

PROCEDURE RELATED TO ISSUANCE OF FIREARMS LICENCES. OVERVIEW OF RELATED ISSUES

Zbigniew Kopacz, PhD in Legal Sciences

Faculty of Law and Administration of the University of Warmia and Mazury in Olsztyn

Abstract: *The object of the present article is analysis of selected elements connected with the procedure related to issuance of firearms licences, with particular focus on premises for granting of firearms licences, competences of public administration institutions, formal elements of the application, evidence collection measures and form of conducting the evidence collection procedure, as well as position of the applicant in the evidence collection procedure.*

Keywords: *Administrative procedure, decodification of administrative procedure, firearms.*

The right to possess firearms is not a constitutional freedom, but an attribute of state control. The system of firearms licences constitutes an exception to the general rule prohibiting possession of firearms and munitions by the citizen¹. Thus, the issue of limits of citizens' freedoms in terms of self-defence seems topical. Of particular importance seems to be the question who should have legal access to firearms in a democratic state – probably officers of respective forces, but what about citizens? Perhaps they should be allowed that in extraordinary situations based on a discretionary decision or based on a related decision after fulfilment of certain premises, or perhaps an unconditional prohibition of access to firearms should be regulated².

The Act of 21 May 1999 on firearms and munitions³ contains both positive (art. 10) and negative (art. 15) premises related to issuance of a firearms licence. Provisions of the Act clearly specify to units of the Police the premises for issuance of a firearms licence, which have an unconditionally binding character, without allowing any interpretation gaps⁴. Pursuant to art. 10 par. 1 of the Act on firearms and munitions, a competent Police unit issues a firearms licence if the circumstances referred to by the applicant justify its issuance. Use of the term “issues” indicates that the administrative act has a related character⁵. However, while reviewing a specific case, Police units are entitled pursuant to

¹ Ruling of the Supreme Administrative Court of 25 June 2008, II OSK 698/07, LEX № 508221.

² E. Olejniczak-Szałowska, *Reglamentacja dostępu do broni i amunicji* [in:] *Materialne prawo administracyjne. Pojęcia, instytucje, zasady*, edited by M. Stahl, Warsaw 2002, p. 367.

³ Consolidated text in the Journal of Laws of 2001, № 52, item 525, as amended – hereinafter: Act on firearms and munitions.

⁴ Ruling of the Voivodeship Administrative Court in Warsaw of 8 August 2007, VI SA/Wa 53/07, LEX № 372089.

⁵ M. Mincer-Jaśkowska, Gloss to the ruling of the Supreme Administrative Court of 7 February 1991, SA/Ka 848/90, „Orzecznictwo Sądów Polskich” 1993, № 1, item 19, p. 42.

art. 80 of the Act of 14 June 1960 Code of administrative procedure⁶ to freely evaluate the evidence material (...). Therefore, it is a citizen's right of an exceptional character, which is subject to restriction in case of determination that actual circumstances of the case justify issuance of such licence⁷.

It should also be raised that art. 10 of the Act on firearms and munitions contains an open catalogue of circumstances justifying issuance of the firearms licence which, in particular, include: permanent, realistic and above-average threat to the life, health or property; being authorised to hunt; documented membership in a shooting association. A premise justifying issuance of the firearms licence is, in fact, existence of objective circumstances supporting its issuance. Determination whether such circumstances exist in a given case is the competence of Police units which in this respect may conduct a more or less strict policy whose principles are not subject to court control; the court only controls whether evaluation does not demonstrate characteristics of latitude and whether no regulations were violated upon issuance of the licence⁸.

Analysis of art. 15 of the Act on firearms and munitions by way of *a contrario* reasoning specifies premises to be met by a person applying for a firearms licence:

- age of 21 or above, the place of permanent residence in the territory of the Republic of Poland,
- proper condition of physical and mental health⁹,
- no criminal record in connection with crimes against life and health or crimes against property regulated in the Criminal Code; the applicant may not be a person towards whom proceedings are in progress for committing such a crime, and
- positive result of the qualification examination¹⁰.

In the Polish legal system, competence of an institution to review and handle a case related to issuance of a firearms licence is determined in provisions of the Act on firearms and munitions. Pursuant to art. 9 par. 1 of the Act on firearms and munitions, firearms and respective munitions may be held by a person based on a firearms licence issued by the voivodeship chief of the Police competent for the place of permanent residence of the applicant; in the case of professional soldiers – upon a licence issued by the competent chief officer of the Military Police.

Apart from specifying substantive competence, the aforementioned regulation governs the method of determining territorial competence in the above area. It ought be to emphasises that the regulation contained in art. 21 of the Code of administrative procedure

⁶ Consolidated text in the Journal of Laws of 2000, № 98, item 1071, as amended – hereinafter the C.A.P.

⁷ E. Ura, S. Pieprzny, *Postępowanie w sprawach wydawania pozwoleń na broń palną* [in:] *Kodyfikacja postępowania administracyjnego na 50 – lecie K.P.A.*, edited by J. Niczypuruk, Lublin 2010, p. 859.

⁸ *Ibidem*, p. 859.

⁹ See: regulation of the Minister of Health of 23 December 2005 *on the specification of illnesses and disorders related to psychological functioning preventing issuance of a firearms licence and registration of firearms* (Journal of Laws № 2, item 14). For example, a person submitting an application for a firearms licence may not suffer from mental impairment, mental disorders and disorders caused by use of psychoactive substances, excluding the smoking of tobacco.

¹⁰ Pursuant to art. 16 of the Act on firearms and munitions, the following persons – among others – are exempt from the examination: officers of the Police, Internal Security Agency, Intelligence Agency, Military Counterintelligence Service, Military Intelligence Service, Central Anticorruption Bureau, Border Guards, Government Protection Bureau, Prison Service, officers or employees of other armed state units and professional soldiers of the Military Forces of the Republic of Poland.

does not apply here, even though the manner of determining that competence would give the same results as the institution competent for the applicant's place of residence would be competent (art. 21 § 1 item 3 of the Code of administrative procedure). Pursuant to art. 6 par. 2 of the Act of 6 April 1990 on the Police¹¹, the territorial scope of activity of voivodship chief officers of the Police and powiat chief officers of the Police matches the basic administrative division of the country.

Proceedings related to issuance of firearms licences are conducted in compliance with regulations contained in the Code of administrative procedure. Pursuant to art. 61 § 1 of the Code of administrative procedure, the request for initiation of the administrative procedure ought to specify the object of procedure; in case of doubts, the request ought to be specified in detail by the applicant, and not by the public administration institution conducting the evaluation¹².

Pursuant to art. 61 of the Code of administrative procedure, administrative proceedings may be initiated both by the public administration institution and by the applicant obliged to submit a respective application. One ought to bear in mind that proceedings are as a rule initiated based on the application – if the resolution vests the right in the applicant, or ex officio – if it imposes an obligation onto the party¹³. That means that the procedure is initiated by the applicant¹⁴.

The application should at least specify the person who submits it, the object of request and it should satisfy other requirements regulated in detailed provisions (e.g. actual justification of the need to possess the given kind of firearms, and attachments, including a medical certificate).

On the other hand, the administrative procedure may not be initiated if the request for its initiation is submitted by an unauthorised entity. In fact, such procedure is invalid from the very beginning¹⁵. That means that the person submitting the application for issuance of a firearms licence must have a legal interest (right of action as defined in art. 28 of the Code of administrative procedure). Thus, if the application is submitted by a person not being a party to the case or not acting as a proxy or representative of a party, this should result in issuance of a refusal due to formal reasons, i.e. due to lack of right of action of the party.

The next stage of the procedure, if the application is submitted properly, is evaluation by the institution whether the application comes from an authorised person and if the request concerns a case handled by way of administrative decision. Fulfilment of those premises is of greatest importance at the initial stage, as this stage involves formal and procedural evaluation of the application and the claim for settling of the administrative request contained therein. As a result of negative evaluation by the institution the formal aspects of the application, the application will not be further examined, e.g. if the

¹¹ Journal of Laws of 1990, № 30, item 178, as amended.

¹² Ruling of the Supreme Administrative Court of 18 January 1989, III SA 229/89, [in:] E. Smoktunowicz, *Kodeks postępowania administracyjnego w orzecznictwie Sądu Najwyższego, Naczelnego Sądu Administracyjnego i Trybunału Konstytucyjnego. Wykładnia prawa administracyjnego*, Warsaw 1995, p. 152.

¹³ E. Ura, E. Ura., *Prawo administracyjne*, Warsaw 2004, p. 291.

¹⁴ S. Maj, *Ustawa o broni i amunicji. Komentarz*, Warsaw 2010, p. 105.

¹⁵ G. Łaszczycza, Cz. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, Volume I, Zakamycze 2005, p. 582.

application does not contain the applicant's address¹⁶. However, other deficiencies of the application do not cause such consequences, as they involve requesting the applicant to remove the deficiencies within 7 days with an advice that in case of failure to remove them, the application will not be further examined (art. 64 § 2 of the Code of administrative procedure)¹⁷.

Pursuant to the principle of objective truth, contained in art. 7 of the Code of administrative procedure, public administration institutions guard the law and order during the procedure, undertaking – ex officio or based on a request submitted by the parties – any activities necessary for thorough clarification of facts of the case and handling the case, taking into account the social interest and legitimate interest of citizens. It is during the clarification procedure that the institution is obliged to clarify the actual and legal state of an individual case, which involves any activities undertaken during the administrative procedure to clarify the case. Indeed, this is the *sine qua non* condition of proper and, therefore, legal resolution of the case. As a consequence, institutions conducting the procedure have two duties:

1. to determine ex officio what evidence is required to determine the facts of the case, and
2. to conduct the required evidence collection procedure¹⁸.

During the procedure related to collection of evidence, the institution of public administration conducting the procedure and the party undertake activities aimed at determining existence or non-existence of facts important to resolution of the case, or truthfulness of the statements of fact. On the other hand, the sole condition for admitting the above mentioned source material as evidence in an administrative procedure is its compliance with valid laws, both substantive and formal¹⁹. The outcome of the evidence collection procedure is evidence material based on which the institution handles the administrative (individual) case²⁰. One should refer here to the standpoint of the Voivodeship Administrative Court in Warsaw which in the ruling of 17 March 2009 stated that “the obligation stipulated in art. 7 and 77 of the Code of administrative procedure is not in contradiction to the principle that the burden of proof finally rests on the party who derives legal effects for themselves from a certain fact. However, it is only the party's failure to submit evidence despite being summoned by the institution excludes the possibility to effectively raise the claim that the appealed decision is contradictory to the law as a result of violation of the institution's obligation to verify circumstances of the case in compliance with art. 7 and 77 of the Code of administrative procedure. Although while pursuing the principle of material truth the institution is obliged to thoroughly collect and analyse the whole material, the said party is not exempted from the obligation of loyal collaboration in clarifying actual circumstances if failure to prove a certain fact may result in issuing a decision unfavourable to the party”²¹.

¹⁶ Ruling of the Supreme Administrative Court of 16 December 1987, IV SA 757/87, „Orzecznictwo Naczelnego Sądu Administracyjnego” 1988, № 1, item 20.

¹⁷ P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2010, p. 61.

¹⁸ W. Chróścielewski, J. P. Tarno, *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warsaw 2009, p. 119; B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2011, p. 58 - 60.

¹⁹ *Ibidem*, p. 120.

²⁰ R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2005, p. 198.

²¹ Ruling of the Voivodeship Administrative Court in Warsaw of 17 March 2009, VI SA/Wa 2430/08, LEX № 531542.

In the light of art. 75 § 1 of the Code of administrative procedure, evidence may be anything which may contribute to clarification of the case; in particular, evidence may include documents, testimonies of witnesses, expert opinions and inspections. The provision does not exhaust the catalogue but, to the contrary, it has an open character, which is evidenced by the phrase “in particular” used in this provision²².

The evidence collection procedure connected to issuance of a firearms licence takes place in the form of so-called cabinet proceedings. This form of proceeding occurs if the premises specified in art. 89 of the Code of administrative procedure do not apply, nor do separate provisions which the aforementioned Act refers to²³. Although this procedure is less formalised than a court hearing, all principles of evidence collection procedure apply therein. Cabinet proceedings are dominated by the rule of written proceeding above verbal proceeding.

During the evidence collection procedure related to issuance of a firearms licence, activities to be performed by competent units of the Police or Military Police include verification of the candidate’s shooting abilities and familiarity with the law, health condition, obedience to the law and existence or non-existence of a justified concern that the given person may use firearms in a purpose contradictory to the interest of public security or order; whether the given person is sentenced for a crime in the National Court Register; in the National Police IT System and the National Centre of Criminal Information, or whether criminal proceedings are in progress against the candidate²⁴.

The obligatory measure related to collection of evidence, applied in the discussed procedure, is the qualification examination. The matter constituting subject of the examination is specified in the regulation of the Minister of Home Affairs and Administration of 20 March 2000 on the examination of familiarity with regulations concerning possession of firearms and the ability to use firearms²⁵. Pursuant to § 3 of the above mentioned regulation, the examination consists of two parts: theoretical and practical.

The objective scope of the theoretical part of the examination covers:

- a) familiarity with provisions of the Act of 21 May 1999 on firearms and munitions and regulations issued on its ground,
- b) familiarity with provisions of the Criminal Code governing crimes connected with firearms.

The theoretical part of the examination is carried out as a test, whose result is recorded in the examination card unless the licence is issued in connection with sports activity. The theoretical part may then take the form of a verbal examination consisting of 10 questions. In order to pass the theoretical part of the examination, all questions asked must be answered correctly.

As far as the practical part of the examination is concerned, its objectives include:

- a) verification of compliance with regulations of the shooting range,
- b) verification of the ability to correctly disassemble and assemble firearms, load and unload munitions, release and close the safety catch of the given piece of firearms, as well as the manner of proceeding in case of defectiveness of the firearms,

²² J. Borkowski [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. op. cit.*, p. 332.

²³ B. Adamiak [in:] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądownoadministracyjne*, Warsaw 2003, p. 242.

²⁴ S. Maj, *Ustawa o broni i amunicji. Komentarz*, Warsaw 2010, p. 109.

²⁵ Journal of Laws № 19, item 241, as amended.

- c) conducting of a shooting test using firearms of the given kind at the shooting range, unless – as stipulated in § 5 paragraph 7 of the regulation on the examination concerning familiarity of regulations governing possession of firearms and ability to use firearms – the licence is to be issued in connection with a collection, a souvenir or for possession of a crossbow. In such cases, a shooting test is not performed, but the examination is conducted at a shooting range or at the premises of a competent institution.

The result of the practical part of the examination, similarly to the result of the theoretical part, is recorded in the examination card. Detailed criteria of the shooting test are specified in appendix № 2 to the regulation on the examination concerning familiarity of regulations governing possession of firearms and ability to use firearms. The practical part of the examination is passed on condition of obtaining a positive result of verification concerning familiarity with the issues specified above.

The report of the conducted examination is recorded in the protocol whose inseparable component is the examination card from the theoretical and practical parts of the examination. The person taking the examination ought to be notified by the examination board of the board's right to include in the protocol comments concerning the course of the examination and, therefore, of the possibility of submitting a request for retaking the examination.

Another source of evidence in the procedure for issuance of a firearms licence are documents attached to the application by the applicant: medical certificate, psychological certificate, certificate of membership in the Polish Hunting Association or a licence stating the authorisation to practise sport shooting. However, these documents only evidence that their issuer submitted the statements contained therein²⁶. That means that the institution of public administration in the clarification procedure must accept the information stated in the text of the document as proved. It ought to be emphasised here that in the procedure related to issuance of a firearms licence, conducting of the evidence collection procedure based on an opinion of an expert with respect to circumstances covered by the issued certificates (medical and psychological) is excluded.

Another measure applied in connection with collection of evidence in the discussed procedure is the environmental inquiry aimed at determination whether there does or does not exist a justified concern in the case that the given person may use firearms in a purpose contradictory to the interest of public security or order.

A party to the procedure concerning issuance of a firearms licence is the person who submits the application for issuance of the aforementioned licence or, among others, a sports school, a sports organisation or the Polish Hunting Association.

The position of a party in the evidence collection procedure involves active participation of the party in the evidence collection procedure. Pursuant to this principle, the party to the evidence collection procedure acquires both certain rights and obligations, including:

- 1) the right of being notified of the place and date of evidence collection,
- 2) the right to speak for himself/herself,
- 3) the right to participate actively in determination of facts of the case and participate in activities making up the evidence collection procedure,
- 4) the right to review files of the case,

²⁶ A. Wiktorowska [in:] M. Szubiakowski, M. Wierzbowski, A. Wiktorowska, *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne*, Warsaw 2002, p. 110.

- 5) the obligation to show up whenever summoned by the institution conducting the administrative procedure,
- 6) the obligation to notify the institution of change of address if the change occurs during the ongoing procedure (art. 41 of the Code of administrative procedure).

Pursuant to art. 9 of the Code of administrative procedure, bodies of public administration are obliged to provide proper and exhaustive information to the parties on actual and legal circumstances which may influence determination of their rights and obligations constituting object of the administrative procedure. Therefore, if the application for issuance of a firearms licence contains – for example – formal deficiencies, the public administration institution is obliged to notify the party of possible effects of failure to remove those deficiencies, as defined in art. 64 § 2 of the Code of administrative procedure²⁷.

Active participation of the party involves at the same time the obligation of the institution conducting the procedure, which ought to enable participation of the party in those activities. Such a solution is adopted in art. 79 of the Code of administrative procedure which stipulates that the party ought to be notified of the place and date of obtaining evidence from testimonies of witnesses, expert opinions or inspection at least seven days in advance. As it was stated by the Voivodeship Administrative Court in Wrocław in its ruling of 21 February 2008, the party may not be deprived by the institution of its rights resulting from the provision of art. 79 of the Code of administrative procedure by failing to notify the party of collected evidence. This activity is not left to the discretion of the institution, but constitutes its obligation irrespective of the essence and importance of obtained evidence. Indeed, a decision on participation in the evidence collection procedure may only be made by the party, not by the institution before which the administrative procedure is conducted²⁸.

Another fundamental right of the party in the evidence collection procedure is the right to present a standpoint concerning the collected evidence. This right is expressed in art. 81 of the Code of administrative procedure, pursuant to which an actual circumstance may be considered to be proved if the party had an opportunity to express a standpoint concerning the collected evidence unless circumstances referred to in art. 10 § 2 of the Code of administrative procedure occur. The party is entitled to make a decision whether to use this right, which means that exercise of the right depends on the party's will. If the party uses the right, the party's standpoint concerning the collected evidence ought to be recorded in a protocol drawn up by the institution and signed by the party²⁹. The standpoint of the Supreme Administrative Court contained in the ruling of 7 November 1988 ought to be cited here, in which the Court stated that “actual circumstances determined during the procedure in which the party did not have an opportunity to participate and speak about the collected evidence may not be considered to be proved before issuance of the decision”³⁰.

²⁷ B. Adamiak [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. op. cit.*, p. 309-310.

²⁸ Ruling of the Voivodeship Administrative Court in Wrocław of 21 February 2008, II SA/Wr 697/07, LEX № 487233.

²⁹ B. Adamiak [in:] B. Adamiak, J. Borkowski, *Postępowanie (...), op. cit.*, p. 235.

³⁰ Ruling of the Supreme Administrative Court of 7 November 1988, IV SA 701/88, [in:] E. Smoktunowicz, *Kodeks postępowania administracyjnego w orzecznictwie Sądu Najwyższego, Naczelnego Sądu Administracyjnego i Trybunału Konstytucyjnego. Wykładnia prawa administracyjnego*, Warsaw 1995, p. 149.

On the other hand, in the ruling of 17 March 2005, the Supreme Administrative Court stated that “during the procedure for issuance of a firearms licence, a party may not effectively report a claim for conducting the evidence from opinion of an expert, because all circumstances concerning the health condition which the party intends to prove ought to be confirmed through evidence foreseen in the regulation on medical and psychological examinations of persons applying for firearms licences³¹. Inadmissibility of such evidence is also raised by the Voivodeship Administrative Court in Warsaw in its ruling of 14 June 2007 stating that “on the ground of a court and psychiatric opinion issued during the criminal procedure, a Police unit is entitled to state occurrence of circumstances sufficiently justifying the suspicion that the given person comes under the definition of persons specified in art. 15 par. 1 item 3 of the Act on firearms and munitions (...) Not only are Police units authorised to verify final medical and psychological certificates, (...) but they are also bound by them³².”

After conclusion of the clarification procedure, the public administration institution proceeds to the next stage, namely issuance of decision in the case. However, prior to issuance of the decision, pursuant to art. 10 § 1 of the Code of administrative procedure, the institution ought to notify the party of completion of the evidence collection procedure and appoint to the party a deadline for acquainting himself or herself with all evidence material collected in the case.

Conducted above, basic analysis of formal regulations contained in particular in the Code of administrative procedure and in the Act on firearms and munitions, concerning the method of proceeding in cases concerning firearm licences allows determination that the procedural status of a person applying for issuance of the decision is much worse than that of the entity requesting initiation of the procedure, regulated exclusively by the provisions of the Code of administrative procedure. In this context, attention ought to be paid to considerable formalisation regarding the requirements contained in the Code of administrative procedure. Apart from the obligation to fill in the questionnaire (application), the party must attach thereto a number of certificates. With that in mind, one ought to state that formalisation of this application resulted in shifting the burden of proof onto the applicant and in charging the applicant with the costs. That would be impossible in case of a procedure conducted exclusively on the basis of provisions of the Code of administrative procedure under which – pursuant to art. 7 and art. 77 § 1 of the Code of administrative procedure – the burden of proof rests exclusively with the institution. Moreover, art. 80 of the Code of administrative procedure is of significant importance as it stipulates that the institution ought to perform evaluation based on all evidence material in the context of vague terms used by the legislator; however, there exists rich court judicature which has developed the line of interpretation.

³¹ Ruling of the Supreme Administrative Court of 17 March 2005, II OSK 1273/04, LEX № 189224.

³² Ruling of the Voivodeship Administrative Court in Warsaw of 14 June 2007, VI SA/Wa 657/07, „Central Database of Administrative Court Rulings” (available at the website www.orzeczenia.nsa.gov.pl).