

LIMITS OF INTERVENTION IN FUNDAMENTAL RIGHTS AND FREEDOMS DURING THE OFFENCES INVESTIGATION IN SLOVAK REPUBLIC¹

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Abstract: *Authors pay their attention to the constitutional aspects of the police investigation regarding to the rights guaranteed by Convention for the Protection of Human Rights and Fundamental Freedoms (right to protection from degrading treatment, right to liberty and right to to respect for private life). They analyze the judgment of the Constitutional Court of the Slovak Republic on the violation of these rights of private individuals.*

Key words: *police investigation, Convention for the Protection of Human Rights and Fundamental Freedoms, right to protection from degrading treatment, right to liberty, right to to respect for private life*

1. The Police Force and its power to investigate administrative offenses

The Police Force is an armed security force, which performs the tasks in the field of public order, security, the fight against organized crime, including its forms and international forms and tasks of The Police Force under the international commitments of the Slovak Republic.

The National Council of the Slovak Republic and the Government supervise the activities of the Police Force. Its jurisdiction is governed by *the Act NC SR no. 171/1993 Coll. the Police Act, as amended*, as well as other, specific laws. However, the Act NC SR no. 171/1993 Coll. is crucial, because it minutely regulates the terms of the procedures of the police force in carrying out its tasks, which are essential for the definition of the limits of the police intervention in the legal status of private individuals.

¹ This work was supported by Slovak Research and Development Agency under the contract No. APVV-0024-12.

Within its work the Police Force is under the Art. 1 (3) of the Act NC SR no. 171/1993 Coll. governed by the Constitution, constitutional laws, laws and other generally binding legal regulations and international treaties which are binding the Slovak Republic. This obligation includes an obligation of the police force to respect the fundamental rights and freedoms guaranteed by the Constitution of the Slovak Republic, which may be affected by the procedure of this public armed corps.

The performance of the police power may affect the fundamental right of a person:

- to life under Art. 15 of the Constitution of the Slovak Republic,
- the integrity of the person under Art. 16,
- the personal liberty under Art. 17 (rendition, body execution, power to require a medical examination for the consumed amount of alcohol or other use of addictive substances)
- protection against unauthorized interference in private and family life under Art. 19 (fingerprinting, identifying of physical characteristics, physical measurement, sampling of biological materials, expulsion from shared household)
- protection of property right under Art. 20 (withdrawal of thing, the withdrawal of weapons)
- the inviolability of the home under Art. 21 (permission to open flat)
- freedom of movement and residence under Art. 23 (closure of public place).

The protection of these fundamental rights is also ensured through Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 5 (right to liberty and security) and Art. 8 (right to respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Fundamental rights and freedoms can be divided into two groups according to the fact, whether the Constitution of the Slovak Republic:

- eliminates any intervention to the right and freedom,
- allows the intervention with the fundamental right and freedom.

For example the first group includes the right to protection from torture, which is specifically expressed in Art. 16 (2) of the Constitution in the form of prohibition do torture, or cruel, inhuman or degrading treatment or punishment.

The second group of fundamental rights and freedoms are those against to which the interventions are permissible, but only in cases and in the manner provided by law. For instance, the deprivation of liberty (Art. 17 (2) of the Constitution), seizure of correspondence, documents and other confidential records stored or sent by post or by other manner (Art. 22 (2)), a house inspection (Art. 21 (2)), interventions of integrity and privacy (Art. 16

(1)). Moreover, according to Art. 13 (4) of the Constitution, the general rule is that when restricting constitutional rights and freedoms their essence and meaning must be ensured, and such restrictions shall only be used for the established purpose.²

Almost every official intervention is able to breach fundamental right or freedom without following the legal limits of implementation of state authority powers.

Fundamental rights and freedoms of persons may be affected:

- in the implementation of a police intervention,
- as a result of acts under investigation.

2. The principles of police actions in the implementation of police force

The official action of the police officer is defined by the Art. 9 (3) of the Act NC SR no. 171/1993 Coll. as „*activity of the police officer provided by law and carried out within its scope, which directly affects the fundamental rights and freedoms*”. Principally the immediacy of the action distinguishes this type of official action of the police officer from other official acts and it places specific requirements on its implementation from the point of view of the protection of fundamental rights and freedoms.

According to Art. 9 of the Act NC SR no. 171/1993 Coll. *the policeman on duty* is required within the limits of the law to carry out the police action, when any crime or offense is committed or when there is any reasonable suspicion of their commission. Such an obligation has the policeman both during and *beyond the time of duty*, if a crime or an offense, which is an immediate danger to life, health or property, is committed.

The police intervention:

- involves the use of force, that means the coercion, and
- its purpose is to eliminate illegal status, that means the status, which is contrary to the protected public interest.

The policeman within the police action implements its powers enshrined in law.³

² Záhora, J.: Limity zásahov do základných práv a slobôd v prípravnom konaní. In: Psychológ medzi právnikmi. Pocta profesorov Gustávovi Dianiškovi k 75. narodeninám. Trnava: Trnavská univerzita v Trnave, Právnická fakulta 2015, p. 410.

³ For example, under Art. 19 (1) point. a) of the Act NC SR no. 171/1993 Coll. policeman is entitled to detain a person, who with its actions directly endangers its life or health or life and health of other persons or property; according to Art. 29 (1) if there is a justified fear of the risk of death or serious risks to the health of the person, or if there is significant damage (Art.11 (3)) to the property and the matter is urgent police officer is entitled to open the flat to enter into it and take action to avert a threat .

When carrying out a police action the *following general principles* shall apply:

- *The principle of lawfulness*, that means the legislation must anchor the power of the policeman to take enforcement actions,
- *The principle of subsidiarity*, that means the coercion can be applied only if the person has been given previous opportunity to voluntarily undergo the command or prohibition while such an unlawful situation persists,
- *The principle of protection of the rights of third parties* affected by the implementation of the police intervention,
- *The principle of proportionality*, that mean the limitation of the procedure of the public official in the implementation of coercion, which is assessed in relation to: a) selection of power (WHAT), b) the method of its use (HOW) and c) the time of execution of the enforcement action (WHEN),
- *The principle of judicial protection* of the rights of person liable in cases of unlawful intervention with fundamental rights and freedoms.

The basic condition for the realization of a police action of the policeman is to simultaneously fulfill the following prerequisites:

- Immediately and clearly threatened or infringed interest protected by law (safety of life, health, property, public order), which preconditions the urgency of the police action,
- The existence of a situation where the danger can not be kept off otherwise.

Immediate intervention may be directed to:

- Violator (i. e. against the person who caused the violation or threat)
- Third parties, which did not raise the threat, but diversion of the danger requires it.

A presumption of lawfulness relates to the immediate intervention. The person against whom the immediate intervention is heading, *is obliged to tolerate it* and it must not evaluate its validity.

Self defense is not permissible, because immediate intervention is the performance of the official power.

Within the police intervention the policeman is authorized to use the *coercive measures*.

When using a coercive measure the *principles of subsidiarity and proportionality* shall apply.

The coercion may be performed if desired goal can not be achieved otherwise and at the same time it must not exceed what is necessary to achieve the purpose of immediate intervention, that is being followed. Any use of coercion against a person that is not necessary due to the person's own behavior and the specific circumstances of the performed immediate intervention, shall be considered as *an intervention to the right guaranteed by Art. 3 of Convention for the Protection of Human Rights and Fundamental Freedoms*.⁴

⁴ Strasbourg organs of human rights protection evaluate the violation of the rights of individuals with regard to the specific circumstances of the cases, but also always take into account the principle of proportionality.

The largest number of decisions of the Strasbourg organs of human rights protection in relation to the right to life is linked to the possibility of the use of lethal force permitted by the Convention for the Protection of Human Rights and Fundamental Freedoms, the second paragraph of the Art. 2.

The State liability arises in the event of a breach of the right to life, where the authorities directly and willfully caused the death of a person. While Article 2 covers not only intentional killing but also situations where it is permitted to use force which may have unintendedly resulted in the deprivation of life (case *Makaratzis v. Greece*, judgment of December 20th 2004, the application no. 50385/99).

The court always considers whether the force used by the authorities is proportional to the objective and that the authorities act so to the extent possible to exclude the use of lethal force. Unconditional necessity of using lethal force must be judged by stricter criteria than those used in evaluating the degree of state intervention because of its necessity in a democratic society.

Besides torture the Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms prohibits the inhuman treatment, including punishment and humiliating treatment from the authorities. *For degrading treatment* it considers such conduct that grossly humiliates the individual against others or compelling him to act against his will or his conscience.

European Court of Human Rights in the case of *Makaratzis v. Greece* stated that only in exceptional circumstances, the actual physical ill-treatment by the official person which does not result in death, may cause a violation of Art. 2 of the Convention. In other cases, illegal administrative practices linked to the attack or harm of a person shall be classified under Art. 3 of the Convention.

Contrary to the principle of proportionality is the use of coercion against a person that is not necessary due to the actual conduct of the person and the particular circumstances of the immediate intervention.

Strasbourg organs of human rights protection have considered:

- a) whether the intervention occurred during accidental or planned police intervention,
- b) what is the severity of impact and
- c) what is the behavior of the person against whom the procedure is directed, during a police intervention.

Svák, J.: Ochrana ľudských práv (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv). 2. rozšírené vydanie. Poradca podnikateľa, spol. s r. o. 2006, Žilina, p. 211.

The policeman is entitled to use the coercive measures on the ground and under the conditions laid down by law.

The valid legislation provides in this context for:

- the procedure of the public official prior to the use coercive measures,
- rules for the selection of a coercive measure,
- assumptions of the use of a particular type of coercive measure and
- the obligations of the public official after the use coercive measures.

In accordance with the *principle of subsidiarity*, while using the coercion, there is a regulation of the the legal obligation prior to the use of coercive measures including the call of the person against whom immediate intervention is performed to desist the unlawful conduct, with the warning that some of coercive measures may be used.

The police officer may waive the call and the warning *only in case prescribed by law*. Abandonment of the call and the warning relates to cases where the word call represents an unwated delay to the intervention, that shall eliminate a serious threat, or cases where a call is clearly superfluous.⁵

Within the current legislation two principles coercive measures apply, namely:

- *numerus clausus principle* – only the coercive measures expressly permitted by law (the legislation shall establish the kinds of coercive measures exhaustively)
- *principle of graduality/sequence* – coercive measures shall apply *mutatis mutandis* to the particular situation from milder ones to the stronger ones.

In accordance with the principle of proportionality, such kinds of measures with such intensity and for such time shall be used, that will meet the purpose of the intervention, and for the same time the intervention shall represent as little interference with the legal integrity of the addressee as possible, that is it shall not cause harm to its rights.

The fact which of the corcive measures shall be used is decide by the the police officer according to the particular situation in order to reach the objective pursued by police action and the use of coercive measure and the intensity of its use shall not not create an unreasonable intensity to the danger of attack.

⁵ Škoda, J. in Mates, P. – Škoda, J. – Vavera, F.: Verejné zbory. Wolters Kluwer ČR, a. s. 2011, Praha, p. 195.

A special condition limiting the use of coercion is the *restriction to the use of coercive measures against the categories of persons* specified by law.⁶

Having used the coercion there is legal obligation of the public official including, e. g. the reporting obligation, the obligation to carry out the compliance test on the use of coercive measures with the law.⁷

The rights of the person, against whom the intervention is performed, may be derived from the general principles of law that shall apply when a police action is carried out. These rights are an expression of the legal protection against unlawful official action, which would the police officer commit if it did not respect its legal obligations in implementing immediate intervention.

3. Principles of investigative acts that are part of the police administration

According to Art. 7 (1) of the Act NC SR no. 171/1993 Coll. *within the investigation* performs the police officer all actions *in accordance with the laws and is responsible for their timely enforcement*.

The requirement of *compliance with the laws* includes a requirement of compliance with the Constitution of the Slovak Republic and also compliance with international conventions, that are binding the Slovak Republic. The influence of this fact is that the national legislation on the police procedures shall comply with the requirements of the Convention for the Protection of Human Rights and Freedoms. However this provides only a minimum standard of protection and leaves the Contracting States free to exceed this standard (Art. 53 of the Convention). Therefore, the fact, that the Slovak legislation would provide more extensive protection of any rights than the international treaty could not be considered as a violation of the Convention.

⁶ According to Art. 65 of the Act NC SR no. 171/1993 Coll. such a person is a pregnant woman, an elderly person clearly physically handicapped or ill, and persons under 15 years of age. Against such a person the police officer is authorized use only following coercive measures: strikes, grips and handcuffs. Other coercive measures is the police officer authorized to use only when attacks of these persons directly threatens the lives and health of other persons or police officer or a serious damage to property imponds and the risk can not be prevented otherwise.

⁷ According to the Act no. 171/1993 Coll. If a police officer finds that the use of coercive measures has injured a person it is required to provide first aid to the injured person and provide it with a medical treatment. The policeman must report to his supervisor any police action in which he used coercive measure. If there are doubts about the legitimacy or proportionality of the use of coercive means or if it is caused death, bodily harm or damage to property, the senior officer must determine, whether the use of power has been in accordance with the law. The outcome of the findings of shall be written in an official record.

The police investigation constitutes an official investigation procedure covered by the Art. 6 of the Convention for the Protection of Human Rights and Freedoms.

According to Art. 6 ods. 2 of the Convention the context of the right to a fair trial requires that charged with a criminal offence shall be presumed innocent until proved guilty according to law. From this fact the basic procedural rules, that shall be applied in the legal regulation on the procedure on a criminal charge are being derived:

- the onus of proof is in principle on the prosecution,
- in the doubt in favor of the accused (in dubio pro reo),
- inadmissibility of illegally obtained evidence,
- right not to incriminate oneself (nemo tenetur se ipsum accusare).

The European Court of Human Rights has clarified the scope of this article anchoring the right to a fair trial, in relation to the *presumption of innocence* in the sense that:

- the persons suspected or the persons accused have the rights under this article from the early stages of police interrogation and
- these guarantees must be extended to witnesses, if they are suspected of committing a crime because the status of a person is not relevant (case *Salduz v. Turkey*).⁸

Even during criminal investigations and when investigating the offenses, that create a special category of administrative offenses, the police force is required to proceed *impartially*.

The official investigation must at the same time:

- be efficient, that means it should be able to come to the findings in a reasonable time,
- provide additional procedural rights deriving from Art. 6 of the Convention.

In the Slovak Republic the procedural administration of the public authority before the start of administrative proceedings on the offense anchors the Act SNC no. 372/1990 Coll. on offenses, as amended. This procedure is called detection of offenses (Art. 58-66). Its aim is to obtain the information needed for decisions by public authorities in proceedings on the offense, which fully exercises the right to a fair trial under Art. 6 of the Convention, and also the right to imposition of punishment explicitly on the legal basis under Art. 7 (1) of the Convention.

⁸ Záhora, J.: Limity zásahov do základných práv a slobôd v prípravnom konaní. In: Psychológ medzi právnikmi. Pocta profesorov Gustávovi Dianiškoví k 75. narodeninám. Trnava: Trnavská univerzita v Trnave, Právnická fakulta 2015, p. 412.

The following principles shall apply in Slovakia within the detection of offenses:

- the principle of lawfulness,
- the principle of equality,
- the principle of protection of the rights of persons affected by the detection of offenses,
- the principle of the procedure of the public authorities within a reasonable time,
- the principle, that the initiated process shall the public authority end with an act.

The principle of lawfulness expresses the requirement that legislation shall establish the power of the authority to detection of offense and that the authority shall act explicitly on the basis and within the scope of the law.

The principle of equality requires, that the authority shall respect the procedural rights of various categories of persons affected by the detection of offenses equally.

The principle of protection of the rights of persons affected by the detection of offenses. These are persons having procedural obligations, but also procedural rights guaranteed by law within the detection of offenses.

Among persons affected by the detection of the offense belong:

- the notifier of the offense,
- legal entity and natural person required to give an explanation,
- authority providing expert opinion,
- legal entity and natural person required to submit the necessary documents,
- public authority, public organization and municipality, if it provides assistance.

The notifier of the offense. The detection of offenses begins either on the observations of the public authority or on the notification of the person. The notifier has a procedural right, that the competent authority shall:

- accept the notification of the offense (Art. 59 (2)),
- decide on the offense notification as soon as possible (Art. 59 (2)),
- if the offense notification has been submitted personally, the authority is required to write a record or minutes on the notification (Art. 59 (3)),
- respond to the notifier, at his request, within a time limit laid down by the law since the notification on the actions taken by the authority (Art. 67 (4)).

The person required to give an explanation. According to the Act SNC no. 372/1990 Coll. everyone is obliged to submit to the authority authorized to detect offenses explanations necessary to verify any notification of offense.

Within the procedural process, which purpose is to find grounds necessary for the administrative decision of the offense applies - in accordance with Art. 6 (2) of the Convention - the prohibition of self-incrimination. The law establishes to the person right to refuse to give an explanation, if it could cause a danger of prosecution to it or a close person.

The authority authorized to detect offenses is obliged to instruct the person giving the explanation on the possibility to refuse to give explanation.

The authority is required to write a record or minutes on the actions connected with the detection of the offense or it is required to record the outcome to the report on the results on detection of the offense (principle of writing documentation).

The principle of the procedure of the authority within a reasonable time. The standard time limit on the detection of offense is one month. However, the Act of the SNC no. 372/1990 Coll. admits also the prolonged procedural process.

The principle, that initiated the process shall end with the act of the authority. The procedure shall not terminate with the decision but with an act, that the act of the SNC no. 372/1990 Coll. calls by a special name.

The authority authorized to detect offenses (Art. 58 (3)) is required to terminate the detection of offenses with some of the following acts:

- put aside the case by the record (if there is no suspicion of an offense or if an offense can not be heard),
- insert the case by the record, if the authority could not detect within the time limit the facts to suggest that the offense has been committed by a particular person,
- submit the case to the competent authority (e. g. if it is a criminal offense)
- report the outcome of the detection of the offense after finding an offender to the competent administrative authority and connect to it all the evidence obtained during the detection of the offense (the report is the basis for the initiation of the offense proceedings).

4. Protection of fundamental rights and freedoms in the investigation by the police force

The national legislation of a Member State of the Council of Europe must ensure that the official procedure of the police force in the investigation of crimes and offenses:

- meet the requirements of impartiality, efficiency, thoroughness and effectiveness and within that it shall guarantee the rights of persons under Art. 6 of the Convention,
- respect the limits allowed to intervene with the rights and freedoms of the the persons affected by the procedure and provided by the Constitution of the Slovak Republic and by the Convention.

The rights guaranteed by the Convention, which may affect the actions of the police, mainly include:

- The right to life (Art. 2),
- The right to protection from inhuman or degrading treatment (Art. 3),
- The right to personal liberty (Art. 5) and
- The right to respect for private and family life (Art. 8).

To the violation of these rights may come not only due to the *active but also passive conduct* of the authority, and this behavior is incompatible with the purpose of the Convention and it is causally linked to the illegal consequence, that means the violation of the rights and freedoms guaranteed by the Convention.

According to the case law of the European Court of Human Rights the Art. 2 (1), first sentence, of the Convention requires the State to take appropriate steps to protect the lives of persons within its jurisdiction. This commitment can grow to the obligations of public authorities to take preventive operational measures to protect a person whose life is in danger because of a certain crime. However, not every alleged danger to the life, obliges public authorities to take concrete action. A prerequisite to give a positive obligation is the finding that the authorities at that time relevant knew or should have known of the existence of a real and immediate danger and nevertheless they have not taken action.

An example in this respect is the judgment of the European Court of Human Rights of May 31st 2007 in Case *Kontrová v. Slovakia*. The Court concluded that there had been a violation of Art. 2 of the Convention on the ground, that the police force despite the fact that under current legislation should have take the applicant's criminal complaint to initiate criminal investigation and promptly initiate criminal proceedings, did not carry out these operations. On the contrary, the police officer concerned has helped the complainant and her husband to change the criminal complaint so that it could have been assessed as an offense, that does not require further action in the matter. As a direct consequence of these errors there has been killing of the complainants children.

Cases of *ineffective investigations* by the state authorities may also lead to the violation of the right to protection from inhuman or degrading treatment under Art. 3 of the Convention.

From the Slovak case law the following finding of of the Constitutional Court of the Slovak Republic (III. US 204/02) may be innteresting. The Constitutional Court of the Slovak Republic found a violation of fundamental rights in the exercise of the powers of the Police Force in the case of the offense. Part of the interventions to the fundamental rights and freedoms of the applicant, has been inadmissible in the opinion of the court, because there has been no legal basis for them. Malpractice of the police force has led to intervention with the rights guaranteed by the Constitution of the Slovak Republic within the official procedure in which the complainant has been executed and detained to the police station in order to submit explanations of the offense.

Based on the record contained in the file of the offense the court found that the police department with gross inadequacy of action to the circumstances of the case:

- *violated the right to integrity of the person under Art. 16 of the Constitution of the Slovak Republic* in the exercise of authority under Art. 22 (1) of the Act NC SR no. 171/1993 Coll. ascertain that the person against whom performs police action does not carry a weapon, when the complainant was ordered to strip naked and then all her things have been checked,
- *violated the right to personal liberty under Art. 17 (2) of the Constitution of the Slovak Republic*, when the minutes of the explanation given to the complainant should be drawn up immediately after her detainment, the complainant should not have be placed in a locked room, and given that the purpose of the detainment was only to give an explanation on the basis of Art. 17 (1) of the Police Act, the policemen were not authorized to take identifiers according to Art 20a of the Police Act,
- *violated the right to protection against unauthorized intervention in private and family life under Art. 19 (3) of the Constitution of the Slovak Republic* by police techniques to measure the height of the applicant, to record her eye color and hair, to record her teeth, to inform on her distinguishing marks and to create a picture recordings in violation to the Art. 20a of Act no. 171/1993 Coll. and without the consent of the complainant, although the police force had no power to do so.

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This paper has been reviewed by the organizing committee of the conference.