separate opinion of the Judge of the Constitutional Tribunal A. Jamroz, p. 98-100).

The Authors of separate opinions from the sentence of the Constitutional Tribunal, of 24th February 2010 emphasized the meaning of the lapse of time for the limits of the legislator's actions. The Act that decreases pensions of former officers of the state safety organs was passed almost 20 years after the political system and the society changed. It means that the citizens of the Republic of Poland related with the Act had all bases to make an assumption that the rules binding in the last 20 years shall not be changed, unless new circumstances appear that would ground the radical change of legal regulations. Neither the legislator, nor the General Prosecutor pointed out to such circumstances when they presented their positions.

By not showing the crimes mentioned in the preamble of the 23rd January 2009 Act, the legislator applied groundless sanctions in the form of a repressive change of pension counting system in relation to positively verified retired officers of the Republic of Poland.

The legislator did not delegalize the work (service) or safety organs in any of the adopted legal acts, but he strongly stigmatized them in the content of the preamble to the Act of 23rd January 2009. The factor of 0,7% stipulated in the Act as the basis for every year of the service in the safety organs of the state (instead of 2,6%, as is the case to other officers or 1,3% in the common system) does not have – as the legislator grounded it – the character of liquidation of a privilege, but is a kind of sanctions addressed individually. Thus, if the prerequisite of the legislator's decision as for the regulation included in the 23rd January 2009 Act is the assumption that the addressees committed crimes and their actions were taken out of the responsibility then it means that the legislator qualifies the specific actions. The point is that this qualification should be in the competence of a criminal court, not the legislator, since the crime, if it was committed, must be judged in the court proceedings, not the legislative one. The legislator's infringement of art. 10 of the Polish Constitution (the threefold power split) and art. 42 of the Polish Constitution (criminal proceedings – related rights: ban on the retroactive penal law, right to protection, presumption of innocence) does not bear any doubts (content of a separate opinion of the Judge of the Constitutional Tribunal– W. Wyrzykowski, p. 123).

The 23rd January 2009 Act in its preamble adjudges the collective guilt and measures out punishment in the articulated text. In the meantime everyone, in accordance with the binding international standards and art. 45 par. 1 of the Polish Constitution (right to independent judgment), when deciding about their rights and obligations is entitled to a just and open review of their case by an impartial and independent court. It belongs to universal guarantees of the individuals' legal safety. It is forbidden to punish without procedural guarantees, including the right to two instances, for deeds from before 20 and more years, the crime rate of which is not subject to any evidence proceedings. A certain citizens' group decrease, without individualized proceedings, ex lege, the amount of pensions collected so far, with their moral condemnation means application of rules of collective liability inadmissible in a democratic legal state (content of a separate opinion of the Judge and President of the Constitutional Tribunal B. Zdziennicki, p. 130 – 131).

Full application to the 23rd January 2009 Act has the Resolution of the Parliamentary Assembly of the Council of Europe of 1999 (no. 1096) on the measures to dismantle the heritage of former communist totalitarian systems, which defines unexceedable frames for all historical settlements. The Resolution is based on the Convention on the protection of human rights and basic freedoms (ratified by the Republic of Poland on 19th January 1993); it also refers to art. 6 of the Treaty on the European Union, whose provisions have been binding for Poland from the moment of access to the European Union. The European Court of Human Rights in Strasbourg quotes, in its numerous sentences, the 1096 Resolution as the

determinant of standards that must be complied with by all European countries, in relation to the settlement with the historical past of former totalitarian systems (content of a separate opinion of the Judge and President of the Constitutional Tribunal – B. Zdziennicki, p. 125).

The President of the Constitutional Tribunal, Judge Bohdan Zdziennicki, in a separate opinion to the sentence of the Tribunal of 24th February 2010 claimed, when he quoted the Report doc. 7568 of 3rd June 1996 of the Committee for Law and Human Rights of the Parliamentary Assembly of the Council of Europe that that document was created in the effect of vast works over the liquidation of the heritage of communist systems. It includes guidelines that would ensure the consistence of all liquidation activity with the requirements of a democratic legal state respecting all rules guaranteed in the European Convention on the protection of human rights and basic freedoms and the rules resulting from common constitutional traditions. Based on a Report doc. 7568 of 3rd June 1996 a Resolution No. 1096 on measures to liquidate the heritage of former communist totalitarian systems was accepted by the Parliamentary Assembly of the Council of Europe. The Resolution is based, and that was emphasized by the President of the Constitutional Tribunal, on the Convention on the protection of human rights and basic freedoms ratified by the Republic of Poland on 19th January 1993 and it strictly corresponds with article 6 of the Treaty of the European Union binding Poland from the moment of accessing the European Union.

Based on the Resolution the liquidation actions should be conducted only with the support of administrative measures and they may not be more or less open, or camouflaged punishment of people. The administrative measures applied should not be overused for political purposes. They should also be limited in time. All actions in this matter, based on the Resolution, should end at the latest on 31st December 1999. Until this time the new democratic system should establish in former communist states (content of a separate opinion of the Judge and President of the Constitutional Tribunal – B. Zdziennicki, p. 133 – 134).

The legal opinion on the 23rd January 2009 Act was filed in the Constitutional Tribunal, before the hearing of the case file no. K 6 /09, by the International Helsinki Federation for Human Rights, a non-governmental organization, whose statutory aim is the protection of human rights, including their obeying by the public authorities in Poland. The International Helsinki Federation for Human Rights monitors obeying the rules of the legal state, rights of individuals and procedural guarantees in relation with the legal measures for getting through and settlement of the communist period. The legal opinion of the International Helsinki Federation for Human Rights includes numerous claims against the 23rd January 2009 Act and points out its inconsistency with the Polish Constitution, as well as with other legal acts adopted by the Republic of Poland within the Council of Europe, including the European Convention on the protection of human rights and basic freedoms.

On 24th February 2010 the Constitutional Tribunal issued a ruling on the consistence of the 23rd January 2009 Act with the Polish Constitution, but did not refer to the legal opinion issued by the International Helsinki Federation for Human Rights at all. By doing this the Constitutional Tribunal in its sentence did not respect the charges included in that opinion. Moreover in the pending proceedings before the Constitutional Tribunal all motions filed by the Act opponents were rejected. The Constitutional Tribunal particularly rejected the motion to hear as witnesses former ministers of internal affairs, who in 1990 guaranteed that the pension conditions for the positively verified officers still serving for the Republic of Poland would not change.

Dear Mr Commissioner for Human Rights of the Council of Europe

The heritage of the totalitarian system may not be overcome by totalitarian methods, that is with the infringement of the rule of a democratic legal state, as is stipulated in Resolution No. 1096, point 4 of the Parliamentary Assembly of the Council of Europe. Point 12 of the quoted

Resolution excludes the option of taking revenge on former officers in the process of dismantling the heritage of former communist totalitarian systems. The Parliamentary Assembly of the Council of Europe treats its resolutions as obligations imposed on member states. The Republic of Poland is a member of the Council of Europe, and, as it was emphasized at the beginning of this letter, it obliges, in accordance with the provision of art. 3 of the Statute of the Council of Europe, to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and, moreover, to collaborate sincerely and effectively in the realisation of so formulated aim of the Council.

The Polish Sejm, in its Act of 23rd January 2009 deprived us and our families not only the source of living in the form of a considerable cut of our pensions, but moreover we were deprived of dignity, making us second-class citizens, as was pointed out by the Constitutional Tribunal judges in their separate opinions to the Tribunal's 24th February 2010 sentence.

During a long lasting campaign in all types of media, both public and private (press, radio, TV, Internet), followed by the Sejm adoption of the Act of 23rd January 2009, the Polish society received untrue contents with a very strong emotional appeal, evoking the worst instincts. Consequently the authors of this populist legal act (people playing minor roles in the Polish system transformation), called in Poland the legal failure of 2009, created a climate of social condemnation, disapproval and eventually characteristic social exile of the Act addressees. The authors of the extraordinarily aggressive media campaign used terminology proper for the criminal law – describing all former officers as “headmen” and other members of the society as “victims”. When explaining, in a demagogic manner, the legislator's aims to the public there was an opinion cruising in the media that a headman (and “headman” referred also to the positively verified officers of III RP, such as all members of our association) should not receive a higher pension than his victim. Let me say it once again that the Constitutional Tribunal judge, Ewa Łętowska, when evaluating the content of the preamble of the Act of 23rd January 2009, emphasized, that the preamble includes “(...) charges with a very strong emotional, moral and legal condemnation. If such an accusation is aired in a global manner – it grounds the accusation of condemnation” (quotation of p. 106 of the judge's separate opinion).

As citizens of the European Union we benefit from the right to apply to the Council of Europe for the protection of our rights guaranteed by the European Convention of 1950.

We are entitled to full benefits of such values adopted by the European Union and the Council of Europe as: legal state, respect for personal dignity, equality, lack of discrimination, tolerance, justice, solidarity. We cannot accept the actions of the Polish legislator aiming at charging us with the accusation of performing crime in the past, in a situation where none of us was accused of an infringement of binding laws; moreover, the 1990 verification gave us characteristic moral certificates for the period of service in the People's Republic of Poland. We had worked hard and efficiently for the democratic Poland which, as we were deeply convinced, would always testify in our favour; at least, we could not have assumed that whenever, in whatever scope, the Republic of Poland would invalidate the guarantees concerning our pension rights, granted upon offering us to work in the State Protection Office, made by the Ministers K. Kozłowski and A. Milczanowski, supported by the quoted Act of 18th February 1994, especially, that:

- it was the Republic of Poland that honoured and awarded, for the unquestionable credits in its favour, many already retired officers, gathered in our association, promoting them to higher positions and ranks (some of our friends were promoted to the rank of general);

- it was the special operation of a highly qualified group of those officers in Iraq that led, to a great extent, to the success of the famous NATO action “Desert Storm”, which had the direct result of the reduction of Poland’s foreign debt by the astronomical amount of USD 16.5 billion (a mere percent of which would be enough to pay the pensions of all former officers of the State Protection Office till the end of their lives);
- it was another group of the aforementioned officers that provided a secure transport of hundreds of thousands of Jews from the territory of the former USSR to Israel;
- the main authors of the key pro-integration activities related with the Republic of Poland’s access to the NATO and the EU are members of our association.

We are thus entitled to be protected by the Council of Europe, still, we are unable to obtain legal protection from the authorities of our country. We do not see the possibility to apply to the Spokesman of the Republic of Poland Citizens’ Rights for an intervention in relation with the protection of our rights since on 2nd March 2010, in the channel one of the Polish public television, the Spokesman for Citizen Rights, Ph.D. J. Kochanowski, said: “The Safety Service (Służba Bezpieczeństwa) was a military tool of a criminal regime and that was a criminal formation.” It must be noted here that Ph.D. Kochanowski said so about a formation whose direct legal successor became the Office of State Protection (which is unambiguously ascertained by the content of the article 135 of the above quoted Act on this office), taking over its officers, documents and the so-called assets.

Yours sincerely,

Maciej Niepsuj

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