

Warsaw, 19th July 2019

1059/2019/PSP/JG/KW

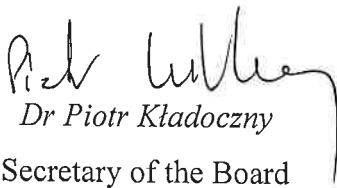
Ms. Ksenija Turković
The European Court of Human Rights
President of the First Section
Section I
Council of Europe
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France

Ref. *Alina Dłużewska against Poland*

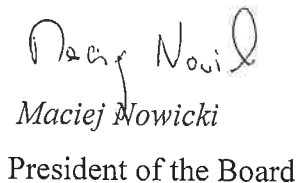
Application No. 39873/18

Pursuant to the letter of Mr Abel Campos, the Section Registrar of the First Section of the European Court of Human Rights (hereinafter also referred to as “ECtHR”, “Court”) dated 24th May 2019, granting leave to make written submission to the High Court, and the letter of Ms. Renate Deagener, the Deputy Section Registrar, which determined the time-limit for 22th July 2019, the Helsinki Foundation for Human Rights (hereinafter also referred to as “HFHR”) with its seat in Warsaw, Poland, would like to respectfully present its written comments on the case of Alina Dłużewska against Poland (application no. 39873/18) with attachments.

On behalf of the Helsinki Foundation for Human Rights,


Dr Piotr Kładoczny
Secretary of the Board

Helsinki Foundation for Human Rights


Maciej Nowicki
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Alina Dłużewska
v. Poland
(application no. 39873/18)

Amicus curiae brief
Prepared by
the Helsinki Foundation for Human Rights

Executive summary

- According to WHO classification, individuals over 60 years of age are considered elderly. Subcategories in this group include the elderly (60+), the oldest old (usually 80+), centenarian (100+) and the super-centenarian (110+)¹.
- Societies in Europe and around the world are currently ageing and this problem is also noticeable in Poland.
- The prison population also reflects these societal changes.
- According to statistical data, in 2018 there were 2 934 people over the age of 61 in detention facilities in Poland², an increase of 1431 people as compared to 2008.
- As of June 2019, Polish detention facilities held 3 295 people over the age of 61 (including 438 under pre-trial detention)³. This means the number of such individuals has increased by 361 since 31 December 2018.
- In 2018, inmates over the age of 61 constituted 4.1% of all persons deprived of liberty, an increase of 2.34 percentage points as compared to 2008.
- For many years running, the Helsinki Foundation for Human Rights has received complaints of failure to adapt penitentiary conditions to the basic needs of the elderly. Issues of inadequate medical care and living conditions are especially emphasized in letters received by the Foundation.
- The elderly are deemed vulnerable persons in the reports and recommendations of international bodies and organizations. However, Polish legislation relating to use of pre-trial detention or deprivation of liberty fails to distinguish the elderly as a distinct group.
- The deprivation of liberty of elderly people or use of isolation measures against them requires consideration from several perspectives, including adjustment of conditions in detention facilities to the needs of elderly people, providing an adequate level of medical care in detention facilities, adequate penitentiary interventions, as well as any contraindications to serving a sentence and application of penal measures.

¹ Health situation and trend assessment. Elderly population, http://www.searo.who.int/entity/health_situation_trends/data/chi/elderly-population/en/ [access: 12/07/2019].

² Prison service in its qualification creates age groups: 61-63, 64-66, 67+.

³ Letter from the Central Board of the Prison Service of 2 July, 2019.

I. Helsinki Foundation for Human Rights activities in the field of rights of persons deprived of liberty

1. Use of pre-trial detention and overall issues related to detention and its conditions are of particular interest to the Helsinki Foundation for Human Rights (hereinafter: HFHR or Foundation) and have been since the outset of its activity. Over the years, HFHR has undertaken a number of activities to monitor the rights of persons deprived of liberty as well as observation of parliamentary activity that could influence the rights of persons deprived of liberty pursuant to criminal proceedings. In addition, in 2011-2013, the Foundation implemented the "Healthcare in Polish prisons - striving to comply with human rights standards" program. In recent years, HFHR has regularly published reports providing an overview of practical and legal problems regarding the rights of persons deprived of liberty. The above circumstances have led the Foundation to present its opinion to the Court in the present case.

2. HFHR submitted an *amicus curiae* brief to the court at the domestic proceeding stage of the applicant's case, outlining international pre-trial detention standards. Due to the scope of consent granted by the Tribunal, as well as the nature of the *amicus curiae* brief, the present *amicus* brief does not address factual issues and concerns only issues of a general nature. We hope it will be helpful during the analysis of this case.

II. Preliminary Information

3. HFHR is convinced the proceedings before the Tribunal are important from the point of view of the Foundation's previous practice and mission, as well as discourse on the treatment of persons deprived of liberty and detention conditions currently ongoing in Poland and throughout Europe. Non-governmental organizations, the Commissioner for Human Rights (hereinafter: CHR) and the National Prevention Mechanism of Torture have been particularly vocal in the national public discourse. In the course of analyses, postulates are being submitted that may lead to improvement of conditions in detention facilities, especially from the perspective of the elderly. The solutions being proposed are primarily of a practical nature, but also legislative. This issue is also present in the public discourse of other states and on the European forum. In many states such results from the increasing number of elderly prisoners who may have special health needs stemming from limited mobility, dementia, mental health or deterioration of eyesight. Such prisoners may require additional specialist care and more frequent health examinations⁴. Penal Reform International indicates that many limitations faced by older prisoners result from the inadequate adjustment of detention facilities to the needs of older people⁵. From the deteriorating eyesight, which makes it difficult for the prisoners to read their documents or legal acts, to location of cells/facilities that impedes access by physically weaker people, many such hindrances require the elderly prison population to seek assistance from other prisoners⁶. The World Health Organization (hereinafter: WHO) also notes that "the physical and mental health of older prisoners should be assessed by focusing on typically geriatric traits such as sensory disabilities, functional impairment, incontinence and cognitive impairment that are common and may constitute a particular threat in prison"⁷.

4. HFHR is aware that the European Court of Human Rights has already issued judgments in many cases concerning conditions prevailing in detention facilities and pre-trial detention centers, including those against Poland and the standard in this respect has already been established (e.g. *DG v. Poland*, application no. 45705/07, judgment of 12 February 2013; *Olszewski v. Poland*, application no. 21880/03, judgment of 2 April 2013, *Bujak v. Poland*, application no. 686/12, judgment of 21 March 2017), as well as in matters relating to elderly persons deprived of liberty (e.g. *Farbtuhs v. Latvia*, application no. 4672/02, judgment of 2 February 2004, *Enea v. Italy*, application no. 44912/01, judgment of 17 September 2009, *Contrada (no. 2) v. Italy*, application no. 7509/08, judgment of 11 February 2014). However, new cases are still appearing in Poland, which may suggest that the Court's further guidelines are still needed. According to the Foundation, the ECHR's position in new cases,

⁴ OSCE Office for Democratic Institutions and Human Rights (ODIHR): Penal Reform International Guidance document on the Nelson Mandela Rules. Implementing the United Nations revised standard minimum rules for the treatment of prisoners, <https://www.osce.org/odihr/389912?download=true> [accessed: 8/7/2019 r.].

⁵ B. Sleep: Old age behind bars: how can prisons adapt to the needs of increasingly elderly populations?, 2014 <https://www.penalreform.org/blog/age-bars-prisons-adapt-increasingly-elderly-populations/> [accessed: 8.07.2019].

⁶ *D.G. v. Poland*, application no. 45075/07, judgment of 12 February 2013.

⁷ WHO, Regional Office for Europe: Prisons and Health, pp. 165-172.

including those examined by the Court, may contribute to significant changes not only in the legal system but also in the situation of inmates.

5. As it was emphasized before, The Court has already ruled on issues related to deprivation of liberty of the elderly. It held that age alone does not prohibit deprivation of liberty. However, such does not preclude a violation in specific cases where an individual is deprived of liberty despite his or her age, health and special needs resulting therefrom, and the penitentiary unit is unable to assure proper care⁸. Compliance with art. 3 of the European Convention on Human Rights requires the State to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. A detained individual's health and well-being must also be adequately secured by, among other things, providing requisite medical assistance⁹. We express our belief that the present case may contribute to further development of current standards.

III. The elderly - statistical data

Demographic structure

6. Statistical data supports the weight of proceedings before the Court and confirms that the problem of prison population ageing is becoming increasingly noticeable.

7. According to the definition adopted by the World Health Organization, a person aged over 60 is considered elderly¹⁰. WHO introduces an additional classification in this group based on age structure, with the following cohorts, the elderly (60+), the oldest old (usually 80+), the centenarians (100+) and the super-centenarians (110+)¹¹.

8. In recent decades, the world has witnessed a slowdown in demographic growth and an increase in the elderly population. WHO projects that by 2050 the world's population aged 60+ will increase from 900 million in 2015 to 2 billion¹². Statistical surveys show the continuing ageing of the population in highly developed countries, which is the effect of prolonged lifespan and is exacerbated by low fertility rates¹³.

9. Equally important as the growth of the 60+ population is the even faster growth of the 80+ population on a global scale. United Nations forecasts indicate that in 2050 this group will include 434 million people, i.e. more than triple over 2015, when there were 125 million people aged over 80¹⁴.

10. The Central Statistical Office report confirms the same tendency in Poland. The percentage of older people in the structure of society continues to grow and that acceleration has not markedly changed in 2018 since 2010. As of 2018, the Polish population totaled 38 411 million, i.e. approximately 22 thousand less than at the end of 2017, meaning the population has dropped by 6 people per every 10,000 in that time. The main population trend since 2013 has been the negative population growth¹⁵, where the latest Polish Central Statistical Office statistics show that the group of people aged 65+ is consistently growing in absolute terms and as a percentage of the population. In 2018, it grew by 212 thousand people and currently totals over 6.7 million¹⁶. As a consequence, the elderly amounted to 17.5% of the population in 2018, but accounted for only 10% of the population in 1990¹⁷.

⁸ *Farbutuhs v. Latvia*, application no. 4672/02, judgment of 2 December 2004.

⁹ *Kudla v. Poland*, application no. 30210/96, judgment of 26 October 2000, § 94.

¹⁰ There are also other ways to qualify seniors as a social group. The Organization for Economic Cooperation and Development and Eurostat both use 65 years-of-age as the age limit. However, this amicus curiae brief adopts the WHO criteria in order to adopt a uniform nomenclature.

¹¹ Health situation and trend assessment. Elderly population, http://www.searo.who.int/entity/health_situation_trends/data/chi/elderly-population/en/ [accessed: 12/07/2019].

¹² WHO: Ageing and health, <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health> [accessed: 12/07/2019].

¹³ Central Statistical Office: Population. State and structure as well as natural movement in territorial cross-section in 2018. Status as of 31 December, pp. 11-18.

¹⁴ United Nations: World Population Ageing, https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf. [accessed: 12/07/2019], p. 2.

¹⁵ *Ibid.*, p. 10-12.

¹⁶ At the same time, the population of Poland is approx. 39 million

¹⁷ Central Statistical Office: Population. Condition and structure ... op. cit.

Demographic structure in Polish detention facilities

11. The demographics presented above are also reflected among the population of persons deprived of liberty. According to annual Prison Service statistics, over the last 10 years¹⁸ the number of prisoners decreased by 11 747 (attachment no 1). However, the number of people 61+ years of age being in prisons and pre-trial detention centers increased by 1 431 (attachment no 2). This means that the percentage share of the elderly within the inmate population is gradually increasing, and has grown from approximately 2% to approximately 4% (attachment no 1-4).

12. Prison Service data clearly shows a systematic decrease in the overall inmate population. In 2008, 73 859 people were deprived of liberty, while in 2018 this number was 64 045. Pre-trial detention statistics differ slightly. In 2008-2015 the number of people in pre-trial detention decreased, but began to rebound beginning 2016¹⁹.

13. While the number of individuals placed in prisons and pre-trial detention centers remains lower than in 2008, the number of people aged 61+ deprived of their liberty pursuant to completed or pending criminal proceedings is gradually increasing. In 2008, there were 1 326 people over the age of 61 in prison, while in 2018 there were already 2 570 such elderly inmates. The age structure of individuals in pre-trial detention is similar, where 177 elderly individuals were held in pre-trial detention centers in 2008, 391 in 2017, and 364 in 2018 (attachments no 7-10).

14. When analyzing Prison Service data, the Foundation also attempted to determine the percentage share of people over 67 - that is, the oldest group among prisoners - in the structure of people over 61 years of age. The obtained data show that since 2008 the number of prisoners over the age of 67 has held on average at 24.8%, with 24% of those being in prisons and 31.2% in pre-trial detention centers (attachment no 11).

15. A summary of annual data published by the Prison Service confirms the hypothesis that the social structure of penitentiary establishments changes year over year in accordance with global and Polish trends. The number of prisoners over the age of 61 is increasing in prisons and pre-trial detention centers. This may be due to the ageing of the prison community²⁰, but also to more crimes being committed by people in the 61+ age group. We present all the above data in graphs attached to this *amicus curiae*.

IV. The elderly deprived of liberty - the Polish experience

16. One of the tasks of the state is to create the appropriate legal and institutional framework to implement social policy towards senior citizens. The legislator must act with respect to individuals who are at liberty as well as those who are incarcerated.

17. It can be assumed, that Polish penitentiary policy tends to focus on youthful offenders and recidivists while neglecting the older prisoner cohort. Evidence of this includes the Polish age classification for inmates, i.e. juveniles (15-21 years old) and adults (21+ years old), and the lack of categorization of the elderly as a particularly vulnerable group in penitentiary laws. This may result from the fact that people over the age of 60 constitute a small portion of the incarcerated population²¹. Thus, despite the increasing number of senior citizens in detention facilities, they still constitute a group that has not yet been given sufficient attention.

18. According to Renata Deki's publication, "Ageing of the incarcerated population is a new challenge for the Prison Service", the allocation of seniors in dispersed small groups throughout the country clearly contributes to their being omitted from penitentiary programs. Most prisons satisfy only the basic needs of seniors, such as food and healthcare without addressing special needs like emotional security, the need to belong and feel useful²². Introduction of facilities intended for older prisoners would improve their quality of life and enable the use of appropriate social rehabilitation programs.

¹⁸ Data for the years 2008-2018.

¹⁹ In 2008, it was 8926 people, while in 2018, it was 7360.

²⁰ Inmates serving long-term sentences, including life imprisonment. Art. 78 § 3 of the Penal Code, probation of an individual sentenced to this penalty may be sought after serving at least 25 years in prison.

²¹ Letter from the Central Board of the Prison Service dated 23 April 2019.

²² Renata Deka: [Starzenie się populacji osadzonych nowym wyzwaniem dla Służby Więziennej] Ageing of the Prison Population Poses a New Challenge for the Prison Service, pp. 119-121.

19. R. Deka also points out that penitentiary isolation accelerates the onset of numerous factors that lead to deterioration of the elderly's quality of life. Living environment and personal activity are two vital factors that determine the pace of degeneration associated with ageing and current standards prevailing in penitentiary institutions can significantly accelerate the onset of these changes. The most visible changes are physical; they primarily include chronic disease and ineptitude. Frequent problems with mobility may limit or even prevent the use of the library or available sporting activities. Elderly inmates with limited mobility also cannot take advantage of various conveniences or aids generally available to the public, such as walkers or beds and rooms adjusted to their individual needs. Their prior lifestyle, which may have involved drug and alcohol abuse and/or improper nutrition, also often negatively affects their current functionality²³.

20. Incarceration of the elderly may also be viewed from the psychological and social perspectives. Incarceration in a detention facility or pre-trial detention center results in fewer social contacts, which are an important element of proper functioning. According to R. Deka, this means that older prisoners have two strikes against them - one because of their age and the other of being a criminal. At the same time, their progressing physical degeneration leads to a deterioration of their position within the inmate community²⁴.

21. Because they are members of a particularly vulnerable group, incarcerated elderly individuals should receive special support. Sławomir Grzesiak suggests we reconsider the logic behind incarcerating seniors along with the psychosocial consequences of this choice. He posits that there may be preferable alternatives to incarceration, which reduce the stigma of incarceration and positively influence a convict's motivation toward compliance with social norms²⁵.

22. Examples of penitentiary policy for the elderly introduced in other European countries may provide some guidance. The German prison system provides special departments for people requiring geriatric treatment. Greek legal solutions offer elderly inmates various alternatives to incarceration and differing ways to calculate time served. Serbia adopted special rules for elderly inmates that take into account their health, place of detention, nutrition, activities and social security when they leave the detention facility²⁶. The examples presented above show that some European countries have already taken steps to develop national rehabilitation policies for the elderly, whereas the Polish Central Board of the Prison Service in a letter dated 23 April 2019 points out that "there are no detailed regulations or guidelines specifying conditions for placing persons over the age of 67 in penal institutions and pre-trial detention centers"²⁷.

23. "Old age is one of the human development phases" and, like other stages, it is suited for the acquisition of new knowledge and shaping attitudes and behaviors²⁸. However, according to Polish academics, neither the conditions of Polish penitentiary institutions nor the development of resocialization gerontology have received sufficient attention, despite their importance from the perspective of providing adequate living and psychophysical conditions to elderly inmates.²⁹

Elderly persons deprived of liberty in research by the Commissioner for Human Rights

24. Problems concerning elderly persons in detention were also explored by the Office of the Commissioner for Human Rights. In July through December 2016, the CHR conducted research on inmates aged 75+ in penitentiary facilities. The aim of the research was to check how prison institutions and detention centers respect the rights of incarcerated seniors. As part of the research, CHR employees interviewed selected inmates individually and obtained information from their councilors on the inmates' functioning. They also reviewed the inmates' documentation. The respondents included 14 people under pre-trial detention and 48 convicts, a total of 62 individuals. The majority of convicted seniors served their sentences in the ordinary system. In the surveyed population

²³ Renata Deka: Ageing of the Prison Population ... op. cit, pp. 117-179.

²⁴ Ibid.

²⁵ Sławomir Grzesiak: Seniorzy w jednostkach penitencjarnych w sytuacji naznaczenia społecznego [The Elderly in Detention Facilities Subject to Social Stigma], pp. 376-377.

²⁶ Recommendation of the Committee of Ministers' CM / Rec (2014) 2 on the promotion of the rights of the elderly, adopted by the Committee of Ministers on 19 February 2014 during the 1192nd meeting of deputy ministers, <https://www.msz.gov.pl/resource/161bbca4-55d0-4c79-834f-c2d4f4f4559d:JCR> [accessed on: 9.07.2019], p. 19.

²⁷ Letter from the Central Board of the Prison Service dated 23 April 2019.

²⁸ Sławomir Grzesiak: Człowiek stary w placówce penitencjarnej [The Elderly in a Detention Facility], p. 256

²⁹ Ibid.

only three convicts were serving a short-term sentence (up to six months) with long-term inmates (over three years) making up by far the most numerous group³⁰.

25. Information provided by prisoners and findings of CHR employees indicate the rights of the detained seniors were mostly observed in terms of living conditions. Facility staff, if possible, took into account the needs of older people in this area. It seems, therefore, that the violations of the rights of the respondents regarding living conditions result primarily from objective difficulties existing in individual detention facilities, related to, among other factors, cells holding over a dozen inmates, un-enclosed or overly small sanitation areas, lack of screens between shower stalls, sink placement outside the sanitation space, and walking areas without partial roofing³¹.

26. Health problems of the examined prisoners were rather typical for people in this age group. However, due to their place of stay, they experienced them more acutely, also due to the inability to choose a doctor, verify the correctness of treatment applied (no second opinion), or to take advantage of family assistance and care. In the opinion of the CHR, detention facilities had problems ensuring rapid treatment under hospital conditions to senior patients who are chronically ill, who should not be in ordinary or even therapeutic wards due to deterioration of their physical condition or serious mental disorders. Currently, all inmates with such ailments are referred to the only Polish ward for the chronically ill, located in the Detention Facility in Czarne. The time it takes to be admitted to the ward is very long; at the time of the research the wait time was about two years. There is also a problem with providing help to elderly prisoners in matters of everyday life. In Polish detention facilities, the care of such persons is not legally defined. In practice, individual selection of prisoners is used, while some units organize professional training courses for caretakers of the elderly and disabled as part of their resocialization programs³².

27. Elderly inmates were also asked about rehabilitation activities. According to information indicated by CHR, the scope of resocialization work with elderly prisoners is much smaller due to limitations stemming from health conditions as well as their physical and intellectual capabilities. The selection of classes available to the oldest seniors is limited. Interviewed inmates indicate they most often spend their time passively, e.g. by watching TV in a cell³³.

28. In its research summary, CHR drew attention to the need for a thought-through concept for incarcerating convicted seniors. The opinion stresses that separate residential units would be beneficial for older prisoners. In addition, it notes the need to provide ongoing social, medical and nursing care³⁴.

V. International standards for the elderly

29. International norms and standards, especially in the field of soft law, categorize elderly inmates as those who have special needs. Particular sensitivity in this case means that state authorities should take additional protective measures to prevent their ill-treatment. Importantly, particular elderly individuals often have several features that testify to their particular sensitivity³⁵.

30. As indicated by the Recommendation of the CM/Rec (2014)/2 of the Committee of Ministers to member states on the promotion of elderly people's rights³⁶ (hereinafter: Recommendation), judicial authorities should exercise special diligence in handling cases involving older people, and in particular should take into account their age and health. The recommendation does not preclude depriving the elderly of liberty, but does indicate that in such situations, states must ensure that attendant conditions do not constitute inhuman or degrading treatment or punishment. It makes the minimum level of severity deemed inhuman or degrading treatment dependent on factors such as age or health and the

³⁰Commissioner for Human Rights: Wykonywanie tymczasowego aresztowania i kary pozbawienia wolności wobec osób w wieku senioralnym [Pre-trial detention of the elderly] <https://www.rpo.gov.pl/sites/default/files/Wykocnywanie%20tymczasowego%20i%20aresztowania%20kary%20pozbawienia%20wolno%C5%9Bci%20wobec%C3%B3w%20kukuioralni.pdf%20s> [access: 9.07.2019], pp. 9-13.

³¹ Ibid., pp. 14-19.

³² Ibid., pp. 20-25.

³³ Ibid., p. 29-32.

³⁴ Ibid., pp. 34-38.

³⁵ J. Murdoch, V. Jiricka, Combating ill-treatment in prisons. A handbook for the prison staff with focus on the prevention of ill-treatment in prisons, <https://rm.coe.int/combating-ill-treatment-in-prison-2-web-en/16806ab9a7> [accessed: 8.07.2019].

³⁶ Recommendation CM / Rec (2014) 2 of the Committee of Ministers to member states on the promotion of elderly rights, adopted by the Committee of Ministers on 19 February 2014 during the 1192nd meeting. vice-ministers, <https://www.ms.gov.pl/resource/161bbca4-55d0-4c79-834f-c2d4f4f4559d:JCR> [accessed: 8/07/2019]

associated risk that it will affect elderly persons deprived of liberty. In addition, the Recommendation requires member states to ensure the elderly deprived of liberty age-appropriate conditions, including adequate access to sanitary, sports, educational and training infrastructure, which enables them to spend their free time.

31. Furthermore, in accordance with the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) concerning healthcare in detention facilities³⁷, the elderly should be included in the group of particularly vulnerable inmates. Therefore, detention officials have additional obligations - the CPT indicates the need to distinguish categories of particularly vulnerable inmates to which the detention health services should pay special attention. For terminally and severely ill people who cannot be adequately treated in prison conditions, people with severe disabilities or the elderly, long-term deprivation of liberty in a prison environment can create an unbearable situation, and the task of the prison doctor should be to report and transfer such individual to the appropriate authorities so that he or she may be subject to penitentiary measures alternative to deprivation of liberty. The CPT also imposes on detention authorities the obligation to pay attention to the special needs of the elderly when admitting them to a facility³⁸. It emphasizes the need for a medical examination immediately after admissions, with special attention paid to minors, the elderly, addicts or people with mental disorders.

32. The European Prison Rules also recognize the problem of diversified age cohorts among inmates including with respect to nutrition. Pursuant to those rules, inmates must be fed in accordance with age, health, physical condition, culture and type of work being performed (point 22.1) and, in the cases requiring such, a doctor or a qualified nurse shall order a change of diet for medical reasons (point 22.6).

33. In the context of the present case, attention should also be paid to the Resolution of the Parliamentary Assembly of the Council of Europe 1663 (2009)³⁹. Art. 10 of said document points out that as regards "the hygiene and health needs of women prisoners, the Assembly calls on the member states to: ensure that prison policies and programmes for women in the areas of hygiene and health care exist and that they are specifically tailored to their needs. In particular, hygiene and health-care needs of pregnant women, breast-feeding mothers, post-natal mothers and older women should be identified and met."

VI. Polish legislation regarding the situation of elderly persons deprived of liberty

34. Deprivation of liberty pursuant to a pre-trial detention order or a sentencing pursuant to criminal proceedings are primarily controlled by the Act of 6 June 1997 – Executive Criminal Code (hereinafter: the Penal Code), the Act of 6 June 1997 - Code of Criminal Procedure (hereinafter: Criminal Procedure Code), as well as by the Ordinance of the Minister of Justice of 21 December 2016 on the organizational and procedural regulations for the execution of the penalty of imprisonment (hereinafter: regulations regarding the execution of punishment) and the Ordinance of the Minister of Justice of 22 December 2016 regarding the organization and procedural regulations for temporary detention (hereinafter: the regulations on temporary detention). However, none of the above-mentioned legal acts contain specific regulations defining the situation of elderly individual nor do any define such a term. Age as a differentiating premise appears in the Penal Code in art. 82 in the context of classification and placement in cells, as well as in art. 109 for determining food rations. The premise of age appears in the context of placement in cells also appears in the regulations regarding the execution of sentences and the regulations regarding pre-trial detention⁴⁰. Further, regulations on execution of punishment indicate the need to take age into account in assigning work to a prisoner⁴¹. Apart from the above provisions, there are no specific references to the situation of older prisoners.

³⁷ Healthcare in prisons. Extract from the Third General Report, (CPT/Inf (93)12-part) <https://rm.coe.int/16806ce93a> [accessed on: 8.07.2019], points 64 and 70,

³⁸ Remand detention. Extract from the 26th General Report of the CPT (CPT / Inf (2017) 5-part), 2017, <https://rm.coe.int/combating-ill-treatment-in-prison-2-web-en/16806ab9a7> [accessed: 8.07.2019].

³⁹ Resolution 1663 (2009) Women in prison, PWP 2011.

⁴⁰ In both cases in §10.

⁴¹ § 41.

General regulations concerning inmates

35. The Polish Penal Code is the fundamental legal act regulating the situation of persons deprived of liberty. It contains very detailed provisions defining inmates' rights and obligations, as well as forms of punishment, but does not mention the special needs of elderly inmates in any way. Art. 4 points out that punitive measures, security measures and preventive measures "shall be carried out in a humane manner, respecting the human dignity of the convicted individual. Torture or inhuman treatment or punishment shall be prohibited". The obligation to provide incarcerated individuals with humane treatment as well as adequate living conditions, respect for dignity and healthcare is also imposed on officers of the Prison Service under the Act of 9 April 2010 on the Prison Service⁴².

36. Regulations relating to execution of sentencing and its objectives include that of Article 67 of the Penal Code. It provides that incarceration is intended to encourage the convicted to cooperate in shaping his or her socially desirable attitudes, in particular the sense of responsibility and the need to comply with the legal order, and thus refrain from returning to crime. In order to attain these goals, individualized correctional means are applied within the framework of punitive systems specified in the Act, of various types and in various kinds of detention facilities. The kinds of correctional means meant to influence the incarcerated include work, teaching, cultural and educational activities, sports, maintaining contact with the family and the outside world, as well as therapeutic measures. Importantly, these activities are only taken with respect to inmates serving prison sentences and not those subject to temporary detention.

37. Acting in accordance with the principle of individualized means, the Prison Service adjusts the applied methods to the needs and capabilities of the incarcerated individual. However, the elderly do not use most of the forms of correctional means indicated in art. 67 of the Penal Code, mainly due to their age. They are not assigned to teaching and employment, while cultural, educational and sports activities are not addressed to them to a large extent.

38. In addition to rehabilitation measures, provisions should also be included that relate to fundamental issues affecting inmates' living conditions. Among the most important rights of an individual deprived of liberty enumerated in art. 102 of the Penal Code are food, clothing, living conditions, housing, care and hygiene conditions - all provided at a level appropriate to maintain health. The Prison Service is to ensure the personal security of detention facility detainees as in art. 108§1 of the Penal Code. It is inextricably linked with the duty to guarantee adequate living conditions, as provided in art. 110 ECC. Pursuant to §4, medical, psychological and rehabilitation recommendations must be taken into account when assigning an inmate to a residential cell. It is especially important to assign elderly prisoners to cells with appropriate cell mates, because the former are physically weaker and may need the assistance of others in everyday functioning⁴³. In addition, art. 115 § 1 of the Penal Code outlines the duty to provide free health services, while prostheses, orthopedic devices and auxiliary means must be provided free of charge to inmates should absence of such worsen their state of health or prevent incarceration (in other situations such are to be provided for a fee)⁴⁴.

39. Health services are to be provided to inmates primarily by healthcare services designated for inmates or by other entities whose assistance is required to provide immediate health services due to a threat to life, health or to perform specialized examinations, treatment or rehabilitation. In particularly justified cases, the director of a detention facility may allow the inmate to receive treatment at his or her expense from a physician or medical facility of choice and/or to use additional medicines and other medical devices.

40. Paragraph 10 of the Penal Code also provides for stays of execution and furloughs. Execution of sentencing must be stayed or a furlough granted in the event of an inmate's mental illness or other serious illness. Furthermore, if the punishment would result in exceedingly onerous consequences for

⁴² Art. 2 section 2.

⁴³ Memorandum of the Commissioner for Human Rights: Pre-trial detention and imprisonment of the elderly, <https://www.rpo.gov.pl/sites/default/files/Wykonywanie%20tymczasowego%20i%20aresztowanie%20kary%20pozbawienia%20wolno%C5%9Bci%20o%20wobec%C3%B3w%20s%20kukuioralni.pdf> [accessed: 12.07.2019].

⁴⁴ This was specified in detail in the Regulation of the Minister of Justice of 14 June 2012 on the provision of health services by medical entities for persons deprived of liberty ([Journal of Laws] - Dz. U.) of 2012, item 738, as amended) and of 9 May 2012 on detailed conditions, scope and mode of cooperation of medical entities for persons deprived of liberty in prisons and pre-trial detention centers in providing health services to persons deprived of liberty (Journal of Laws - Dz. U.) of 2012, item 547).

the convicted party, their family, or if the number of inmates in prisons or pre-trial detention centers exceeds the capacity of such facilities throughout the country, the court may grant a stay or furlough. A serious illness is defined as such a condition of an inmate where placement in a detention facility may threaten life or cause serious health defects; age does not constitute an independent foundation in this regard.

41. The above regulations clearly show that the Executive Criminal Code provides no solutions aimed at adapting penitentiary conditions to the specific needs of incarcerated seniors.

Pre-trial detention in Polish criminal procedure

42. Although the Penal Code also applies to pre-trial detention, the scope of its application is significantly limited. This is mainly because the purpose of pre-trial detention is to secure the proper course of proceedings, while one of the goals of punitive measures is rehabilitation. Art. 209 of the Penal Code et. seq. precisely defines issues individually provided for in pre-trial detention as outlined in the Code, including organization of pre-trial detention centers, rules for the deployment of inmates, the issue of special protection for inmates, rights of the arrested, as well as rules for granting visitation privileges.

43. Pre-trial detention is the most severe preventive measure available to secure the proper course of trial proceedings in Polish criminal procedure. The Act of 6 June 1997 Code of Criminal Procedure regulates basic legal norms for pre-trial detention. Art. 249 et. seq. defines when pre-trial detention may be used as well as guidelines determining permissible duration.

44. Pre-trial detention may only be used against an individual who has been formally charged, whereas it may be used in court proceedings against a defendant. Art. 249 § 1 of the Code of Criminal Procedure indicates a precondition for use of pre-trial detention, while art. 258 of the Code of Criminal Procedure prescribes special conditions.

45. Factors that weigh against pre-trial detention listed in art. 259 of the Code of Criminal Procedure include a threat to the defendant's life or health, serious consequences for the defendant or their immediate family, or when a case does not involve a severe penalty. Thus, the inmate's age may not be considered a factor weighing against pre-trial detention.

46. As mentioned above, Chapter XV of the Penal Code also regulates the situation of inmates subject to pre-trial detention and posits that pre-trial detention shall serve the purpose for which it was applied and that pre-trial detention is subject to provisions relating to incarceration. The main foundation for effecting pre-trial detention is to secure the proper course of proceedings, which is a discretionary premise and, as such, limits these inmates' opportunities for recourse.

According to Article 212 of the Penal Code, a detainee should be placed in pre-trial detention in a manner preventing his or her corruption. In addition, the article requires separation of detainees from convicts, ensure order and security in remand, maintain medical, psychological and rehabilitation recommendations, shape the proper atmosphere among inmates, and to prevent self-harm and commission of crime in the course of pre-trial detention.

48. A detained person pursuant to art. 214 of the Penal Code has at least the same rights as a convict in a regular detention facility; limitations of liberty shall not exceed those necessary to secure the proper course of proceedings. These rights may be limited pursuant to provisions of section XV.

49. During pre-trial detention inmates may use their own clothing, undergarments and footwear, unless such interferes with the order established in the detention center or is contrary to safety or sanitary considerations. In addition, subject to consent of the relevant authority, and the director of the pre-trial detention facility, they may use food, medicines and hygiene products received from outside the detention facility.

50. The relevant authority's decision to grant visitation privileges is one of the restrictions on persons deprived of liberty, as such may occur once a month and is subject to a visitation consent order. Such order may be refused pursuant to a reasonable fear that the visitation will be used to unlawfully hinder the criminal proceedings or commit a crime, especially the crime of incitement. In addition, pursuant to art. 217c of the Penal Code, telephone contact with pre-trial detainees may be limited for the same reasons as for visitations.

51. Pursuant to Article 221a of the Penal Code, a pre-trial detainee may move about the detention facility, participate in learning and employment, as well as religious services, religious meetings and religious instruction, and may take advantage of visitations, walks, bathing, cultural and educational

the field of physical culture and sport, provided such does not adversely affect the proper course of criminal proceedings.

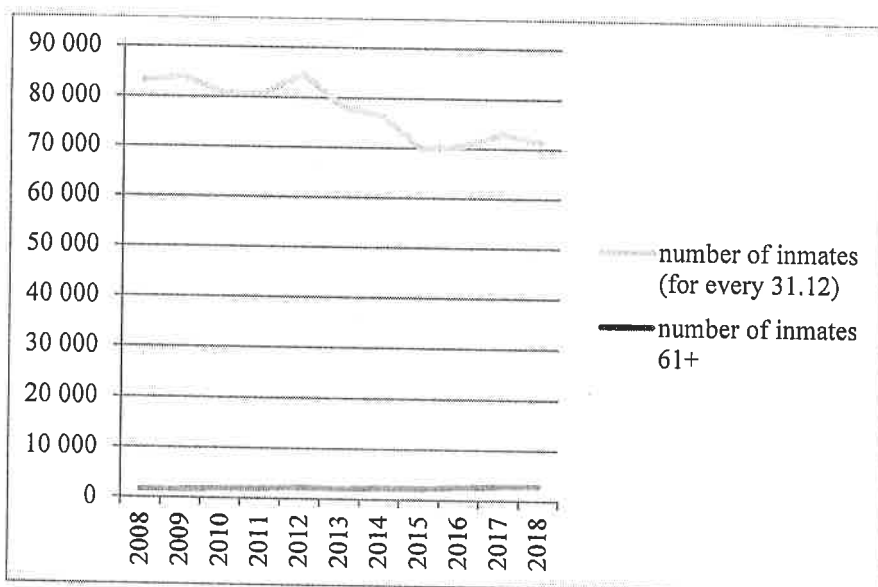
52. None of the above provisions *expressly* regulate conditions of elderly pre-trial detainees or provide any specific requirements for such.

VII. Conclusions

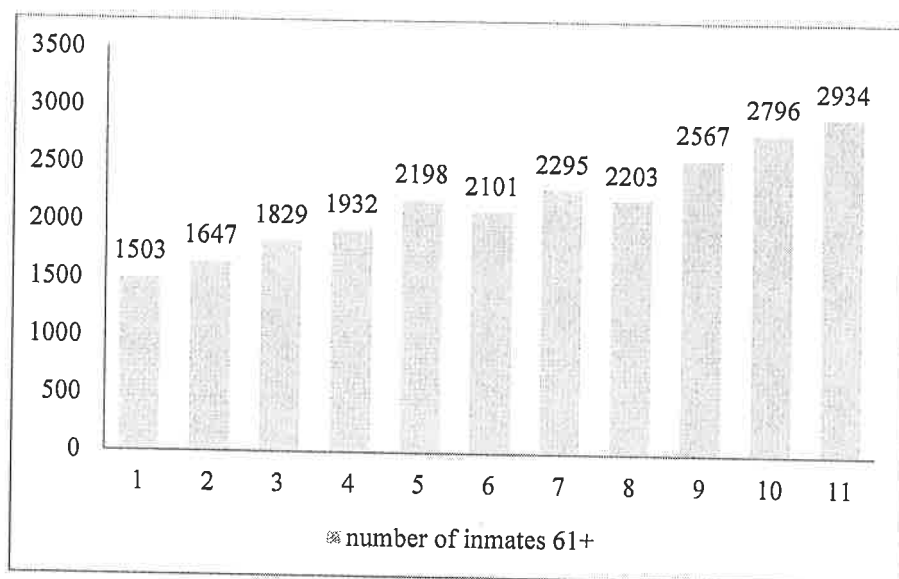
53. To sum up, societal age structure has been changing in recent years in Poland as well as in other states. Demographic forecasts indicate the world's population aged 60+ will increase from 900 million in 2015 to 2 billion in 2050. Although these demographic changes also affect the prison population, adequate responses from penitentiary authorities are lacking at the general level. As a result of the growing numbers of prisoners aged 60+, many European states are taking steps to provide them with appropriate conditions as part of their incarceration. Unfortunately, Polish criminal and prison regulations, including goals, sanitary facilities, medical care, resocialization classes, are not adapted to elderly prisoners. Neither the Polish legislator nor the Prison Service distinguish the elderly as a distinct and separate class of inmates. Importantly, the situation of the elderly subject to pre-trial detention requires special attention in light of the many limitations they suffer due to the need to secure proper proceedings. The present case and the Tribunal's decision may have a real impact on the delineation of a separate and distinct group of geriatric prisoners who qualify as a vulnerable group as well as adoption of regulations defining specific, appropriately humanitarian, penitentiary conditions for elderly inmates.

This amicus curiae brief has been prepared by Julia Gerlich, a lawyer in the Strategic Litigation Programme under the supervision of Katarzyna Wiśniewska, Ph.D. and Piotr Kładoczny, Ph. D.

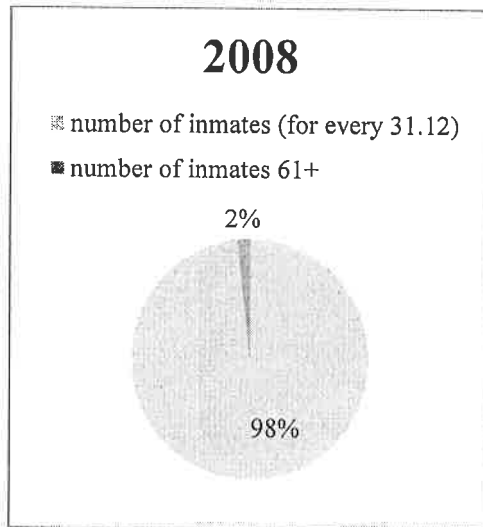
Attachments



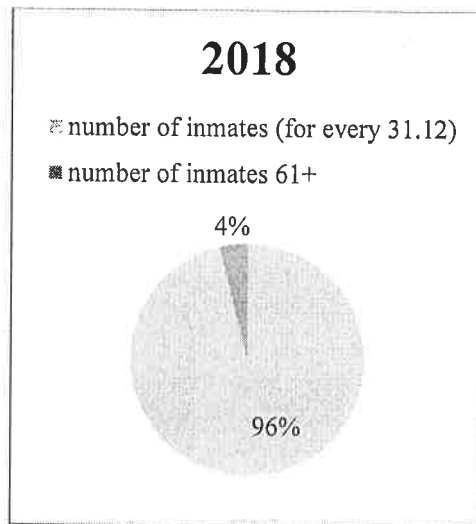
Attachment no 1. Ratio of general number of inmates and 61+ inmates.



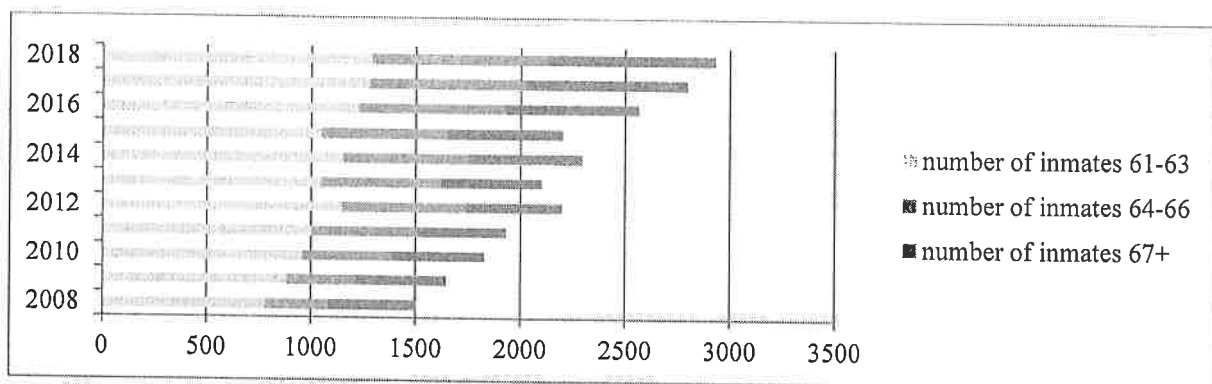
Attachment no 2. Number of 61+ inmates in years 2008-2018.



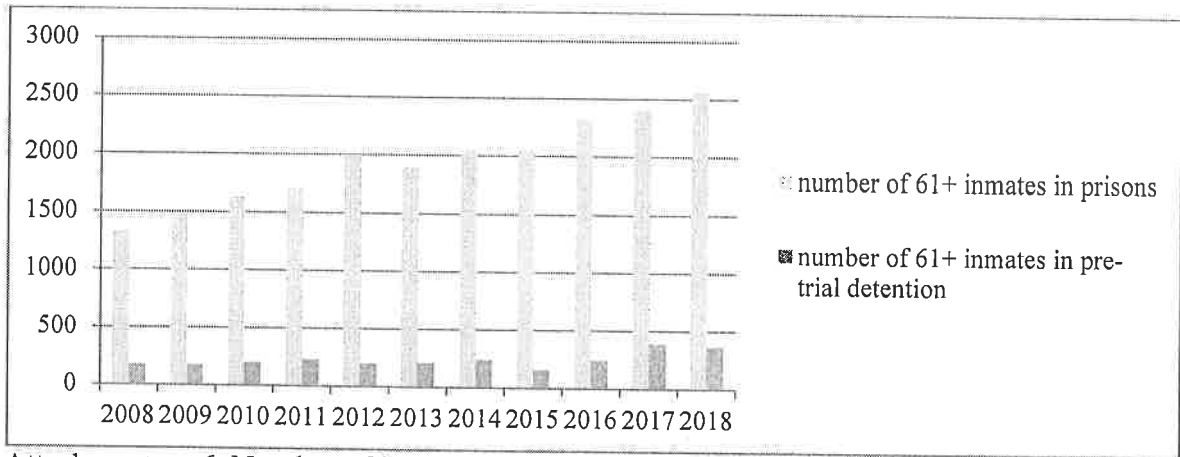
Attachment no 3. Ratio of number of inmates and number of 61+ inmates in 2008.



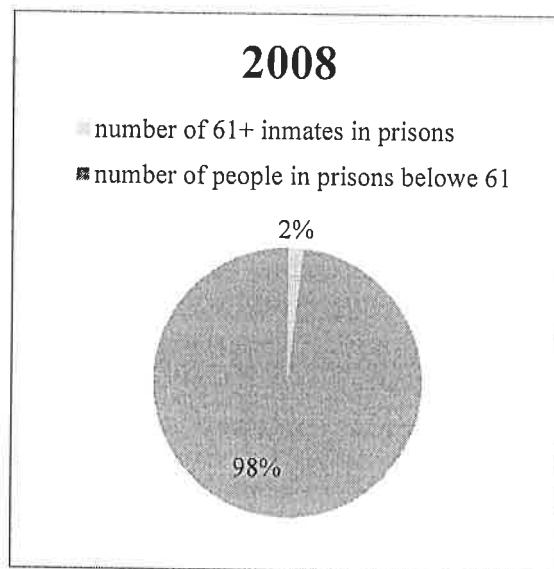
Attachment no 4. Ratio of number of inmates and number of 61+ inmates in 2018.



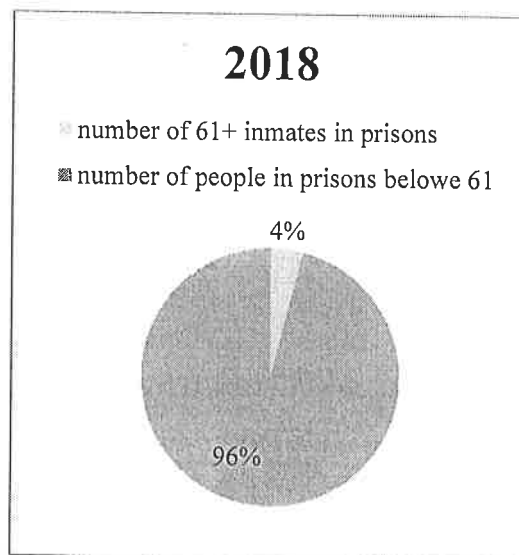
Attachment no 5. Number of 61+ inmates with specified age groups in years 2008-2018.



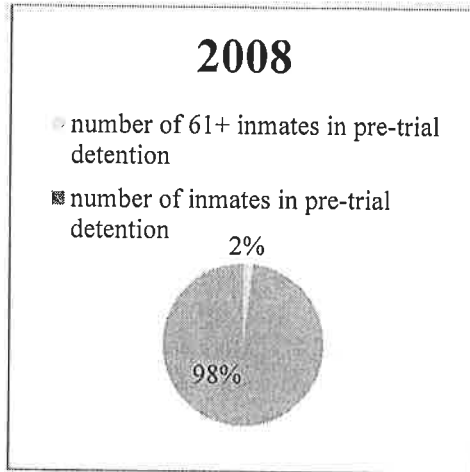
Attachment no 6. Number of inmates 61+ being in prisons and in pre-trial detention in years 2008-2018.



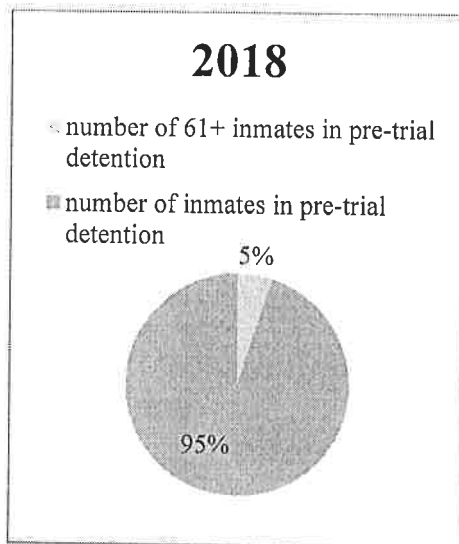
Attachment no 7. Ratio of the number of 61+ inmates in prisons and number of inmates in prisons in general in w 2008.



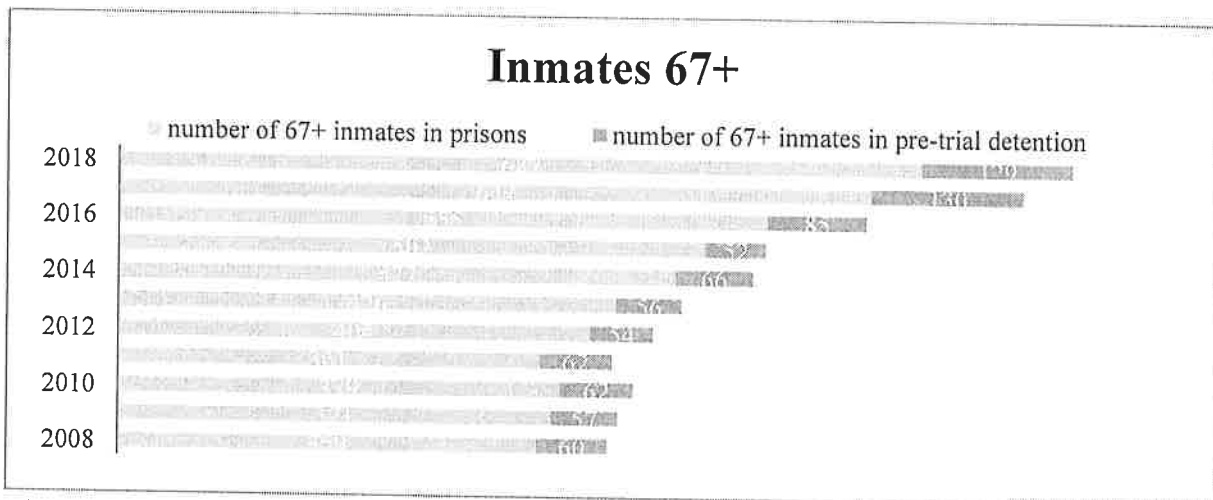
Attachment no 8. Ratio of the number of 61+ inmates in prisons and number of inmates in prisons in general in 2018.



Attachment no 9. Ratio of the number of 61+ inmates in pre-trial detention and number of inmates in pre-trail detention in general in 2008.



Attachment no 10. Ratio of the number of 61+ inmates in pre-trial detention and number of inmates in pre-trail detention in general in 2018.



Attachment no 11. Summary of the number of inmates 67+ in prisons and pre-trial detention in years 2008-2018.