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THE OMBUDSMAN AS INITIATOR OF ADMINISTRATIVE PROCEEDINGS IN POLAND

Zbigniew R. Kmiecik

Katedra Postępowania Administracyjnego
Uniwersytet Marii Curie-Skłodowskiej w Lublinie
e-mail: seth.coa@neostrada.pl

Summary. The Ombudsman may demand that the administrative proceedings be initiated in any matter disposed of through a decision if the substantive law provides for initiation of the proceedings upon application of a party. The Ombudsman does not, however, help citizens out in submitting requests for the initiation of the proceedings or legal remedies against administrative resolutions: he does not exercise the role of their general representative for litigation. The Ombudsman should be at liberty to choose the matter, procedure and instance in which he will take action. This should not be perceived as a case of unequal treatment of citizens.

Key words: ombudsman, administrative proceedings, initiation of the proceedings

1. Administrative proceedings can be initiated in two ways: *ex officio* or upon application of an empowered entity. In the vast majority of cases the entity empowered to demand the initiation of the proceedings is obviously a party. Special provisions (included and not included in the Code) may however also grant such rights to other entities. The right to initiate the proceedings in a particular matter can be vested with either an authority or a party, or with both these entities, sometimes with a party and third parties, or with an authority, party or third parties. In matters where an authority is empowered to initiate the proceedings *ex officio*, the application to initiate the proceedings can be also filed by a public prosecutor and a social organization, and in all matters – by the Ombudsman and by the Children's Ombudsman. It is not always easy to determine the entities which are vested with the initiative to institute the proceedings in a particular matter. The answer to the question should be sought in the provisions of substantive law[1]. Defining of who can be the initiator of instituting the proceedings in a particular matter in light of substantive law determines the

[1] The term „substantive law" is used here to denote the so-called „substantive statutes", i.e. statutes that regulate individual areas of administrative law relations. The presence of provisions in such statutes, which define e.g. the entities empowered to initiate the proceedings in matters regarding the rights and duties specified by such statutes, does not, obviously, change the character of the provisions as procedural law ones.

admissibility of initiating the proceedings in cases defined in the provisions of the Code of Administrative Proceedings[2] by entities specified therein.

The situation is comparatively simple when substantive law explicitly shows *expressis verbis* on whose initiative the proceedings can be initiated in a particular matter or category of matters, although even in such cases there may be and sometimes there are doubts as to interpretation. The problem becomes complicated when substantive law provisions are silent on this point. It is then assumed that the right to initiate the proceedings is determined by the character of an administrative matter: the matters whose subject is the extension of a party's scope of rights are instituted on his application whereas the matters aimed to restrict the party's rights are instituted *ex officio*[3]. There is no consensus of opinions, however, about whether this separation of powers to initiate the proceedings should be treated as a recommendation whose observance increases the possibilities of achieving the goal of the proceedings and minimizes the cases of closing the proceedings with a discontinuance decision, or as an absolutely or at least relatively binding requirement, violation of which results in an aggravated defectiveness of the decision issued.

Special cases of the initiative to institute the proceedings are also regulated by the CAP but in a different way than by substantive laws. Unlike the latter, the provisions of the CAP define the entities empowered to initiate the proceedings in any matter but under specified conditions rather than in a specific matter or a specific category of matters regardless of any circumstances. Therefore, while the substantive law provisions (directly or indirectly) indicate the entities initiating the proceedings in connection with the subject of the matter, the CAP provisions empower specific entities to initiate the proceedings because of the circumstances of the matter. The Code provisions do not therefore assign the initiators of instituting the proceedings to specific matters or kinds (categories) of matters, they only indicate the conditions for initiating the proceedings in any matter by specified entities. In this way the Code empowers a public prosecutor, a social organization and a competent public administration authority to initiate the proceedings. The character of the conditions that actualize the right of a public prosecutor or social organization to initiate the proceedings (removal of unlawfulness, regard to the public interest) shows that the two entities may demand that the proceedings be instituted only in the matters where the substantive law provisions provide for *ex officio* initiation of the proceedings The case is different with the Ombudsman and the Children's Ombudsman, whose right to demand that the proceedings be initiated is granted by the laws that establish

[2] Act of 14 June 1960 – Kodeks postępowania administracyjnego [The Code of Administrative Proceedings], uniform text: Dz. U. [Journal of Laws] of 2013, item. 267 as amended; hereafter CAP.

[3] See e.g. B. Adamiak, in: B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz* [The Code of Administrative Proceedings. Commentary], C.H. Beck, Warszawa 2011, 290.

these authorities. The character of the conditions that actualize this right in their case (protection of human and civil rights and freedoms, protection of the child's rights) allows the assumption that they can demand that the proceedings be initiated first of all in the matters where the proceedings are instituted in principle on application of the parties.

The *ex officio* initiation of the proceedings denotes not only instituting the proceedings on its own initiative of an authority but also on the initiative of a third party (e.g. following the submission of a public interest complaint). However, (contrary to the wording of Art. 31 § 2 and Art. 186, CAP) the *ex officio* proceedings are not the proceedings initiated upon an application, which an authority (with the exception of cases of the groundless proceedings) is obliged in principle to take into account (such as the application by a public prosecutor or by the Ombudsman) or at least to take a stance on them in the form of procedural decisions (e.g. in the case of application by a social organization concerning matters of another person)[4].

The legislator's decision to not formalize initiation of the proceedings should be positively assessed. In matters (categories of matters) where the issue of having the title to start the proceedings[5] may raise doubts and in order to resolve it explicitly, explanatory proceedings have to be conducted, the legislator may, by way of specific provisions, introduce the requirement to issue formal acts starting the proceedings, and does so. In this way the legislator prevents the problem of the non-existent or invalid proceedings, i.e. the proceedings conducted despite the lack of effective initiation thereof by the fact of submitting the request itself. There is no reason, however, to apply such solutions to all matters disposed of in the form of jurisdiction proceedings.

2. The rights of the Ombudsman in the administrative proceedings are defined by Art. 14 item 6 of the Act of 15 July 1987 – Law on the Ombudsman[6], pursuant to which he can request initiation of the administrative proceedings and participate in the proceedings with the rights and powers of a public prosecutor. Despite explicitly granting the Ombudsman the procedural initiative in the administrative proceedings, the analysis of initiation of the proceedings upon demand of the Ombudsman is basically only theoretical. As B. Adamiak observes, in practice the Ombudsman does not demand that the administrative

[4] See the remarks by Z. Janowicz concerning the initiation of the proceedings as a result of public prosecutor's objection (*Kodeks postępowania administracyjnego. Komentarz* [The Code of Administrative Proceedings. Commentary]), Wydawnictwa Prawnicze PWN, Warszawa 1999, 482.

[5] In the case of the parties such an entitlement (the title to start the proceedings) is to have legal interest; in the case of entities (participants) as parties – this title is the need to protect specific values, which an entity was established to protect.

[6] Uniform text: Dz.U. [Journal of Laws] of 2001 no. 14, item. 147 as amended.

proceedings be initiated[7]. The reason why this procedural right is not utilized is the assumption that the Ombudsman exercises his functions based on the principle of subsidiarity, and the fact that there are procedural grounds allowing the Ombudsman to take specific action is not enough for the Ombudsman to do so. First of all, a „justification as to the substance" is necessary[8]. Such a justification – both in the case of demand to institute the proceedings and in respect of all other actions that the Ombudsman may take – is the necessity to protect the human and civil rights and freedoms specified in the Constitution of the Republic of Poland and in other normative acts (Art. 1 section 3, Law on the Ombudsman).

Freedom is commonly understood as the sphere of rights which the legislator does not make but only defines their boundaries, whereas the catalogue of rights is determined by the State. A person can utilize freedom at his discretion without the occurrence of determinant conditions (e.g. a separate permission) unless a legal provision provides otherwise. In contrast, the actualization of a right is effected through occurrences provided for by the law and consists in being entitled to performances also specified by the law or in the ability to perform actions specified by the law[9]. Implementation of a substantive right generally also requires that it be specified beforehand in reference to an individual by a competent State authority. Supervision over the observance and implementation of these values by the competent authorities is exercised by the Ombudsman not only with regard to legality but also to the principles of social justice and social coexistence.

The doctrine emphasizes that the Ombudsman can not take actions that initiate the opening of the administrative proceedings in all matters disposed of by public administration authorities but only in such as pertain to human and civil rights and freedoms[10]. It should however be observed that the function of the Ombudsman is to safeguard the human and civil rights and freedoms specified not only in the Constitutions but also in other normative acts, i.e. statutes, international agreements, and even in regulations. This applies therefore to all rights and freedoms of the individual in relation to the State rather than only those that can be termed constitutive, basic or fundamental. The citizen's right is not only the right to property or freedom but also, for example, to a driving license. Consequently, it is in principle only the rights of the individual arising from contrac-

[7] B. Adamiak, in: B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne* [Administrative Proceedings and Proceedings before Administrative Court], LexisNexis, Warszawa 2003, 157.

[8] Cf. cases: RPO 4085/89/I, RPO 35495/88/I.

[9] Cf. Z. Kędzia, *Pojęcie „prawa i wolności obywatelskie" (Uwagi na tle ustawy o Rzeczniku Praw Obywatelskich)* [The Concept of Civil Rights and Freedoms. (Remarks in the Context of the Law on Commissioner for Citizens' Rights)], Państwo i Prawo 1989, no. 3, 31.

[10] G. Łaszczyca, in: G. Łaszczyca, Cz. Martysz, A. Matan, *Postępowanie administracyjne ogólne* [General Administrative Proceedings], C.H. Beck, Warszawa 2003, 388.

tual relations that are outside of the Ombudsman's competency[11]. The latter are not part of the jurisdiction of the administrative authorities but of common courts of law. Essentially, therefore, the Ombudsman may demand that the administrative proceedings be initiated in any matter disposed of through a decision if the substantive law provides for initiation of the proceedings upon application of a party.

The factor that justifies actions by the Ombudsman is, however, not the kind of right being examined or to be examined by the administrative proceedings but the infringement upon a right or freedom. The Ombudsman intervenes only when there was (is) a violation of rights or freedoms of the citizens[12].

The violation of substantive rights in the scope in question can be spoken of in two cases: 1) when a public administration authority unjustifiably deprives a person of his vested rights (e.g. by expropriation); 2) when a public administration authority unjustifiably refused to grant a right to a person by issuing a negative decision. Violation of formal rights occurs when an authority is conducting the proceedings with breach of the procedural provisions of the Code of Administrative Proceedings and other normative acts containing regulations concerning the mode of issuance of and appeal against administrative decisions. The violation of both kinds of rights manifests in desistence from initiating the proceedings or in closing the proceedings without a decision as to the merits of the case despite the fact that there are conditions for disposing of the matter as to its substance.

The Ombudsman does not, however, help citizens out in submitting requests for the initiation of the proceedings or legal remedies against administrative resolutions: he does not exercise the role of their general representative for litigation, nor does he provide specific legal advice on how to institute an action or manage an affair[13]. The mass character of matters submitted to the Ombudsman would allow him to initiate the proceedings only in some matters, which would result in objections as to the unequal treatment of citizens. Consequently, the Ombudsman of the First Term opted for the limitation of the use of measures concerning the initiation and conduct of individual civil, administrative, and criminal cases provided for under Art. 12 items 4, 5, and 6 of the Law on the Ombudsman[14]. This stance is universally accepted by the doctrine.

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[11] See A. Kubiak, *Rzecznik Praw Obywatelskich* [The Ombudsman], Państwo i Prawo 1987, no. 12, 8–9; Z. Kędzia, *op. cit.,* 26–27; A. Karnicka, *Rzecznik Praw Obywatelskich (kompetencje, postępowanie, środki działania)* [The Omudsman (Competences, Conduct, Measures)], Państwo i Prawo 1990, no. 1, 54; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [The Constitution of the Republic of Poland. Commentary], Zakamycze, Kraków 1998, 223.

[12] See W. Taras, *Rzecznik Praw Obywatelskich o postępowaniu administracyjnym* [The Ombudsman on Administrative Proceedings], Państwo i Prawo 1991, no. 1, 45–46.

[13] Cases: RPO 10317/88, RPO 9367/88/VI.

[14] *Sprawozdanie Rzecznika Praw Obywatelskich prof. Ewy Łętowskiej za okres 1 XII 1988 – 30 XI* 1989 [Report of the Ombudsman, Prof. Ewa Łętowska for the period of from 1 Dec. 1988 to 30 Nov. 1989], Biuletyn RPO – Materiały 1990, no. 5, 16.

For that reason, literature on the subject assumes that the interference of the Ombudsman in administrative matters is based on the principle of subsidiarity. Pursuant to this principle, the Ombudsman „takes action when a person whose rights were infringed upon used all available means of legal protection first". The interested person should first use the procedural powers granted to him by the legislation (active participation in the proceedings, appeals and letters of dissatisfaction submitted to the administrative court) and only then he should consider whether it is advisable to submit the matter to the Ombudsman[15].

With this assumption, however, the provision granting the Ombudsman the right to demand that an administration authority should institute the proceedings would be essentially a dead provision (like the provisions on the Law on the Procedure before Administrative Courts[16] granting the Ombudsman the right to submit a claim to the provincial administrative court and a cassation claim to the Supreme Administrative Court). The legal system does not provide for any control proceedings that could be instituted upon application of the Ombudsman but would not be available to the parties as their initiators. Under such circumstances, after the parties have exhausted all possible legal remedies, the Ombudsman could do nothing. A motion to demand initiation of the proceedings would have to be rejected because of the force of *res iudicata*. The Ombudsman could again submit a demand to initiate administrative proceedings concerning a particular matter only when the previous demand of a party was ignored or rejected, like the administrative measures that the party submitted (a complaint against failure to dispose of a matter within the prescribed time limit or against the order to refuse to initiate the proceedings) and, likewise, legal remedies (a complaint against failure to act submitted to the provincial administrative court or a cassation complaint submitted to the Supreme Administrative Court). The possibility of all these facts occurring jointly appears to be close to nil, however.

To sum up the foregoing remarks, it should be concluded that, having adopted the subsidiarity principle in the wording cited above, the Ombudsman could demand only that the extraordinary administrative proceedings be initiated (before the ordinary proceedings are instituted, one cannot speak of violation of rights while the right to submit an appeal can be granted to entities acting as parties only on condition that they participate in the first-instance proceedings) and only when the Ombudsman concludes that a person wishing to pursue his rights, despite his full capacity to enter into legal transactions, is helpless, and cannot use the services of a legal representative for some reasons. The restriction of the Ombudsman's interventions in administrative matters only to such situations appears to be decidedly insufficient.

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[15] W. Taras, *op. cit*., 47.

[16] Act of 30 August 2002 – Prawo o postępowaniu przed sadami administracyjnymi [Law on the Proceedings before Administrative Courts], uniform text: Dz. U. [Journal of Laws] of 2012, item. 270 as amended; hereafter LPAC.

In view of the foregoing, it is necessary either to change the way of construing the principle of subsidiarity or admit exceptions to it, or, which would be the best, to adopt both of these two. It appears that a sufficient (although also not absolute) condition for the Ombudsman's intervention should be for a party to exhaust the procedure of appeal. Allowing the Ombudsman freedom to choose the matter, procedure and instance in which he will take action, should not be perceived, contrary to E. Łętowska's fears[17], as a case of unequal treatment of citizens. It is obvious and probably understandable to all that the Ombudsman is not able to participate in all administrative proceedings even when it seems advisable. There is no doubt that the social reception of the Ombudsman's activities will be better when he intervenes in some cases than in none.

The Ombudsman of the First Term rightly defined the exercise of her statutory tasks as taking actions to remove gross injustices[18] and this is the directive by which the Ombudsman should be guided when choosing the matter, procedure and instance in which he will take measures consisting in initiation of and/or participation in the administrative proceedings, rather than by whether a party has exhausted all legal remedies that he is entitled to.

3. The Ombudsman, like other participants as parties, may also demand that the extraordinary proceedings be initiated. The Ombudsman, like a public prosecutor, does so in a specific way: by filing an objection against the final decision. Although Art. 14 item 6 of the Law on the Ombudsman stipulates only that the Ombudsman may request initiation of the administrative proceedings and participate in them with the rights and powers of a public prosecutor (while it does not provide *expressis verbis* for the right to file an objection), yet the doctrine generally assumes that the statutory right of the Ombudsman to participate in the administrative proceedings with the rights and powers of a public prosecutor also (implicitly) includes the right to file an objection (as in Z. Janowicz[19], E. Ochendowski[20]; differently in T. Woś[21]).

An objection can be filed in three groups of cases: a) in cases justifying the reopening of the proceedings (Art. 145 § 1, Art. 145a, Art. 145b CAP)[22]; b) in

[17] See footnote 14.

[18] Case: RPO 393/88/III.

[19] Z. Janowicz, op. cit., 485.

[20] E. Ochendowski, *Postępowanie administracyjne i sądowoadministracyjne. Wybór orzecznictwa*, [Administrative Proceedings and Proceedings before Administrative Court. Selected Decisions], TNOiK, Toruń 2000, 94.

[21] T. Woś, in: T. Woś (ed.) H. Knysiak-Molczyk, A. Krawiec, M. Kamiński, T. Kiełkowski, *Postępowanie administracyjne* [Administrative Proceedings], LexisNexis, Warszawa 2013, 189.

[22] When the grounds for an objection is the provision of Art. 145 § 1.4 (i.e. when a party, not due to his fault, did not participate in the proceedings), the provision of Art. 145a (i.e. if the Constitutional Tribunal ruled that a normative act, on the basis of which a decision was issued, violated a superior act) or the provision of Art. 145b (when a civil court ruled that the principle of equal treatment was violated, which affected the contents of the decision), a party has to consent to filing an objection.

cases where there are grounds for declaring a decision invalid (Art. 156 § 1 CAP); c) in other cases specified by provisions that allow for quashing or amending of a final decision.

Regardless of the fact whether or not the Ombudsman is granted the right to file an objection, it should assumed that the public administration authority will refuse to initiate the extraordinary proceedings at the request of the Ombudsman in the same cases as when the public prosecutor files an objection against a final decision.

Art. 186 CAP stipulates that "if the public prosecutor files his objection, the competent public administration authority shall institute the proceedings in the matter ex officio and shall notify all parties thereof". This provision is generally interpreted as meaning that the administration authority may not refuse to conduct the appropriate extraordinary proceedings if the public prosecutor demands this in the objection[23]. Such an interpretation is erroneous because it leads to a conclusion that the public administration authority has to conduct the appropriate extraordinary proceedings even when the objection is inadmissible.

It should be assumed that it only follows from Art. 186 CAP that an objection must not be rejected **on substantial grounds** without first conducting the appropriate proceedings as to the merits of the matter. In other words, if the public prosecutor (or the Ombudsman) files an objection, the public administration authority may not refuse to conduct the appropriate extraordinary proceedings by invoking the groundlessness of the objection (for example by claiming that it is obvious that the defect of the decision or defect of the proceedings specified in the objection did not actually occur). The administration authority may, however, do so for **formal reasons**, i.e. when an objection is inadmissible.

In light of the provisions of Division IV of CAP, objections are inadmissible in the following cases: 1) when a decision is not final (if, however, the public prosecutor or the Ombudsman participated in the proceedings, the objection against such a decision should be treated as an appeal); 2) when the objection is based on the circumstance that constitutes no grounds for challenging a final decision; 3) when the public prosecutor (the Ombudsman) files an objection because a party, not due to his fault, did not participate in the proceedings (Art. 145 § 1 item 4 CAP) or because the provision upon which the challenged decision was based violated the Constitution (Art. 145a CAP), or because the principle of equal treatment was violated, which affected the contents of the decision (Art. 145b CAP), while he did not first obtain a party's consent to filing an objection on these grounds; 4) when a circumstance that constitutes the grounds for an objection

[23] See e.g. L. Żukowski, *Wybrane uwagi w sprawie udziału prokuratora w postępowaniu administracyjnym* [Selected Remarks on the Public Prosecutor's Participation in the Administrative Proceedings], Organizacja – Metody – Technika 1985, no. 3, 12.

has already been subject to judicial review[24]. In the foregoing cases the authority to which the prosecutor (the Ombudsman) will file objections shall be empowered to refuse to conduct the appropriate proceedings.

The last of the foregoing circumstances needs to be commented upon. In accordance with Art. 189, CAP the public prosecutor (and the Ombudsman) may not file his objection against a decision if he first filed a claim against it to the administrative court on the basis of the same grounds. This provision requires some clarifications.

Firstly, the inadmissibility expressed in this provision applies to situations when the public prosecutor's (the Ombudsman's) objection would be based on the same grounds as the claim filed earlier to the administrative court by any empowered entity, and not only to situations when the claim was filed by the public prosecutor (the Ombudsman). Underlying the provision in question is the circumstance that the court's decision as to substance cannot be reviewed in the administrative proceedings because under Art. 170, LPAC a valid judgment by the administrative court binds not only the parties and the court which passed it, but also other courts and State authorities, thereby excluding the possibility of issuing a decision by the public administration authority, which would be inconsistent with the judgment. It is immaterial, however, who initiated the proceedings before administrative court as a result of which the judgment was passed.

Secondly, the prior filing of a claim to the court on the basis of the same grounds as an objection to be filed is an impediment to filing the objection only when the court considered the claim as to its substance (and, consequently, it dismissed it; if the court complied with the claim there would be no grounds for challenging the decision again). If, however, the court did not consider the claim as to its substance but rejected it on formal grounds, then, regardless of the reason for filing it, the path to filing an objection by the prosecutor will not be closed.

Thirdly, it should be finally emphasized that even the reasons other than those specified in the dismissed claim to the court may not justify the filing of an objection if these reasons existed and could have been examined by the court at the time of adjudicating. When inspecting whether a decision is compliant with law, the provincial court is not bound by the scope of the claim and should ex officio consider all violations of the law rather than only those that were raised by the applicant in the claim. In practice, this means that none of the grounds for the invalidity of a decision can be the basis of an objection filed after the court has passed a judgment because each of them can be revealed during the proceedings before the administrative court. A public administration authority cannot initiate the proceedings to declare the invalidity of the decision that was the subject of judicial review. The case is different with the conditions for reopening the proceedings. The circumstances specified in Art. 145 § 1.3, 4,

[24] Cf. Judgment of the Supreme Administrative Court (NSA) of 21 March 2000, II SA/Gd 230/98, unpublished, cited after J. Borkowski, in: B. Adamiak, J. Borkowski, *Kodeks...*, 681–682.

and 6, CAP always exist already at the time of issuing a decision and should be explained and established during the court-administrative proceedings The remaining conditions, by their nature, may be revealed (Art. 145 § 1 items 1, 2, and 5) or may occur (items 7 and 8 and Art. 145a, CAP) only after the claim had been examined and the ruling was issued by the administrative court, and consequently they may be the grounds for an objection filed after the closing of the court-administrative proceedings. The public prosecutor's objection filed after the court judgment may thus result in reopening the administrative proceedings only on the grounds of circumstances which the court could not take into consideration at the time of issuing a ruling..

In the context of the foregoing remarks it should be also added that the Ombudsman, like the public prosecutor, is not the master of the proceedings started by the objection he has filed. In the judgment of 25 March 1997, the Supreme Administrative Court ruled that "The withdrawal of the public prosecutor's objection after the proceedings have been instituted ex officio by the public administration authority under Art. 157 § 2 in conjunction with Art. 186, CAP cannot be recognized by this authority as the grounds for discontinuation, under Art. 105 CAP, of the proceedings to declare a decision invalid"[25].

RZECZNIK PRAW OBYWATELSKICH JAKO INICJATOR POSTĘPOWANIA ADMINISTRACYJNEGO W POLSCE

Streszczenie. Teoretycznie Rzecznik Praw Obywatelskich może żądać wszczęcia postępowania administracyjnego w każdej sprawie załatwianej w drodze decyzji, o ile przepis prawa materialnego dopuszcza wszczęcie postępowania na wniosek strony. Rzecznik Praw Obywatelskich nie wyręcza jednak obywateli w składaniu żądań wszczęcia czy środków prawnych od rozstrzygnięć administracyjnych, nie spełnia roli ich generalnego pełnomocnika procesowego. Rzecznik powinien mieć swobodę wyboru sprawy, trybu i instancji, w której podejmie działania. Nie powinno to być postrzegane jako przejaw nierównego traktowania obywateli.

Słowa kluczowe: Rzecznik Praw Obywatelskich, postępowanie administracyjne, wszczęcie postępowania

[25] I SA 932/95, ONSA 1997, no. 4, item. 189.