

Received: 16.08.2022  
Accepted: 28.11.2022  
Published: 30.12.2022

Annals of The Administration and Law  
Roczniki Administracji i Prawa  
2022, XXII, i. 4: pp. 15-31  
ISSN: 1644-9126  
DOI: 10.5604/01.3001.0016.3312  
<https://rocznikiadministracjiiprawa.publisherspanel.com>

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## CURRENT ISSUES CONCERNING THE FREEDOMS AND RIGHTS OF PEOPLE WITH DISABILITIES IN THE OMBUDSMAN'S ACTIVITIES

## AKTUALNE PROBLEMY DOTYCZĄCE WOLNOŚCI I PRAW OSÓB Z NIEPEŁNOSPRAWNOŚCIĄ W DZIAŁALNOŚCI RZECZNIKA PRAW OBYWATELSKICH

**Summary:** This article presents selected cases handled by the Ombudsman in 2022 on the subject of human and civil liberties and rights. This period was and is special if only for the fact that the COVID-19 epidemic prevailed and still prevails. It was combined with restrictions on human and civil freedoms and rights, including those of persons with disabilities. Their analysis leads to the conclusion that there are more and more cases of a general nature - those that do not only and exclusively concern an individual person(s), but are relevant to the entire group of persons with disabilities. One can see the increasing activity of the Ombudsman in this area. Activity that is derived from societal needs. And although the subjects to whom the general address is addressed do not always share the Ombudsman's position, the issue becomes high-profile and in the media, and the problem is visible in the public sphere. And this is probably also the point of the Ombudsman's activity - besides the 'hard' legal measures, the Ombudsman should publicly point out in which areas the law is not well structured and in which areas there is bad/improper practice in the application of the law. Thus, it can be concluded that the Ombudsman is not only a body that contributes to the implementation of good administration, but also a body that is supposed to implement the postulate of good law.

**Keywords:** Ombudsman, people with disabilities, family benefits, discrepancies in case law, good law

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**Streszczenie:** W artykule przedstawiono wybrane sprawy prowadzone przez Rzecznika Praw Obywatelskich w roku 2022 w przedmiocie wolności i praw człowieka i obywatela. Okres ten był i jest szczególnie choćby z tego powodu, iż panowała i nadal panuje epidemia COVID-19. Łączyła się ona z ograniczaniem wolności i praw człowieka i obywatela, w tym także osób z niepełnosprawnościami. Analiza tych spraw prowadzi do wniosku, że jest ich coraz więcej o charakterze generalnym – takich, które nie dotyczą wyłącznie pojedynczej osoby (pojedynczych osób), a mają znaczenie dla całej grupy osób z niepełnosprawnościami. Widać coraz większą aktywność Rzecznika Praw Obywatelskich w tym zakresie. Aktywność, która jest pochodną potrzeb społecznych. I chociaż nie zawsze podmioty, do których kierowane jest wystąpienie generalne, podzielają stanowisko Rzecznika, to jednak dana sprawa staje się głośna i medialna, a problem jest widoczny w sferze publicznej. I o to także chodzi chyba w działalności Rzecznika – obok „twardych” środków prawnych, Rzecznik powinien publicznie wskazywać, w jakich obszarach prawo nie jest dobrze skonstruowane i w jakiej dziedzinie mamy do czynienia ze złą/niewłaściwą praktyką stosowania tego prawa. Można więc stwierdzić, iż Rzecznik Praw Obywatelskich jest nie tylko organem, który przyczynia się do realizacji dobrej administracji, ale także organem, który ma realizować postulat dobrego prawa.

**Słowa kluczowe:** Rzecznik Praw Obywatelskich, osoby z niepełnosprawnością, świadczenia rodzinne, rozbieżności w orzecznictwie, dobre prawo

## I

The issues of people with disabilities have been of particular interest to the Ombudsman for years. The literature also analyzes the activities of the Polish Ombudsman in the field of freedom and rights of people with disabilities<sup>1</sup>. However, some time has passed since the publication of these works, and the freedoms and rights of people with disabilities are an area that is constantly evolving and transforming. Political events also have a great impact on the sphere of freedom and rights of people with disabilities; the real protection of these rights also depends on the political will of the rulers. The analysis in this area should be ongoing; when problems and dangers arise, they should be reported. It is therefore necessary to regularly analyze and identify problems in this area. The activities of the Ombudsman in this area should be appropriate to social needs.

The analysis of the activities of the Ombudsman in this area also seems important because this entity is one of the main bodies dealing with the protection of freedoms and rights of persons with disabilities. This Ombudsman, of course, is

<sup>1</sup> Cf. eg. G. Krawiec, *Wsparcie osób z niepełnosprawnością w działalności Rzecznika Praw Obywatelskich – aktualne problemy*, „Studia Prawnicze. Rozprawy i Materiały” 2020, no. 1; herein, *Prawa osób niepełnosprawnych w działalności Rzecznika Praw Obywatelskich*, [in:] *Urzeczywistnianie idei humanizmu w kontekście zagwarantowania podstawowych praw osobom z niepełnosprawnościami*, ed. M. Borski, Sosnowiec 2017.

a 'universal ombudsman' who deals with the protection of all freedoms and rights, but the freedoms and rights of people with disabilities are of particular interest to the Polish Ombudsman. This Ombudsman, in accordance with statutory and international regulations, also acts as the competent authority in matters of equal treatment, and performs the tasks of the National Mechanism for the Prevention of Torture. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, together with the Optional Protocol (OPCAT)<sup>2</sup>, gave rise to the creation of the National Mechanism for the Prevention of Torture (KMPT) in Poland. It is a body that visits places where people deprived of their liberty are staying. The objective of the KMPT is to take actions aimed at eliminating the risk of torture or inhuman or degrading treatment. However, the Polish Ombudsman can also be considered as a special authority competent in matters relating to persons with disabilities. Although no legal provision expressly provides *expressis verbis* for a special role of the Ombudsman in this regard, the analysis of the Ombudsman's activity allows to conclude that the area of freedoms and rights of persons with disabilities remains under the special 'guardianship' of the Ombudsman, which results from the enormity of problems arising in this area.

This work will present selected problems related to the freedoms and rights of people with disabilities, emerging in the last year (2022) in the activities of the Ombudsman. This period was and is special, if only because of the COVID-19 epidemic. It was connected with limiting human and civil freedoms and rights, including those of people with disabilities. By introducing provisions on preventing, counteracting and combating COVID-19, freedoms and rights were also limited; 'All restrictions on freedoms or human rights have been transferred from the act to the level of regulations, contrary to the Constitution of the Republic of Poland. (...) It was decided to combat the epidemic with the usual legal tools. In making this choice, which is important from the point of view of legislative rules, tools were used that were completely inadequate for a state functioning outside states of emergency in the form of constitutional regulations of freedoms or rights by means of ordinances, i.e. normative acts that are the lowest in the hierarchical structure of normative acts<sup>3</sup>.

However, in this period there were also problems that had already arisen; the legal situation of guardians of people whose disability was diagnosed in adulthood has not changed. Although the judgment of the Constitutional Tribunal in this case was issued in 2014, it has not yet been implemented. This forces guardians to initiate long-term proceedings before administrative authorities and administrative courts in order to obtain financial assistance in the same amount as guardians of people

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<sup>2</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly in New York on 18 December 2002 (Journal of Laws of 2007, item 192).

<sup>3</sup> S. Trociuk, *Prawa i wolności w stanie epidemii*, Warszawa 2021, p. 21.

whose disability was diagnosed in childhood. The Ombudsman also drew attention to this<sup>4</sup>.

## II

In the discussed period, a significant part of the activities of the Ombudsman the field of human and civil rights and freedoms were the so-called general statements. The expression 'general statement' is not legal; this is the activity referred to in Art. 16. 1 of the Act of 15 July 1987 on the Ombudsman<sup>5</sup>; this provision states that 'in connection with the cases under consideration, the Ombudsman may submit to the competent authorities, organizations and institutions assessments and proposals aimed at ensuring effective protection of human and citizen freedoms and rights and improving the procedure for dealing with their cases'.

Thus, it gives the Ombudsman 'the right to formulate comments and assessments going beyond the framework of an individual case. The need for the Ombudsman to use the measure provided for in Art. 16.1 of the Act appears when the individual cases under consideration indicate that the practice of applying the law in a way that violates the sphere of freedoms and rights is perpetuating on the part of authorities and institutions'<sup>6</sup>. Of course, such a general statement may appear in connection with an individual case, but in the course of examining the case, the Ombudsman may decide that the problem presented by the applicant is of a general nature and that a general intervention is necessary.

Such a problem appeared in the activities of the Ombudsman due to the impossibility of obtaining a monthly adjustment of the retirement and disability pension to the amount of the carer's allowance by some guardians of family members with disabilities. Although their caring role is the same, when they take care of a disabled adult child, they receive benefits lower than the nursing benefit. In the opinion of the Ombudsman, this cannot be reconciled with the principle of justice. The Ombudsman repeatedly indicated the need to eliminate restrictions in obtaining the right to a carer's allowance by persons actually taking care of a disabled close family member with a certificate of severe disability. And the Ombudsman is still receiving letters regarding the lack of state aid for guardians entitled to retirement and disability benefits. On June 26, 2019, the Constitutional Tribunal issued a judgment<sup>7</sup> regarding Art. 17. 5.1a and the act on family benefits. It considered it – to the extent to which the nursing benefit is not due if the person providing care has an estab-

<sup>4</sup> Cf. Information on the activities of the Ombudsman in 2021, "Biuletyn Rzecznika Praw Obywatelskich" 2022, no. 1, Źródła, Warszawa 2022, p. 14.

<sup>5</sup> Consolidated text Journal Laws of 2020, item 627 as amended.

<sup>6</sup> S. Trociuk, *Ustawa o Rzeczniku Praw Obywatelskich. Komentarz*, ed. II, LEX/el. 2020, commentary on Art. 16.1.

<sup>7</sup> Ref. no. SK 2/17.

lished right to a pension for partial incapacity for work – as incompatible with Art. 71.1, second sentence in connection with Art. 32.1 of the Constitution.

The Tribunal emphasized that ‘restricting the possibility of receiving a care benefit by a guardian who has an established right to a disability pension for partial incapacity for work, but at the same time does not take up work due to taking care of a disabled child, is a manifestation of the legislator’s incorrect interpretation of the constitutional duty to support individuals and families in their efforts to meet their essential needs and enable them to live in conditions that are worthy of human dignity’. According to the Constitutional Tribunal, ‘the factual and legal situation of guardians with an established right to a disability pension, but resigning from further employment in order to take care of a disabled person (...) indicates a similarity of their situation to the situation of guardians who are healthy and thus do not have the right to pension, but also resign from employment in order to take care of a disabled person. (...) The exclusion by the legislator of the possibility for a guardian-pensioner to obtain a carer’s allowance, and thus also burdening the family of a disabled person with the costs related to the care of a disabled person and depriving a disabled family member of social assistance in this respect, constitutes a disproportionate and unjustified differentiation’.

Article 17.5.1a of the Act of November 28, 2003 on family benefits<sup>8</sup> expired on January 9, 2020 to the extent that it states that the carer’s allowance is not due if the person providing care has an established right to a pension for partial disability to work. So far, however, no action has been taken to implement the judgment of the Constitutional Tribunal.

The problem was only partly resolved by the Act of 29 October 2021 on the compensatory benefit for persons entitled to early retirement due to the care of children requiring constant care<sup>9</sup>. Persons entitled to early retirement under the Regulation of the Council of Ministers of May 15, 1989 on the rights to early retirement of employees caring for children requiring constant care (so-called EWK early retirement for women), in an amount lower than the amount of the care benefit, may obtain additional support in the amount of between the amount of the carer’s allowance and the pension/retirement and annuity benefits.

The Ombudsman, in his application of October 31, 2022 to the Minister of Family and Social Policy<sup>10</sup>, considered this regulation to be correct and long-awaited; however, as he indicated in his speech, it covered a very narrow group of guardians with the right to a pension/retirement and annuity benefits. The Act left outside the scope of its activity guardians entitled to old-age and disability benefits who have a benefit symbol other than EWK. It does not matter that their caring role is the

<sup>8</sup> Consolidated text Journal of Laws of 2022, item 615, hereinafter: a.f.b.

<sup>9</sup> Journal of Laws of 2021, item 2314.

<sup>10</sup> III.7060.535.2022.JA.

same, the benefits they receive are lower than the carer's allowance, they take care of a disabled adult child.

In the above-mentioned statement, the Ombudsman further argued that such guardians remain outside the state support system due to the fact that they actually care for relatives with a significant degree of disability. In the opinion of the Ombudsman:

1) this is incompatible with the principle of justice.

2) The implementation of the constitutional obligation to support individuals and families in meeting their essential needs and enabling them to live in dignified conditions requires the creation of an effective financial support mechanism for this group of guardians.

One must agree with these arguments of the Ombudsman. The Ombudsman is obliged to investigate whether, as a result of the act or omission of a public authority, there has been, among others, violation of the principles of social justice. Therefore, the literature states that 'the concepts presented by the Ombudsman regarding the nature and content of the <principles of social justice> are of great importance not only theoretically but also in practice, because they give impulses to include the <principle of social justice> in the jurisprudence of the Constitutional Tribunal'<sup>11</sup>.

In the Polish Constitution of 1997, social justice was indicated as an element of the principle of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland). It must be understood not only in the social aspect, but it should also be understood as a social sense of justice, which is indicated in court decisions: 'the principle of social justice (understood not in the socio-economic aspect), but also related to the social sense of justice, which in a democratic state ruled by law should not be ignored by the legislator'<sup>12</sup>.

The Ombudsman's arguments related to the need to fulfill the constitutional obligation to support individuals and families also deserve full approval. It needs to be emphasized that the rights of people with disabilities have been guaranteed in the Constitution of the Republic of Poland in the part concerning economic, social and cultural freedoms and rights: in accordance with Art. 68.3 'public authorities are obliged to provide special health care to children, pregnant women, people with disabilities and the elderly'. Whereas Art. 69 of the Constitution of the Republic of Poland provides that 'disabled persons shall be provided by public authorities, in accordance with the Act, with assistance in securing existence, adapting to work and social communication'. The actual situation of people with disabilities can be considered in the category of human rights; such persons have the right to full participation in public life and in every sphere of life. There is no doubt that due to the

<sup>11</sup> Z. Ziemiński, *Sprawiedliwość społeczna jako pojęcie prawne*, Warszawa 1996, p. 72.

<sup>12</sup> Judgment of the Supreme Administrative Court of May 12, 2017, I OSK 328/16. See also: judgment of the Provincial Administrative Court in Gliwice of February 8, 2017, IV SA/Gl 1065/16.

psychophysical atypical nature of people with disabilities and their confrontation with social barriers, their needs, compared to the rest of society, are unique<sup>13</sup>.

The arguments based on international regulations are not without significance here. The purpose of the UN Convention on the Rights of Persons with Disabilities is to protect and ensure the full and equal enjoyment of human rights and fundamental freedoms by persons with disabilities on an equal basis with all other citizens. There is no doubt that a person with a disability is indirectly benefiting from the carer's allowance, the issue of entitlement to the benefit is closely related to the implementation of the objectives of the Convention.

In response<sup>14</sup> to the above general statement of the Ombudsman, the Minister of Family and Social Policy pointed out that pursuant to Art. 17.5.1a of the above of the Act, the carer's allowance is not due if the person providing care has an established right to an old-age pension, disability pension, survivor's pension due to the death of a spouse granted in the event of concurrent entitlement to a survivor's pension and other retirement and disability pension, social pension, permanent allowance, teacher compensation benefit, pre-retirement benefit, pre-retirement allowance or supplementary parental benefit referred to in the Act of 31 January 2019 on supplementary parental benefit.

Negative premise from the above article 17.5.1a of the Act on family benefits does not apply to the pension for partial incapacity for work pursuant to the judgment of the Constitutional Tribunal of June 26, 2019, ref. no. SK 2/17. The Constitutional Tribunal in the above-mentioned judgment held that Art. 17.5.1a of the Act of 28 November 2003 on family benefits, to the extent that it provides that the carer's allowance is not due if the person providing care has an established right to a disability pension in respect of partial incapacity for work, is incompatible with Art. 71.1, second sentence in connection with Art. 32.1 of the Constitution of the Republic of Poland. The effects of the above judgment regarding the carer's allowance were defined by the Constitutional Tribunal itself in a judgment published in the Journal of Laws on July 8, 2019, item 1257. According to the above the judgment, the invalidation of the challenged provision to the extent indicated in the judgment took place after 6 months from the date of publication of the judgment, i.e. on January 9, 2020. This means that from that date (i.e. January 9, 2020), having a person's established right to a disability pension for partial incapacity for work is no longer a negative premise, the occurrence of which results in the lack or loss of the right to a carer's allowance. Minister of Family and Social Policy in the above-mentioned response also indicated that the Polish government is aware of the difficult situation of people

<sup>13</sup> A. Nowak, *Zasada równości w Konstytucji RP a status osoby niepełnosprawnej*, „Przegląd Prawa Publicznego” 2011, no. 12, p. 103.

<sup>14</sup> Access: [https://bip.brpo.gov.pl/sites/default/files/202211/Odpowiedz\\_MRiPS\\_swadczenia\\_opiekunow\\_OzN\\_16.11.2022.pdf](https://bip.brpo.gov.pl/sites/default/files/202211/Odpowiedz_MRiPS_swadczenia_opiekunow_OzN_16.11.2022.pdf).

with disabilities and their families, including guardians of people with disabilities, and therefore makes every effort to ensure that support for people with disabilities and their guardians meets the needs of this social group as much as possible.

In the conclusion of the response, this body pointed out that the changes postulated by the disabled people's communities regarding the increase in material support for the disabled and their guardians, i.a. changes in the conditions for granting care benefits and increasing their amount are an extremely important issue, but they require systemic solutions. Implementation of systemic support for guardians of dependent people with disabilities requires changes in the system of certification on disability, based on which it will be possible to distinguish among people with disabilities – people who are actually dependent, whose functioning absolutely requires the help of a guardian entitled to appropriate care services. In view of the above, any changes reported by the disabled people's communities to the conditions for granting care benefits, including the right to a carer's allowance for people with an established right to pension/retirement and annuity benefits and an increase in the amount of social benefits, will be possible after prior regulation of the basic issue for the shape of the social benefits system, i.e. reforming the disability certification system.

It follows from the Minister's reply that the above-mentioned statement of the Ombudsman did not bring the expected result. It shows that the legislature is aware of the difficult situation, but without broader – comprehensive – actions it is difficult to achieve anything. Nevertheless, it was noticed that the problems of people with disabilities should be treated holistically. It seems that recognizing this is the first stage in building a new approach to the problems of people with disabilities. This issue should be further monitored.

### III

However, the Ombudsman may attempt to solve certain general problems not only by directing the above-mentioned general speeches, but also through the use of instruments provided for by law. The Ombudsman is one of the entities which, pursuant to Art. 264 § 2 of the Act of August 30, 2002, Law on Proceedings before Administrative Courts<sup>15</sup>, may submit a request for the Supreme Administrative Court to adopt a resolution aimed at clarifying the legal provisions, the application of which caused discrepancies in the jurisprudence of the courts (Article 15 § 1.2 of the P.A.C. Law on Proceedings before Administrative Courts ). On this basis, the Supreme Administrative Court may take the so-called abstract resolution. It should be emphasized that the entities indicated in Art. 264 § 2 of the P.A.C., i.e. apart from the Ombudsman, also the President of the Supreme Administrative Court, the Prosecutor General, the

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<sup>15</sup> Consolidated text Journal of Laws of 2022, item 329.



General Prosecutor's Office of the Republic of Poland, the Ombudsman for Small and Medium-sized Entrepreneurs, the Ombudsman for Children. It should be emphasized that provincial administrative courts are not entitled to apply for the Supreme Administrative Court to adopt a resolution on an abstract resolution.

The adoption of an abstract resolution is possible when the substantive legal premise specified in this provision has been met, i.e. the resolution is aimed at clarifying legal provisions, the application of which has caused discrepancies in the jurisprudence of administrative courts. At the same time, it is not about explaining any provisions that concern a given matter, a given issue, but those specific provisions, the application of which caused discrepancies in the jurisprudence of administrative courts. Justification of the motion to adopt a resolution is its essential requirement (Article 268 of the P.A.C.). A properly prepared justification should indicate precisely what the discrepancies in the meaning of the provisions indicated in the application consist of and what doubts arise in their interpretation<sup>16</sup>. Discrepancies justifying the adoption of an abstract resolution cannot be evidenced by decisions of an incidental nature or isolated in the presented view; the point is that different positions can be justified with comparable strength. By the concept of 'differences in the jurisprudence of administrative courts' within the meaning of Art. 15 § 1.2 of the Act – Law on Proceedings before Administrative Courts, one should understand not only the difference in legal views expressed in the decisions of administrative courts, but also – and even above all – a certain tendency to 'strengthen' adjudicating panels in their legal positions. Otherwise, each case of finding different judgments of administrative courts (especially at the level of the court of first instance) would always constitute the basis for an effective application by the authorized entity for taking the so-called abstract resolution by the enlarged panel of the Supreme Administrative Court. In addition, the discrepancy in the jurisprudence of administrative courts, as the basis for issuing a resolution by the Supreme Administrative Court aimed at clarifying certain legal doubts, must be real. This means that this discrepancy cannot be derived from the court's positions contained in judgments that were subsequently repealed or amended<sup>17</sup>.

In his application to the Supreme Administrative Court<sup>18</sup>, based on Art. 264 § 2 P.A.C. The Ombudsman pointed out that it should be allowed to grant the right to a carer's allowance due to resignation from employment or other gainful employment to persons other than the parents, actual guardians of the child, related foster families, not only in a situation where the persons liable to a closer degree and the spouse of the requiring support have certificates of severe disability, but also when these people are unable to provide care for objective reasons.

<sup>16</sup> Decision of the Supreme Administrative Court of May 21, 2018, I OPS 6/17.

<sup>17</sup> Cf. Decision of the Supreme Administrative Court of 30 October 2007, II GPS 1/07.

<sup>18</sup> [https://bip.brpo.gov.pl/sites/default/files/2022-04/Do\\_NSA\\_swadczenia\\_pielegnacyjne\\_06.04.2022.pdf](https://bip.brpo.gov.pl/sites/default/files/2022-04/Do_NSA_swadczenia_pielegnacyjne_06.04.2022.pdf).

The Supreme Administrative Court has so far presented fundamentally divergent positions with regard to the interpretation of the provisions specifying the rules for granting the right to carer's allowance for resignation from employment or other gainful employment, and these discrepancies are permanent, real and seem to deepen.

According to the first position, the Supreme Administrative Court assumes that the right to the carer's allowance of other people (i.e. other than: mother, father, actual guardian of the child, a person who is a related foster family within the meaning of the Act of 9 June 2011 on supporting the family and the foster care system) who have a maintenance obligation towards the ward, arises not only in a situation where persons obliged to pay maintenance to a greater extent and the spouse of a person requiring support have certificates of severe disability, but also when these persons are unable to actually care. The Supreme Administrative Court, in its judgment of May 7, 2020<sup>19</sup>, decided that the linguistic interpretation of Art. 17.1.4 in connection with Art. 17.1a of Act on Family Services and Benefits violates the constitutional principle of equality and social justice (Article 2 of the Constitution of the Republic of Poland), and also violates the constitutional orders to protect and care for the family (Article 18 of the Constitution of the Republic of Poland). In the opinion of the Supreme Administrative Court, a formalistic interpretation of the provisions in question could lead to the deprivation of the right to the nursing benefit of the only person who can actually take care of a person with a disability. This would be contrary to the constitutional principle of social justice and resulting from Art. 71.1 of the Constitution of the Republic of Poland, the principle of special assistance of public authorities to families in a difficult material and social situation. Therefore, the Supreme Administrative Court assumed that the formal limitation resulting from Art. 17.1a of the Act on Family Services and Benefits cannot be used in a situation where the guardian preferred by the legislator cannot perform his duties for objective reasons, and these duties are performed by another relative<sup>20</sup>.

According to the second position, the Supreme Administrative Court assumes that the entitlement to the carer's allowance for these persons arises only when persons obliged to pay maintenance to a greater extent and the spouse of the person requiring support have certificates of severe disability.

The Supreme Administrative Court in judgments of February 24, 2021, file ref. act I OSK 2392/20 and of June 17, 2021, ref. no. I OSK 371/21, decided that the persons referred to in Art. 17.1.4 of the Act on Family Services and Benefits, other than those related in the first degree to the person requiring care, a carer's allowance cannot be granted if there are other persons related in the first degree, unless these persons have a certificate of severe disability. The conditions introduced in Art. 17.1a of the Act

<sup>19</sup> Ref. act I OSK 2831/19.

<sup>20</sup> The same position was taken by the Supreme Administrative Court in the judgments of December 14, 2018, ref. no. I OSK 1939/18, and of June 21, 2017, ref. no. act I OSK 829/16.

on Family Services and Benefits make the right to a carer's allowance conditional on whether there are other persons related in the first degree who can provide care. Persons related in the first degree, as obliged on the basis of the Family and Guardianship Code (KRO) to pay maintenance in the first place, are ahead of persons related in the further degree in the right to obtain a carer's allowance, unless they are minors or - 9 - have a decision of a significant degree of disability. The results of the linguistic interpretation of Art. 17.1a of the Act on Family Services and Benefits are confirmed by the system and purpose directives. The carer's allowance is available to persons who take actual and personal care, so in this case the legislator made the right to it for relatives further conditional on whether the relatives in the first degree have a certificate of severe disability. Disability is undoubtedly a circumstance that may exclude the possibility of taking care of another disabled person, which makes this premise convergent with the premise of Art. 132 of the Family and Guardianship Code KRO concerning the situation when the obligated person is unable to fulfill his obligation (providing means of subsistence). The degree of the certified disability of a first-degree relative, as a criterion for 'shifting' the entitlement to the allowance to more distant relatives, is an objectified criterion, and at the same time materially related to the possibility of taking personal care of a person who requires it.

In the Ombudsman's opinion, since a relative obliged to pay maintenance takes care of a member of the immediate family and voluntarily fulfills his moral obligations towards a disabled relative, such a situation deserves support from the state in the form of obtaining the right to a carer's allowance. The provisions specifying the rules for granting carer's allowance should be read through the prism of the principles and values expressed in the Constitution of the Republic of Poland, taking into account the purpose of these regulations. And this goal is, after all, to grant a carer's allowance to people who actually take care of their loved ones with disabilities and those who require such support.

In the opinion of the Ombudsman, such an interpretation of these provisions should be regarded as unjustified, as it restricts the availability of a carer's allowance for persons fulfilling a moral and legal obligation towards a disabled family member, in a situation where they properly provide actual, everyday care.

On November 14, 2022, the Supreme Administrative Court, composed of seven judges, at an open session in the General Administrative Chamber<sup>21</sup>, having examined the motion of the Ombudsman, adopted the following resolution:

'1/ The condition for granting the right to a carer's allowance referred to in Art. 17.1 of the Act of 28 November 2003 on family benefits (Journal of Laws of 2022, item 615, as amended - hereinafter referred to as the Act on Family Benefits) to persons indicated in art. 17.1.4 of the Act on Family Benefits other than those related

<sup>21</sup> Ref. act I OPS 2/22.

in the first degree to the person requiring care, it is necessary for the parents of the person requiring care to prove their identity, persons related in the first degree to the person requiring care with a certificate of severe disability – Art. 17.1a of the Act on Family Benefits.

2/ The condition for granting the right to a carer's allowance referred to in Art. 17.1 of the Act on family benefits for taking care of a married person to the person indicated in Art. 17.1.4 of the Act on Family Benefits other than the spouse, is the spouse of the person requiring care to hold a certificate of severe disability – art. 17.5.2a of the Family Benefits Act.

The Court did not fully share the Ombudsman's position, emphasizing that the issue requiring resolution by a panel of seven judges of the Supreme Administrative Court is not, however, finding an optimal normative solution, but a decision whether the solution established on the basis of the wording given to the act by the legislator is, in relation to constitutional standards, blatantly and inconsistently obviously violating them. It needs to be emphasized that the discrepancy in the jurisprudence and interpretation doubts do not concern the understanding of the legal text caused by its ambiguity, but the issue of departing from the unambiguous wording of the provisions and applying them without the conditions expressed therein, i.e. with the omission of a fragment of the provision that would have to be considered not so much redundant as unacceptable, grossly violating the Constitution of the Republic of Poland, leading to a contradiction with the values protected by it. In other cases, reservations as to statutory solutions may be only *de lege ferenda* postulates addressed to the legislator, possibly implemented by way of legislative initiative through authorized entities. In the opinion of the composition of seven judges of the Supreme Administrative Court, such a situation does not occur in the case of the provisions covered by the Ombudsman's application. The introduction by the legislator of a specific order for family members to apply for a social benefit does not mean that the state fails to fulfill its obligation to protect the family and does not take into account its well-being, nor does it provide support to families in a difficult situation due to disability. It is the situation of the family as a whole, related to the health of its individual members, that justifies providing assistance. Taking into account the systemic context and the purpose of the Act means also taking into account the catalog of other care benefits. The legislator, aware of the tasks of public administration in the field of family protection and care, which result from the Constitution of the Republic of Poland, has defined a catalog of family care benefits, which include: attendance allowance, special carer's allowance and carer's allowance (Art. 2.2 Act on Family Benefits). A special carer's allowance and a carer's allowance are family benefits addressed to guardians who do not take up gainful employment or resign from gainful employment due to taking care of a disabled family member. Benefits for guardians have been shaped in a way that provides a wide range of pos-

sibilities for taking care of a disabled person by family members who, in accordance with the provisions of the Family and Guardianship Code, are obliged to pay maintenance. A special care allowance, provided that the income conditions are met, can be effectively applied for by any person who, in accordance with the provisions of the Family and Guardianship Code, is obliged to pay maintenance, if he or she does not take up gainful employment or resigns from gainful employment due to taking care of a disabled family member.

#### IV

However, apart from general activities, there were also individual cases. They accounted for the majority of cases concerning freedom and human and civil rights. The Office of the Ombudsman received a complaint<sup>22</sup> from a resident of one of the cities concerning the rules of granting the right to free public transport in this city to the blind and people with acquired blindness. Pursuant to local regulations, the following persons are entitled to free travel: the blind and people with acquired blindness. The same provisions make the possibility of exercising this entitlement conditional on having a valid ID card of the Polish Association of the Blind along with an identity document. The applicant is a moderately visually impaired person, but she cannot use free public transport because she is not a member of the Polish Association of the Blind.

In his address to the Mayor of the City, the Ombudsman argued that pursuant to Art. 32 of the Constitution of the Republic of Poland, everyone is equal before the law, and everyone has the right to equal treatment by public authorities. The principle of non-discrimination and equality assumes the requirement of equal treatment of the so-called similar entities that have the same constitutive feature – relevant and significant in a given situation. As a rule, unequal treatment of similar entities is prohibited. And the introduced deviations from the principle of equality must be rationally justified and it is not allowed to differentiate according to any arbitrary criterion. Therefore, the Ombudsman has doubts whether the exemption from fees in public transport only for blind and visually impaired people only on the basis of an ID card of the Polish Association of the Blind does not discriminate against blind and visually impaired people who are not affiliated with this organization.

In the Ombudsman's opinion, membership in the Polish Association of the Blind does not in any way change either the legal or, even more so, the real and practical situation of a blind or visually impaired person. Such a person who is not affiliated with the association of the blind may have the same problems in using public transport as a person with the same disability but who has the appropriate ID. Such differentiation may additionally contribute to the transport exclusion of people who,

<sup>22</sup> <https://bip.brpo.gov.pl/pl/content/rpo-elnk-oplaty-komunikacja-miejaska-niewidomi>.

due to their health condition and the related financial situation, cannot afford tickets that are not covered by the relevant concession.

Referring to the above arguments of the Ombudsman, it should be stated that undoubtedly membership in a social organization is a certain entitlement resulting from the Constitution. However, as it is emphasized in the jurisprudence of the court, it is only when the legislator differentiates legal entities that are characterized by a common essential feature that he introduces a deviation from the principle of equality. Differentiation of legal entities characterized by a common essential feature is admissible (it does not violate the principle of equality), but a prerequisite is a clearly formulated criterion on the basis of which this differentiation is made. Differentiation according to any arbitrary criterion is not allowed. This criterion must be relevant, i.e. be directly related to the purpose and essential content of the provisions which contain the controlled standard, and should serve to achieve this purpose and content. The introduced differentiation must therefore be rationally justified, and the differentiation criterion must be appropriately proportionate to the weight of the interests that are violated as a result of unequal treatment of similar entities<sup>23</sup>. Perhaps belonging to a social organization and the ensuing rights have some sense – and therefore also certain privileges resulting from membership. Perhaps in this way they wanted to prevent certain irregularities related to the use of the exemption from telecommunications fees. Differentiation of entities depending on their affiliation to such an organization is admissible under the conditions indicated in the above judgment of the Supreme Administrative Court. However, other arguments of the Ombudsman argue for not linking certain benefits with belonging to a social organization. These are the arguments related to transport exclusion. This is a serious problem which the Defender has also drawn attention to in other cases. This is a serious problem which the Ombudsman has also drawn attention to in other cases<sup>24</sup>. Transport exclusion is a type of social exclusion and concerns the marginalization of certain people or groups of people from social life. It concerns e.g. situation of unequal access to laws and institutions determining the order of the expected system of functions and social roles<sup>25</sup>. Definitions of social exclusion focus either on specific dimensions of the phenomenon, e.g. institutional and legal restrictions, or on the dominant risk (threat of exclusion), e.g. poverty or lack of qualifications, or on groups of people already affected by social exclusion (e.g. the homeless, addicts) or on showing areas to which access has been restricted (e.g. to consumption, information, culture)<sup>26</sup>. For some authors, discrimination and

<sup>23</sup> Judgment of the Supreme Administrative Court of August 11, 2020, II GSK 3958/17.

<sup>24</sup> Cf. <https://bip.brpo.gov.pl/pl/kategoria-tematyczna/wykluczenie-transportowe>.

<sup>25</sup> R. Babińska-Górecka, *Problem wykluczenia społecznego a system świadczeń z pomocy społecznej*, [in:] *Prawna działalność instytucji społeczeństwa obywatelskiego*, Wrocław 2009, p. 501 and the literature cited therein.

<sup>26</sup> L. Wieczorek, *Zjawiska patologii społecznej i przeciwdziałanie im w mieście średniej wielkości. Kryminologiczna monografia terenu*, Katowice 2013, sp 28 and the literature cited therein.

social exclusion are identical concepts, while for others, social marginalization and social exclusion are consequences of discriminatory actions<sup>27</sup>. In the latter case, the exclusion is based on the situation of diversity and inequality, which contradicts the principle of equality and pluralism<sup>28</sup>. In this sense, exclusion is the result of discrimination – in this sense, the concept of ‘legal exclusion’ appears in the literature on the subject, which – as it is emphasized – is partly identical with social exclusion and is the result of long-term legal and factual discrimination by society. Its element is also non-participation in public or political life (including elections), which results in the failure to take into account certain social groups, their needs or views, by politicians and the law they create<sup>29</sup>. For this reason, the Ombudsman’s arguments pointing to a violation of the principle of equal treatment under Art. 32 of the Constitution on the exemption from transport fees.

## V

The Ombudsman also dealt with many individual cases. In one of the cases<sup>30</sup>, the court issued a default eviction order ordering a large family to leave the apartment belonging to the commune. It held that none of the defendants was entitled to social housing. Meanwhile, there were two people in the family with a certified disability who were entitled to social housing. The court did not check it, and it should have done it *ex officio*. The Ombudsman pointed out that the appealed judgment is an example of a grossly unfair judgment, violating the elementary standards of a democratic state ruled by law. The legal situation shaped by the eviction judgment does not correspond to the constitutional standards of a democratic state ruled by law. Therefore, the Ombudsman filed an extraordinary complaint.

## VI

The analysis of current cases conducted by the Ombudsman shows that these issues are socially significant and have a largely general dimension. The number of such general cases increases every year; therefore, the Ombudsman is becoming more and more active in this regard. The number of such general cases increases every year; therefore, the Ombudsman is becoming more and more active in this regard. The number of such general cases increases every year<sup>31</sup>; therefore, the Ombudsman is becoming more and

<sup>27</sup> A. Winiarska, W. Klaus, *Dyskryminacja i nierówne traktowanie jako zjawisko społeczno-kulturowe*, [in:] *Studia Biura i Analiz Sejmowych Kancelarii Sejmu. Zasada równości i zasada niedyskryminacji*, no. 2(26) 2011, p. 25.

<sup>28</sup> *Ibidem*, p. 26.

<sup>29</sup> *Ibidem*, p. 31 and the literature cited therein.

<sup>30</sup> <https://bip.brpo.gov.pl/pl/content/rpo-skarga-nadzwyczajna-eksmisja-ozn-lokal-socjalny>.

<sup>31</sup> G. Krawiec, *Wsparcie osób z niepełnosprawnością...*, p. 31.

more active in this regard. Activity that is derived from social needs. And although the entities to which a general statement is addressed do not always share the position of the Ombudsman, a given case becomes loud and mediagenic, and the problem is visible in the public sphere. And this is probably what the Ombudsman's activity is all about – apart from “hard” legal measures, the Ombudsman should publicly indicate in which areas the law is not well-constructed and in what area we are dealing with bad/improper practice of applying this law. It can therefore be concluded that the Ombudsman is not only a body that contributes to the implementation of good administration (this is what is indicated in the literature<sup>32</sup>), but also a body that is to implement the postulate of good law. Good law is a certain postulate made in relation to the quality of law. The science of law can construct and indicate certain features of good law, but as S. Biernat emphasizes, good law is a goal to be pursued, but which can never be fully achieved<sup>33</sup>. It is therefore worth considering the Ombudsman as a body contributing to the implementation of the idea of good law. Therefore, it is high time to present this body in the context of the idea of good law in the literature. It is this entity, like no other, that has many legal means that can implement this idea.

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<sup>32</sup> J. Świątkiewicz, *W piętnastą rocznicę ustanowienia instytucji Rzecznika Praw Obywatelskich*, [in:] *Godność człowieka a prawa ekonomiczne i socjalne. Księga Jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa 2003, pp. 7-8.

<sup>33</sup> S. Biernat, *W kierunku dobrego czy złego prawa?*, [in:] *W poszukiwaniu dobrego prawa. Księga jubileuszowa Profesora Mirosława Steca*, vol. I: *Perspektywa publicznoprawna*, Warszawa 2022, p. 91.



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