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Przemysław Tarwacki
Police Academy in Szczytno, Poland
ORCID: 0000-0002-4464-2895
p.tarwacki@apol.edu.pl

Lack of Fair Judicial Review of Pre-Trial Detention after Surrendering the Prosecuted Person as an Absolute Obstacle to Extradition

Brak rzetelnej sądowej kontroli aresztu tymczasowego po wydaniu ściganego jako bezwzględna przeszkoda do ekstradycji

ABSTRACT

The article is a research and scientific study prepared using the dogmatic method. It addresses the most sensitive issues that the Polish Supreme Court has dealt with in recent years in the area of interpretation of obstacles to extradition, i.e. the problem of the lack of prompt and *ex officio* judicial review of non-judicial pre-trial detention at the stage of preparatory proceedings in the State requesting the extradition of a prosecuted person. In one of its rulings, which is crucial in this matter, the Supreme Court took the position that this deficiency was not a sufficient basis for finding a legal obstacle to extradite the prosecuted. The argumentation of the Court does not deserve full approval. It is a manifestation of failure to notice the requirement, under Article 5 (3) of the European Convention on Human Rights and Article 9 (3) of the International Covenant on Civil and Political Rights, to bring each detained person promptly *ex officio* before a judge in the context of their personal security. It should be assumed that the lack of prompt and *ex officio* review of pre-trial detention at the stage of the preparatory proceedings, including bringing the detained person before a judge, after the defendant has been transferred to the authorities of the requesting state, may constitute grounds for assuming that there is a well-founded concern about violation of the defendant's personal security for this reason. Such an assessment should be made *a casu ad casum* as necessary, after supplementing the information from the requesting party.

Keywords: extradition; personal security of the defendant; obstacles to extradition; prompt judicial review of pre-trial detention; *ex officio* judicial review of pre-trial detention; bringing the detained person to the judge

CORRESPONDENCE ADDRESS: Przemysław Tarwacki, PhD, Assistant Professor, Police Academy in Szczytno, Marszałka Józefa Piłsudskiego 111, 12-100 Szczytno, Poland.

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INTRODUCTION

The issue of international cooperation in criminal matters is one of the complex areas of criminal procedural law. Of particular importance in that regard is passive extradition proceedings.

One of the most sensitive issues dealt with by the Polish Supreme Court in recent years in the area of interpretation of absolute grounds for extradition was the lack of assurance, after surrendering the prosecuted person, of a reliable review of pre-trial detention applied to him by the executive authority of the requesting State. Namely, a review involving bringing him before the judge promptly, regardless of the initiative of the prosecuted person. In one of its rulings, instrumental for this issue, the Supreme Court has taken the position that the absence of such review does not provide a sufficient basis for finding an absolute obstacle to extradition. However, the arguments of the Supreme Court used in support of that position are not satisfactory.

Having this in mind, it is worth taking a closer look at this problem. This will be done by: citing the most important theses formulated in the case law; presenting the essence of the violation of human rights as an absolute reason for refusing to extradite the prosecuted person; presenting the infringed law that is legally relevant in the case; assessing the controversial issue in the jurisprudence of the Supreme Court, i.e. the significance of issuing a decision on pre-trial detention by the executive authority of the requesting state; presenting the legal nature of passive extradition proceedings; and then attempting to answer the question how, in this specific procedure, should the court proceed with applications from countries where there are deficits in judicial review of extrajudicial pre-trial detention.

OVERVIEW OF THE SUPREME COURT CASE LAW

According to the overview of published cassation appeal case law, the issue of the lack of fair judicial review of pre-trial detention in the requesting state following the surrender of the prosecuted was addressed by the Supreme Court in case III KK 355/17, closed with the decision of 4 April 2018,[1] and in case III KK 241/19, closed with the decision of 7 September 2019.[2]

Crucial in the context of the subject matter of this study is case III KK 241/19, since the question of the absence of actual judicial review of extrajudicial pre-trial detention in the requesting State has been the subject of the ground for cassation appeal.

[1] LEX no. 2486129.
[2] LEX no. 2740953.

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This remedy was based on alleged gross infringement by the appellate court of Article 433 § 1 CPC[3] in conjunction with Article 440 CPC, which consisted in the upholding of a grossly unfair decision of the court deciding the case on the merits, which declared it legally admissible to surrender the prosecuted person to Belarus, even though it appeared from all the circumstances found during the proceedings that, after surrendering the prosecuted person to the requesting State, the fundamental human rights, i.e. to freedom and security, had been infringed by failing to ensure judicial review of the pre-trial detention imposed on him, as required by Article 41 (3) of the Polish Constitution,[4] Article 9 (3) ICCPR[5] and Article 5 (3) of the ECHR,[6] which, according to the applicant, in the light of Article 55 (4) of the Polish Constitution, providing for absolute obstacles to a surrender, obliged the court to take those circumstances into account *ex officio*, irrespective of the limits of the appeal and the content of the grounds for appeal. That ground formed the sole basis for that appeal.

The Supreme Court in its decision dismissing this remedy, in its most important arguments, i.e. those relating to the ground of cassation appeal, stated that: "For the assessment of the compliance with the rules of the Convention, it is important to determine how much time can elapse in the requesting State from the release request by a person deprived of his liberty on the basis of an arrest warrant issued by the aforementioned entities, until the examination of this request by the court and thus the review of the reasonableness of the pre-trial detention (see, i.a., case *K. Shcherbina v. Russia*, judgment of the European Court of Human Rights [ECtHR] of 26 June, application 41970/11). In accordance with Article 119 (3) of the Criminal Procedure Code of the Republic of Belarus, the court applies and reviews the detention only during judicial proceedings. After the surrender of the prosecuted person to the Republic of Belarus, he will be guaranteed judicial review of the pre-trial detention applied to him, although the stage when that review is initiated is much later than in the case of standards applied in the territory of the Republic of Poland. It should therefore be stressed that persons deprived of their liberty may apply against this preventive measure, as a result of which it is the court which examines the legality of its application. This means that, ultimately, the decision on pre-trial detention of a person is subject to review by the court competent

[3] Act of 6 June 1997 – Criminal Procedure Code (consolidated text, Journal of Laws 2022, item 1375).

[4] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.5.2024).

[5] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, UNTS, vol. 999, p. 171 and vol. 1057, p. 407.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS no. 005.

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to assess the legality of the detention. Consequently, it cannot be stated that the application of pre-trial detention in those circumstances is completely devoid of judicial review. It is therefore difficult to conclude that there is a clear contradiction between the two international agreements in force in the territory of Poland.

However, first of all, which is not noticed by the applicant, the decision to impose on the prosecuted A.D. a preventive measure in the form of pre-trial detention, issued by an officer of the Investigative Division of the Main Directorate of the State Security Committee of the Republic of Belarus, which was one of the grounds for the extradition request, was reviewed and positively verified by Polish courts in the context of the extradition detention. Under the extradition procedure (Article 603 § 1 CPC), the district court shall issue at a hearing its decision on the request of a foreign state. Also, in the case of an application by a foreign state for the pre-trial detention of a person subject to prosecution (as was in the present case), the Polish court in its hearing decides on the pre-trial detention of the person subject to prosecution. Before the decision is issued, the person concerned must be given the opportunity to provide oral or written explanations, as has been done in the present case. A.D. was given the opportunity to be heard by the Polish court on 15 January 2018 and 20 December 2017 and to use effectively his right of defence in the extradition procedure, and he exercised this right".

Moreover, the Supreme Court has, on several occasions, dealt with a closely related issue, i.e. concerning the defective ground for a request for surrender, in the form of a decision of pre-trial detention, issued by an executive authority. The above has been decided in proceedings for the resumption of proceedings. Following the signalling, which related the above circumstance to a negative procedural hindrance under Article 17 § 1 (9) CPC, i.e. in the form of the absence of an application from an authorised entity (cases III KO 112/16,[7] IV KO 78/19,[8] and I KO 6/19[9]).

In the above-mentioned reopening proceedings, the Supreme Court held that the fact that the request for surrender is based on an order for provisional detention issued by an executive authority is legally relevant in the context of absolute obstacles to surrender under Article 604 § 1 (5) CPC (inadmissibility of surrender if it would be unlawful) and Article 604 § 1 (7) CPC (inadmissibility of surrender if there is a well-founded concern that the freedom and rights of the person to be surrendered may be infringed in the requesting State).[10] This issue has been very strongly stressed primarily in case I KO 6/19.

[7] Decision of the Supreme Court of 5 April 2017, III KO 112/16.

[8] Decision of the Supreme Court of 4 September 2019, IV KO 78/19.

[9] Decision of the Supreme Court of 20 May 2020, I KO 6/19.

[10] The prevailing perception of the problem of the fulfilment of requests for extradition of the prosecuted to the Republic of Belarus in the context of the conditions under Article 604 § 1 (5) and (7) CPC, taking into account the content of Article 615 § 2 CPC, seems to be an implicit expression of the position that the catalogue of obstacles to extradition listed in Article 68 of the Agreement on

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In proceedings in case III KK 355/17, the Supreme Court, in turn, considered this very circumstance to be legally irrelevant in the context of the obstacles in question, but at the same time pointed to the importance of determining whether, once surrendered, the prosecuted person is guaranteed in the requesting country that the pre-trial detention applied to him is subject to judicial review in such a way as to be realistic within the framework of the standards respected by the Polish State.

On the other hand, in the case mentioned at the outset, i.e. case III KK 241/19, in which the applicant alleged a violation of a fundamental human right, i.e. the right to personal liberty and security in view of the failure to ensure a real judicial review of the pre-trial detention applied against him, after his surrender to the authorities of the requesting state, it dismissed the cassation appeal.

The most authoritative way of assessing the position of the authority on a given issue is to analyse the decision issued by that authority, in a procedural situation in which its primary task is to resolve the legal problem in question. The procedural authority's legal views expressed incidentally to the main body of considerations, which, in principle, determines the content of the plea of the extraordinary remedy, are of lesser legal significance, but still being significant for determining its position.

The question then arises whether the absence of judicial review of pre-trial detention within the meaning of Article 5 (3) ECHR and Article 9 (3) ICCPR after the surrender of the prosecuted person to the requesting State may constitute an independent ground for refusing to surrender the prosecuted person.

Before undertaking to answer that question, it seems reasonable first to briefly explain the essence of human rights infringement as an absolute reason for refusing to extradite the prosecuted, since the infringement of the right to personal liberty and security is merely an exemplification of that category of plea.

INFRINGEMENT OF HUMAN RIGHTS AS AN ABSOLUTE OBSTACLE TO EXTRADITION

The study of criminal procedure adopts that the violation of human rights in the requesting country, or the likelihood of such violations, is not necessarily an obstacle to extradition in every case. What is necessary, however, is to determine

legal assistance and legal relations in civil, family, labour and criminal matters of 26 October 1994, concluded between the Republic of Poland and the Republic of Belarus (Journal of Laws 1995, no. 128, item 619) is not close-ended. There are specific reasons for this position. Bearing the above in mind, for the transparency of the argument based largely on the cited decisions of the Supreme Court, also in this study the reference point will be extradition obstacles from the Criminal Procedure Code, and not those resulting from higher-level legislation.

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also the nature of the right which would be infringed if the requesting State accepted the request, or what is the nature of the right which is likely to be infringed.[11]

The universal system of protection of human rights, based, among other things, on the ICCPR together with the optional protocols, and the ECHR, provides grounds for distinguishing three categories of rights:

- rights which may be suspended or restricted in certain strictly defined cases, such as public security, the need to protect public order, the prevention of crime and the protection of the rights and freedoms of others (e.g. the right to free speech or freedom of association);
- rights that may only be restricted in the event of war, martial law or exceptional circumstances (right to a fair trial or right to liberty);
- rights which may not be restricted or suspended under any circumstances (e.g. the right to life or the prohibition of torture and inhuman or degrading treatment)[12].

The concern about infringement of the rights in the first category cannot constitute a standalone reason for refusal of extradition. The second may only constitute such a reason in certain circumstances, i.e. when there is a risk of "gross" violation of these rights. On the other hand, the fear of infringing the rights under *ius cogens* constitutes an absolute and indisputable obstacle to extradition,[13] which is directly referred to in the Charter of Fundamental Rights,[14] Article 19 (2) of which states that "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

REVIEW OF PRE-TRIAL DETENTION IN THE MEANING OF ARTICLE 5 (3) ECHR AND ARTICLE 9 (3) ICCPR

In view of the foregoing, personal rights are of particular importance in the context of extradition proceedings. Interference with them is a natural consequence of criminal proceedings against a specific person, including the use of coercive measures in the course of such proceedings. Depriving such a person of liberty in

[11] Cf. M. Płachta, *Prawa człowieka w kontekście przeszkód ekstradycyjnych*, "Palestra" 2003, no. 5–6, pp. 194–195; B. Nita, W. Hermeliński, *Prawa i wolności obywatelskie w postępowaniu ekstradycyjnym*, [in:] *Transformacja systemów wymiaru sprawiedliwości*, vol. 2: *Proces transformacji i dylematy wymiaru sprawiedliwości*, ed. J. Jaskiernia, Toruń 2011, p. 776.

[12] Cf. M. Płachta, *op. cit.*, p. 195.

[13] *Ibidem*, p. 195, 201 and 203; B. Nita, W. Hermeliński, *op. cit.*, p. 776; B. Nita-Światłowska, [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2016, p. 1469.

[14] Charter of Fundamental Rights of the European Union (OJ C 326/391, 26.10.2012), hereinafter: CFR.

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connection with their execution is only possible when minimal procedural guarantees are in place. These guarantees are included in Article 5 (3) ECHR, which states that: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c)[15] of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

A similar standard results also from the CFR, as despite a concise formulation of this matter in Article 6, which states that: "Everyone has the right to liberty and security of person", Article 52 (3) (first sentence) CFR stipulates that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".[16]

An equivalent standard is also included in Article 9 (3) (first sentence) ICCPR. That provision states that "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release".

Importantly, the requirement to "bring" before a judge every person deprived of his liberty on charges of committing a crime, i.e. regardless of his initiative, is given special importance by the ECtHR.

In this automatism lies the essence of the distinction between the guarantee under Article 5 (3) ECHR addressed to those against whom criminal proceedings are initiated, and the guarantee under Article 5 (4) ECHR addressed to a wider circle of persons deprived of their liberty.

Bringing before a judge involves verifying not only the legality of deprivation of liberty but also its reasonableness.[17] The essential function of that guarantee is to protect the person covered by criminal proceedings from arbitrary deprivation of liberty.

The requirement to "bring" a person deprived of his liberty "regardless of his initiative" before a judge is, moreover, relevant not only in the context of his personal security in terms of that right understood as a guarantee against arbitrary

[15] "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save (…): (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

[16] Due to the fact that regarding protection of the right to personal liberty and security, the Charter de facto refers to the ECHR, the provisions of the ECHR as a legally relevant model of regional law will only be referred to herein.

[17] See judgment of the ECtHR of 29 April 1999 in case *Aquilina v. Malta*, application no. 25642/94, para. 52; judgment of the ECtHR of 11 July 2006 in case *Harkman v. Estonia*, application no. 2192/03, para. 38.

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deprivation of freedom of movement, but also in terms of that right, understood as a guarantee against ill-treatment of inmates.[18]

A kind of an aspect of the right to personal security in the latter sense is the prohibition of torture. Each state that is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984,[19] accepted as applicable almost all over the world, is obliged to take effective measures to prevent their occurrence (Article 2 of the Convention). One of the basic measures is precisely the obligation to bring every person deprived of liberty, regardless of their initiative, promptly before a judge.[20]

This is so because the prompt "eye-to-eye" confrontation of the detained person with the judge allows for a personal hearing of the person deprived of liberty and provides the best conditions for noticing possible irregularities. "Bringing" a detainee before a judge, regardless of the detainee's initiative, is also intended to rule out a situation in which a remedy against deprivation of liberty would not be filed due to ill-treatment of the detainee.[21]

The court's obligation to review pre-trial detention *ex officio* is also aimed at preventing the possible delayed forwarding of complaints by the out-of-court body, or "overlooking" to process such remedies.

If a person deprived of liberty is treated unduly in the course of proceedings before the law enforcement authorities, such a review provides a greater chance of undertaking appropriate actions aimed at detecting and judging the irregularities. On the other hand, the very awareness of the law enforcement authorities of the automatic nature of prompt judicial review prevents violations of the rights of detainees.[22]

At this point, it should be noted that according to the experience of entities involved in combating torture and other forms of ill-treatment of persons deprived of their liberty, the criminal behaviour by law enforcement authorities towards detainees most often occur during the first period of detention.[23] Therefore, failure

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[18] Cf. P. Hofmański, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1: *Komentarz do artykułów 1–18*, ed. L. Garlicki, Legalis 2010, item 103 of the commentary on Article 5 of the Convention and the ECtHR judgments cited therein: of 18 December 1996 in case *Aksoy v. Turkey*, application no. 21987/93, para. 76, and of 29 April 1999 in case *Aquilina v. Malta*, application no. 25642/94, para. 49.

[19] UNTS, vol. 1465, p. 85.

[20] Cf. G. Zach, [in:] *The United Nations Convention against Torture and Its Optional Protocol: A Commentary*, eds. M. Nowak, M. Birk, G. Monina, Oxford 2019, p. 137.

[21] Cf. P. Hofmański, *op. cit.*, para. 103 of the commentary on Article 5 of the Convention.

[22] See judgment of the ECtHR of 29 April 1999 in case *Aquilina v. Malta*, application no. 25642/94, para. 49.

[23] Cf. M.A. Nowicki, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2006*, Warszawa 2007, pp. 62–63; Council of Europe, *24th General Report of the CPT: European Committee for the*

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to comply with the requirement of "prompt" (i.e. generally not later than 2–4 days after detention[24]) judicial review of deprivation of liberty cannot be marginalized either. In particular, in cases where no procedural steps have been taken to date with the participation of the prosecuted person and, therefore, the first hearing of that person, which is one of the most important evidence-taking activities in the course of the criminal proceedings and the act in which the risk of undue treatment is greatest, must take place without delay after the surrender of that person to the requesting party.

The international community attaches particular importance to these principles of reviewing pre-trial detention. As practice has shown, other legal solutions which prevent inappropriate forms of treatment being applied to persons deprived of their liberty, such as access to a lawyer, may sometimes prove to be insufficient.[25]

LEGAL SIGNIFICANCE OF THE ISSUING OF A PRE-TRIAL DETENTION ORDER BY A NON-JUDICIAL AUTHORITY IN THE CONTEXT OF ABSOLUTE OBSTACLES TO EXTRADITION

The Agreement on legal assistance and legal relations in civil, family, labour and criminal matters of 26 October 1994, concluded between the Republic of Poland and the Republic of Belarus, like some agreements of Poland with other countries,[26] does not contain the requirement to attach to the extradition request a decision on pre-trial detention to be issued by a court.

Although the Polish criminal procedure provides that pre-trial detention may only be applied by a court, this circumstance alone should not lead to the conclusion that the surrender of a prosecuted person on a request based on pre-trial detention applied by an executive authority would be contrary to Polish law within the meaning of Article 604 § 1 (5) CPC.

By formulating this negative precondition of the inadmissibility of the surrender of the prosecuted person, the legislature has excessively complied with the

Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg 2015, https://rm.coe.int/1680696a9c (access: 16.4.2024), para. 98, p. 50.

[24] For more details, see P. Hofmański, *op. cit.*, para. 107 of the commentary on Article 5 of the Convention.

[25] For example, see decision of the Human Rights Committee of 24 July 2008, 1450/2006, in case *Komarovski v. Turkmenistan*, paras 3.4 and 7.4.

[26] For example, see also Agreement between the Polish People's Republic and the Republic of Tunisia on legal assistance in civil and criminal matters, signed in Warsaw on 22 March 1985 (Journal of Laws 1987, no. 11, item 71); Agreement between the Polish People's Republic and the Turkish Republic on legal assistance in criminal matters, extradition and transfer of sentenced persons, signed in Ankara on 9 January 1989 (Journal of Laws 1991, no. 52, item 552, as amended).

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obligation, arising from the principles of legislative technique, to draft statutory provisions in a concise and synthetic manner.

An obligatory refusal to surrender a prosecuted person on the sole ground that a particular legal institution is regulated differently in the requesting State than in the requested State could result in a paralysis of international cooperation in criminal matters in this area.

A literal interpretation of this precondition thus leads to unacceptable conclusions. Pursuant to teleological interpretation, it should therefore be assumed that if the contradiction does not concern the unrestricted rights under the ECHR and the ICCPR, it is in fact only inadmissible to surrender a prosecuted person if it would be "grossly" contrary to Polish law.

Also for the above-mentioned reasons relating to the benefit of international cooperation, the starting point for defining that gross contradiction should not be the regulations of national law, but first of all the minimum standards arising from regional law and international law that bind on the requested state.

By its very nature, a decision on pre-trial detention of a prosecuted person is made when the person is not present in the requesting country. At the moment of issuance of this procedural decision, the person is therefore not deprived of liberty on suspicion of having committed the offence for which he or she is being prosecuted. In such a procedural situation, the pre-trial detention order for the purpose of extradition is therefore in each case a decision on depriving of liberty and not a decision to continue that deprivation. Indeed, if, even in the requesting State, it is preceded by a procedural decision on detention, that decision is not yet being executed at the moment of issuance of the pre-trial detention order.

On the other hand, it does not follow from the ECHR provisions cited above that a decision on deprivation of liberty issued in respect of a person against whom criminal proceedings have been instituted, including a pre-trial detention order, must be necessarily issued by a court. These provisions only imply that it is court which, in each and every case, makes the final ruling on deprivation of liberty.

As the literature rightly points out, the notions of "arrest" and "detention" used by the ECHR cannot be equated with the institutions of Polish procedural law and are subject to autonomous interpretation,[27] and the decision to deprive a person of liberty (also by means of pre-trial detention in the course of a criminal trial) may also be taken by an authority other than court.[28]

Also the ECtHR in its case law is reluctant to find a violation of the ECHR from the mere fact that a decision on pre-trial detention is issued by a non-judicial body.

In the case *Niedbala v. Poland*, in which the applicant contested the prosecutor's decision to continue his detention on suspicion of having committed a crime

[27] Cf. P. Hofmański, *op. cit.*, para. 104 of the commentary on Article 5 of the Convention.

[28] *Ibidem*, para. 116 of the commentary on Article 5 of the Convention.

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(pre-trial detention order made while the prosecuted had already been held in custody for procedural purposes for two days) and the decision to re-detain him (pre-trial detention order issued after repealing the previous one), the ECtHR rightly held that the prosecutor could not be regarded as "other officer authorised by law" within the meaning of Article 5 (3) ECHR. Ultimately, however, the violation of the ECHR in this case was determined not by this circumstance alone, but in conjunction with another one, namely that the then applicable pre-trial detention provisions of the Polish Criminal Procedure Code of 1969[29] implemented only the requirement of Article 5 (4) ECHR. However, the standard crucial for persons deprived of their liberty on suspicion of having committed a crime, i.e. under Article 5 (3) ECHR, was not met, since at that time, there was no provision in the Criminal Procedure Code of 1969 that would guarantee prompt and reliable judicial review *ex officio* of that detention.[30]

Therefore, one should accept the legal view presented by the adjudicating panel of the Polish Supreme Court in the decision of 4 April 2018 (case III KK 355/17) that "it is not contrary to the ECHR for the original detention order for extradition purposes to be issued by a non-judicial authority, e.g. a prosecutor or an authorised police officer, when national law allows it".

LEGAL NATURE OF THE PASSIVE EXTRADITION PROCEEDINGS AND RESULTING OBLIGATIONS IN THE CONTEXT OF PROTECTION OF THE RIGHT TO FREEDOM AND PERSONAL SECURITY OF THE PROSECUTED PERSON

The proceedings for the surrender of the prosecuted person are the implementation of incidental proceedings, initiated by the requesting State, in which a criminal trial is conducted against a specific person or persons (main proceedings).

The object of these main proceedings is, as a general rule, to hold the offender concerned criminally liable for the commission of a specific offence. Sometimes these main proceedings are already at the enforcement procedure stage, the object

[29] Act of 19 April 1969 – Criminal Procedure Code (Journal of Laws 1969, no. 13, item 96, as amended).

[30] Judgment of the ECtHR of 4 July 2000 in case *Niedbala v. Poland*, application no. 27915/95, para. 55. See also other judgments in which the ECtHR's reasoning was reduced to a brief statement that the applicants were not guaranteed to be brought before a judge or other official authorised by law and to refer to the ECtHR's reasoning in *Niedbala* case, i.e. judgments: of 2 July 2002 in case *Dacewicz v. Poland*, application no. 34611/97, para. 22; of 19 December 2002 in case *Salapa v. Poland*, application no. 35489/97, para. 69; of 3 April 2003 in case *Klamecki v. Poland*, application no. 31583/96, para. 106.

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of which is then the enforcement of the sentence or other measures imposed on the person.

In these incidental proceedings, the requested State must protect the rights and freedoms of the prosecuted person, including his or her personal liberty and security, taking care that the use of pre-trial detention in the requested State (if this measure is used) does not violate the standard under Article 5 (4) ECHR.[31]

Moreover, the State requested for the surrender of a prosecuted person against whom pre-trial proceedings are pending in the requesting State must also, i.a., examine whether there will be a violation of Article 5 (1c) and Article 5 (3) and (4) ECHR if the prosecuted person is surrendered in the requesting State.

The pre-trial detention of the prosecuted person in the requested State, if any, is intended to safeguard the proper course of the passive extradition proceedings.[32] The questioning of the prosecuted person in the course of these proceedings is carried out on legally relevant circumstances in the context of possible obstacles to his or her surrender. Indeed, the clarification of these circumstances is the purpose of the proceedings in question.

An order for the pre-trial detention of the prosecuted person issued in the requesting State, which forms the basis for the request for surrender, is therefore not enforceable in the requested State. That order is enforceable only after the possible surrender of the person concerned, i.e. in proceedings whose object is to hold the person prosecuted responsible for the act charged.

The pre-trial detention of the prosecuted person in the requested State due to the request for surrender is therefore not a deprivation of liberty within the meaning of Article 5 (1c) ECHR, but constitutes only a deprivation of liberty within the meaning of Article 5 (1f) ECHR.[33]

It must therefore be assumed that it is only from the procedural event in the form of the possible surrender of the prosecuted person to the requesting State that the period prescribed for a "prompt" fair review of the pre-trial detention applied by the authorities of that State will run.

[31] For example, see judgment of the ECtHR of 26 June 2014 in case *Shcherbina v. Russia*, application no. 41970/11, para. 10 ff.

[32] Another thing is that the added value here is also to secure the good of the main proceedings carried out in the requested State.

[33] Cf. also judgment of the ECtHR of 26 June 2014 in case *Shcherbina v. Russia*, application no. 41970/11, para. 63.

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ROLE OF ADJUDICATING COURT IN FINDING THE LEGAL ADMISSIBILITY OF EXTRADITION WHERE A REQUEST FOR EXTRADITION IS FILED BASED ON A NON-JUDICIAL ORDER ON PRE-TRIAL DETENTION OF THE PROSECUTED PERSON

By its very nature, the problem of examining requests for extradition based on a pre-trial detention order issued by an executive authority concerns prosecuted persons whose cases in the requesting State are at the stage of pre-trial procedure, but at different procedural stages.

The disclosure in the case file of the fact that the request for extradition was accompanied by a pre-trial detention order issued by a non-judicial authority does not mean that the request is vitiated by a procedural defect.

Since it is accepted that that circumstance does not in itself also entail the existence of a negative obstacle to extradition, the question arises as to how the court should proceed in a case involving such a request.

The court should first of all clarify under which conditions, in accordance with the law in force in the requested State, the provisional detention thus applied by the executive authority is subject to judicial review. Will, as it is, e.g., in the Polish legal system,[34] the person prosecuted in the main proceedings be guaranteed prompt judicial review unless the law enforcement authorities, having heard him or her, cancel his or her provisional detention or replace it with a non-custodial measure?

If the review of the pre-trial detention in accordance with the provisions of the requesting State would not satisfy the conditions provided for in Article 5 (3) ECHR and Article 9 (3) (first sentence) ICCPR, it should be determined whether and what other legal solutions are in place which protect the prosecuted person from arbitrary deprivation of liberty and prevent that person from being ill-treated, which could even partially offset the absence of these guarantees in the legislation of the requesting State.

The documents sent by the party requesting the surrender of the prosecuted person contain in practice different ranges of material. Sometimes the documents accompanying the extradition request explain the substantive reason for the pre-trial detention applied (i.e. on which evidence is based the high probability that a particular offence has been committed by the prosecuted person).

However, there are also cases in which the request and attachments thereto allow the court to get factual knowledge of only the description of the acts alleged against the person concerned, their legal classification, according to the laws in force in the requesting State and the range of penalty for that act. Such data, with the deficient procedural guarantees available to the person deprived of liberty in the requesting

[34] See Article 279 § 3 CPC.

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State, may turn out to be insufficient to assess whether there is a justified concern that the prosecuted person's right to personal liberty and security may be violated.

In such a situation, the court must, pursuant to Article 605 § 5 CPC, ask the requesting party to supplement the request in order to better clarify the facts of the case.

Obviously, this is done not in order to examine the legitimacy of the charges against the prosecuted person, as this is not the role of the court deciding on the legal admissibility of extradition of the prosecuted person, but in order to examine whether the realities of a given case entail an increased risk of infringement of the right to personal liberty and security of the prosecuted person, in view of the deficits in the protection of this right in the requesting State.

The legitimacy to undertake such an in-depth analysis will therefore be the identification of a problem of a systemic nature in the legislation of the requesting country.

For example, there are extradition cases in which a person prosecuted in the home country was charged with committing a crime, admitted to committing it, was on own-recognizance release during the pre-trial proceedings, then left for Poland, and at the stage of extradition proceedings, in the course of providing explanations under Article 603 § 1 CPC, only questions the legal assessment of the act he or she was charged with, or claims that the law enforcement authorities of the requesting State failed to take into account the specific motive-related situation in which he or she acted. However, he or she does not make legally relevant statements for the assessment of the admissibility of their extradition.

In such cases, any possible lack of procedural guarantees set out in Article 5 (3) ECHR and Article 9 (3) (first sentence) ICCPR may, of course, also pose a threat to the personal security of the prosecuted, understood primarily as protection against arbitrary deprivation of liberty. Violation of personal security in this aspect, due to the nature of this right, may, however, constitute the basis for refusing to extradite the person prosecuted in absolutely extraordinary situations.[35]

In such a factual state, the court should be reticent in looking for the situation provided for in Article 604 § 1 (5) CPC or Article 604 § 1 (7) CPC. Since, for the reasons presented above, it should be assumed that with regard to rights not listed in Article 15 (2) ECHR, Article 19 (2) CFR and Article 4 ICCPR, only a "gross" contradiction with Polish law may constitute an absolute reason for refusing to extradite the prosecuted, and only well-founded concern that a "gross" violation of the freedoms and rights of the extradited person may occur in the state requesting extradition causes the occurrence of an absolute obstacle to extradition. The wording "well-founded concern" in Article 605 § 1 (7) CPC, as it is aptly assumed in the literature and judicature, means such a level of probability that not only results

[35] Cf. judgment of the ECtHR of 17 January 2012 in case *Othman (Abu Qatada) v. UK*, application no. 8139/09, para. 233.

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from the disclosed facts or information about facts, but also sufficiently allows the reality of the threat in the requesting State to be objectively assessed.[36]

On the other hand, a deeper reflection on the risk of infringement of the right to the personal security of the prosecuted party will require, in particular, cases in which the materials submitted or supplemented by the requesting party show that no evidence-taking steps have yet been undertaken with the participation of the prosecuted person in the requesting State. The charges against the suspect will be based solely on evidence from personal sources of evidence, indicating only indirectly that he or she is the perpetrator, while the prosecuted person will assert that he or she has no knowledge of the historical event under investigation.

Only upon the surrender of such person by the requested State, that is to say, at the beginning of his or her deprivation of liberty within the meaning of Article 5 (1c) ECHR, commences the requesting State's obligation to promptly hold the first hearing, that is to say, to undertake one of the most important evidence-taking steps during criminal proceedings, which at the same time carries the greatest risk of ill-treatment, particularly in cases with the above evidentiary circumstances.

Such a person will therefore be prosecuted in a situation similar to that of the person remanded in procedural custody in the Polish legal system. Any lack of guarantee in the legislation of the requesting State for a fair review of pre-trial detention imposed on that person by the investigating authority will indicate, in particular, an infringement of his or her right to personal security, in the aspect of that right understood as a guarantee against ill-treatment.

Due to the close link between that right and the prohibitions under Article 3 ECHR, Article 4 CFR and Article 7 ICCPR, the court must determine precisely what legal arrangements are in place in the requesting State to protect him or her from inappropriate treatment and whether, in the circumstances of the case, they are sufficient to presume that his or her extradition will not lead to an infringement of Article 5 (3) ECHR and Article 9 (3) (first sentence) ICCPR to a degree that should result in its refusal.

However, in making such an assessment, the court must be aware that, where the request for surrender originates in a country which has an extradition agreement signed with the requested State, any finding of legal inadmissibility is in breach of the principle of reciprocity resulting from that agreement.[37] Extradition agreements are based on the presumption of good faith of the parties. Any refusal to surrender

[36] Cf. S. Steinborn, [in:] *Komentarz aktualizowany do art. 425–673 Kodeksu postępowania karnego*, ed. L. Paprzycki, LEX/el. 2015, thesis 23 of the commentary on Article 604 CPC and decisions referred to therein: decision of the Court of Appeal in Lublin of 5 May 2005, II AKz 114/05, LEX no. 287466 and decision of the Supreme Court of 20 April 2011, IV KK 422/10, LEX no. 846391.

[37] As rightly assumed by, e.g., the Court of Appeal in Wroclaw in the decision of 21 January 2004, II AKz 407/03, LEX no. 116783.

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a prosecuted person in such a situation is therefore an expression of a lack of confidence in the State party to such an agreement. The assessment must therefore be made with prudence and caution required in such circumstances.

CONCLUSIONS

The absence of a fair, i.e. "prompt" and *ex officio*, review of non-judicial pre-trial detention at the pre-trial stage, including the "bringing of" the prosecuted person before the judge after his or her surrender to the authorities of the requesting State, is contrary to Article 5 (3) ECHR and Article 9 (3) (first sentence) ICCPR and indicates that there is a serious problem in the protection of their right to personal liberty and security.

It must be assumed that the absence of such a review does not in itself imply the legal inadmissibility of the extradition. However, in individual cases where the first hearing of the prosecuted in the requesting State has not yet taken place, therefore in cases at a stage at which the protection resulting from Article 5 (3) ECHR and Article 9 (3) (first sentence) ICCPR is of the utmost importance to the person against whom criminal proceedings are being conducted, that omission may exceptionally give rise to the assumption that, for that reason, there is a legitimate concern about an infringement of the personal security of the prosecuted person to an extent giving rise to the refusal of extradition. Such an assessment should be made *a casu ad casum* as necessary, after supplementing the information from the requesting party.

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ABSTRAKT

Artykuł stanowi opracowanie naukowe przygotowane metodą dogmatyczną. Jego przedmiotem jest jedno z najbardziej newralgicznych zagadnień, którym zajmował się Sąd Najwyższy w ostatnich latach w obszarze wykładni bezwzględnych przeszkód ekstradycyjnych, tj. problem braku niezwłocznej i z urzędu sądowej kontroli pozasądowego aresztu tymczasowego na etapie postępowania przygotowawczego w państwie żądającym wydania ściganego. W jednym ze swych orzeczeń, kluczowym w tej kwestii, Sąd Najwyższy stanął na stanowisku, że brak ten nie jest wystarczającą podstawą do stwierdzenia prawnej przeszkody do wydania ściganego. Argumentacja Sądu wyjaśniająca to stanowisko nie zasługuje na pełną aprobatę. Jest wyrazem niedostrzeżenia znaczenia, wynikającego z art. 5 ust. 3 Europejskiej Konwencji Praw Człowieka oraz art. 9 ust. 3 Międzynarodowego Paktu Praw Obywatelskich i Politycznych, wymogu niezwłocznego postawienia z urzędu każdego tymczasowo aresztowanego przed oblicze sądu w kontekście jego bezpieczeństwa osobistego. Należy przyjąć, że brak na etapie postępowania przygotowawczego niezwłocznej i z urzędu kontroli aresztu tymczasowego, obejmującej postawienie osadzonego przed obliczem sędziego, po przekazaniu ściganego władzom państwa wzywającego, może być podstawą do przyjęcia, że z tego powodu istnieje uzasadniona obawa naruszenia jego bezpieczeństwa osobistego. Oceny takiej należy dokonywać *a casu ad casum*, w razie potrzeby po uzupełnieniu informacji od strony wzywającej.

Słowa kluczowe: ekstradycja; bezpieczeństwo osobiste ściganego; przeszkody do wydania ściganego; niezwłoczna sądowa kontrola aresztu tymczasowego; sądowa kontrola aresztu tymczasowego z urzędu; postawienie osadzonego przed obliczem sędziego