

## POLISH PRACTICE IN INTERNATIONAL LAW

### The Supreme Court (Criminal Chamber) decision of 30 November 2011, Ref. No. I KZP 15/11\*

The Supreme Court – Criminal Chamber at the court, presiding over the case of Jakub T. has examined, pursuant to Article 441 § 1 of the Criminal Code Proceedings, the legal question presented by the Court of Appeal in P. in its decision of 30 August 2011, requiring a fundamental interpretation of the Act in order to determine: whether the reservation formulated by the court of the State issuing the European Arrest Warrant regarding the concurrent (parallel) execution of custodial sentences, which were not subjected to aggregation, constitutes an element of the sentence which binds the Polish court under Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings; or whether such reservation only determines the manner of enforcing the sentence pursuant to Article 607s § 5 of the Criminal Code Proceedings.

#### **The decision:**

To refuse to adopt a resolution. In its current wording the second sentence of Article 607s § 4, in conjunction with Article 607t § 2 of the Criminal Code Proceedings, provides that in order to enforce a sentence imposed by a judgment of a court of another EU Member State which has been forwarded to Poland under the European Arrest Warrant, the adaptation of such judgment for the purpose of its enforcement is possible only in respect of duration of the sentence and only if that sentence exceeds the statutory maximum penalty for the offence or offences in Poland. The adaptation can only consist in imposing, instead of the sentence handed down, the statutory maximum penalty or punitive measure provided for that offence in Polish law according to the adopted legal characterization. Any modification of other parts of the judgment is not possible.

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\* The decision of the Supreme Court is available at [http://www.sn.pl/orzecznictwo/uzasadnienia/ik/I-KZP-0015\\_11.pdf](http://www.sn.pl/orzecznictwo/uzasadnienia/ik/I-KZP-0015_11.pdf) (in Polish).

**Facts:**

The legal issue which required interpretation of the Act, as presented by the Court of Appeal, appeared in the following procedural situation:

By the decision of the Regional Court in P. dated 15 March 2007, Jakub T. – as a subject of the European Arrest Warrant (hereinafter sometimes “EAW”) issued by the Magistrates Court for the City of Westminster – was surrendered to the United Kingdom of Great Britain and Northern Ireland, under the condition that in the event of imposition of a custodial sentence or measure involving deprivation of liberty he should be returned to Poland in order to serve the sentence passed against him. On 28 January 2008 the Exeter Crown Court found Jakub T. guilty of two offences: rape defined under § 1(1) of the Sexual Offences Act of 2003, and causing grievous bodily harm with intent, defined under § 18 of the Offences Against the Persons Act of 1861. As a result of these findings, on 29 January 2008 the court sentenced him to a life sentence for the first of these acts with a recommendation that he served at least 9 years before he could be entitled to conditional release, accompanied by the imposition of a life sentence for the second of the assigned offences with a recommendation that he served at least 6 years before he could be entitled for conditional release. The court held that the sentences shall be executed concurrently and that the convicted could therefore apply for conditional release after serving at least 9 years in prison.

When Jakub T. was re-surrendered to Poland in order to serve the sentences, the Regional Court in P., by its decision of 3 October 2008, stated that the assigned acts satisfy the premises stipulated respectively in the provisions of Article 197 § 1 and Article 156 § 1 point 2 of the Criminal Code, and it determined – having regard to the then wording of the second sentence of Article 604s § 4 of the Criminal Code Proceedings – that the sentence to be enforced in Poland for the offence of rape under Article 197 § 1 of the Criminal Code is life imprisonment with a possibility to apply for conditional release after serving at least 9 years in prison, and that the sentence to be enforced in Poland for the offence of causing grievous bodily harm under Article 156 § 1 point 2 of the Criminal Code was also life imprisonment, but with a possibility to apply for conditional release after serving at least 6 years in prison. The Court added that Jakub T. could apply for conditional release in both of the sentences imposed and forwarded for enforcement after serving at least 9 years imprisonment.

After examination of the complaints lodged by the counsels of the convicted Jakub T., the Court of Appeal in P. upheld the judgment by its decision of 24 March 2009. But on 27 April 2009 the Regional Court in P. resolved, under Article 13 § 1 of the Executive Penal Code, that it had doubts regarding the enforcement of its – already final – decision, stating that the life sentences passed against Jakub T. should be executed concurrently.

As a result of a modification of the content of Article 607s § 4 of the Criminal Code Proceedings, implemented by the Act of 20 January 2011 amending the Act – Criminal Code, Criminal Code Proceedings and Fiscal Penal Code (Official Journal 2011, No. 48, item 245) in force from 22 March 2011, the possibility was created to re-open the proceedings, which had finally ended, when the imposed custodial sentence or measure involving deprivation of liberty exceeded the statutory maximum penalty for an offence according to the adopted legal characterization and including conditions of aggravation of penalty. In this regard, following the request of counsels for the defence, a proceeding for instituting a trial *de novo* was launched. On 24 March 2011 the Supreme Court granted the request, quashing the above-mentioned decision of 3 October 2008 issued by the Regional Court in P. with respect to that part regarding the determination of the sentence to be enforced, and it re-opened the proceeding within this scope, transferring it to the latter court.

On 25 July 2011, following its reconsideration of this issue, the Regional Court in P. stated that the sentences to be enforced against Jakub T. were: for the offence under Article 197 § 1 of the Criminal Code, a penalty of 12 years imprisonment subject to the possibility to apply for conditional release after serving at least 9 years in prison; and for the offence under Article 156 § 1 point 2 of the Criminal Code, a penalty of 10 years imprisonment subject to the possibility to apply for conditional release after serving at least 9 years in prison. In justification of this decision, the Regional Court in P. noted that since, pursuant to Article 607s § 5 of the Criminal Code Proceedings the enforcement of a sentence shall be governed by Polish law, a Polish court is not bound by the decision of a court of another EU country as to the manner of the enforcement of a sentence, and that this issue also relates to the concurrence in executing both sentences, as ordered by the judgment forwarded to Poland for purposes of enforcement. Thus the Regional Court claimed that the custodial sentences, currently adopted to Polish law, “will have to be served consecutively, pursuant to Article 80 § 1 of the Executive Penal Code”, as the provisions of domestic law do not provide the possibility of their concurrent execution, and according to well-established principles of enforcing sentences which have not been aggregated in the State of the judgment, impose an obligation to execute each of them separately.

The counsels of convicted Jakub T. lodged a complaint against this decision, claiming a violation of Article 607s § 4 of the Criminal Code Proceedings by virtue of its misinterpretation and the unjustified assumption that the issue of concurrent execution of the sentences does not constitute an element of sentence, but rather refers to the manner of enforcing the sentence. They also alleged a violation of Article 607s § 5 of the Criminal Code Proceedings in conjunction with Article 80 § 1 of the Executive Penal Code, by virtue of their misapplication and

the assumption that the custodial sentences should be executed consecutively; and a violation of the second sentence of Article 607s § 4 of the Criminal Code Proceedings in conjunction with Article 78 § 1 of the Criminal Code by virtue of the court's failure, in its adaptation of the length of the period required to apply for conditional release, to refer to the provisions of the latter Article; and violation of Article 85 in conjunction with Article 86 § 1 of the Criminal Code by virtue of their misapplication in the imposition of a collective penalty of 12 years imprisonment. On these grounds, the counsels requested to amend the decision and order that both custodial sentences should be executed concurrently and that the convicted Jakub T. may apply for conditional release after serving at least 6 years of imprisonment; or alternatively to impose a collective penalty of 12 years imprisonment with a similar period to apply for conditional release.

Examining the complaints submitted by the counsels, the Court of Appeal in P. found, following the suggestion of the counsels, that a legal issue had emerged in this case requiring a fundamental interpretation of the Act in order to determine the nature of the reservation formulated by the court of the issuing State that the custodial sentences shall be executed concurrently. Thus the Court of Appeal passed to the Supreme Court the legal question mentioned at the outset.

In substantiating its decision, the Court of Appeal submitted that the legal question may be resolved in two ways. One is that the reservation formulated by the court of the issuing State is an element of the sentence, and therefore Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings shall be applied. The other method for resolving the legal question would be to conclude that this reservation only determines the manner of enforcement of the sentence and that Article 607s § 5 of the Criminal Code Proceedings, which provides that a sentence shall be governed by Polish law, is then applicable.

### **Reasoning:**

Considering the legal question presented by the Court of Appeal, the Supreme Court came to the conclusion that it did not conform to the requirements specified in Article 441 § 1 of Criminal Code Proceedings, and that therefore a requested resolution of the question could not be provided.

According to well-established case-law of the Supreme Court, a legal issue presented under Article 441 § 1 of the Criminal Code Proceedings shall comply with following requirements:

- it constitutes a “legal issue”, i.e., an interpretative problem related to a provision interpreted divergently in judicial practice or to a provision of obviously defective or vague wording; and
- it requires a “fundamental interpretation of the Act”, and not an indication of how to resolve a particular case, which means it shall refer

- to a provision which leads to divergent interpretations, and not to one which is clearly formulated and does not cause particular difficulties in its interpretation; and
- it emerged while examining an appeal that is linked to a factual case in such a way that the adopted manner of interpretation determines the resolution of the case.

None of the above requirements were considered fulfilled in the present case. The only thing that occurred is that the presented issue arose in the appeal. However the point is that a legal question is supposed to conform also with two previous requirements specified in Article 441 § 1 of the Criminal Code Proceedings in order to be considered as a legal issue, the determination of which requires a fundamental interpretation of the Act, and not as any legal issue which occurs in front of the Court of Appeal.

It would seem that the Polish Supreme Court should have confined itself to that conclusion. However, having regard to the fact that the legal question referred to a provision which had been in force for only few months and that it concerned the issue of cooperation in criminal cases between EU Member States, and furthermore in light of the fact that this cooperation is expanding and is based on the mutual recognition of judgments, the Supreme Court went on to state that a few observations would be made in the case.

The second sentence of Article 607s § 4 of the Criminal Code Proceedings, in its previous wording before the amendment made by above-mentioned Act of 20 January 2011, read that “the Court is bound by the imposed sentence”, which also applied to cases of re-surrendering a convicted person from another EU country, who had been surrendered there previously under the EAW (Article 607t § 2 of the Criminal Code Proceedings). Therefore the Supreme Court, while expressing itself in an earlier appeal in the case of Jakub T., resolved the legal question presented at that time, which referred to the issue of application of the exequatur procedure under the EAW, by stating that an element of a sentence, which binds a Polish Court, includes also the determination of conditions upon which the convicted person can apply for conditional release made by the court of another EU Member State (see: the Supreme Court’s decision of 3 March 2009, IKZP 30/08). In its justification of its decision, the Supreme Court expressed the view that “sentence”, as specified in the Article in question, shall be understood as the determination of all consequences, within the scope of punishments provided by the legislator, made by the court assigning criminal liability for an offence as necessary or possible to apply to a perpetrator, and thus it determines not only a penalty or other measures of coercive nature, their type and duration, but also all other matters related to this penalty or the measure. Without a doubt, the decision of the

Court in Exeter regarding the concurrent execution of the custodial sentences constituted the “sentence” in above sense, since it determined the punishment which the Court had chosen, rejecting at the same time the other possible decision (as the court documents indicate) to require consecutive execution of the sentences.

The Polish legislator, in amending Article 607s § 4 of the Criminal Code Proceedings in 2011, referred to the Framework Decision of 2008 on application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences, Article 8 section 2 of which reads that when the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where the sentence exceeds the maximum penalty provided for similar offences under its national law, and that the adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State. The current wording of the provision in question conforms to the requirements of that decision.

This means that the current wording of the second sentence of Article 607s § 4 of the Criminal Code Proceeding provides that, due to the principle of mutual recognition of judgments adopted in EU member states, in order to enforce the sentence imposed by a judgment of a court of another EU Member State which has been forwarded to Poland under the European Arrest Warrant, the adaptation of such judgment for the purpose of its enforcement is possible only in respect of duration of the sentence and only if that sentence exceeds the statutory maximum penalty for the same offence or offences in Poland. The adaptation can only consist in imposing, instead of the original sentence, the statutory maximum penalty or punitive measure provided for that offence in Polish law according to the adopted legal characterization. Thus, any modification of other parts of the judgment is not possible. In this regard, a Polish court is bound by the judgment adopted in terms of its enforcement, even if it adapts the duration of the sentence or sentences. Thus it is not the “sentence” and its elements – including the manner of serving the sentence determined in the judgment, if the law of a foreign country so provides – that may be adapted, but only its duration that may be adapted to comply with Polish law, and then only under the conditions specified in the second sentence of Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings.

Although unchanged, Article 607s § 5 of the Criminal Code Proceedings assumes that the enforcement of a sentence shall be governed by Polish law, but it pre-supposed that the enforcement of sentence imposed by a judgment which has been forwarded to Poland for the purpose of its enforcement could be modified only as to its duration, and not as to other matters relating to the sentence which

a court of a foreign state ordered in its judgment of sentence against the convicted, including the conditions of its serving, if according to the law of that state a court is entitled to rule in this matter. It is also worth noting that the Polish Criminal Code provides a court with the possibility to determine, in its judgment, certain additional requirements for serving a sentence, which constitute a specific punishment (for example Article 95a or Article 96 of the Criminal Code), so such a solution is not unfamiliar to Polish regulations, and the latter situation is not treated as belonging to the sphere of enforcement of a sentence, but as a separate ruling with regard to the sentence or other measure.

The fact that the concurrent serving of several sentences imposed by a judgment of a court of a foreign country is not known to Polish law is irrelevant, because under British law – as the court files indicate – the decision in this regard belongs to the court which imposes those sentences and which has a choice between ordering that the sentences be executed consecutively or concurrently, or by turns concurrently and consecutively, and the court has to decide this issue in the same judgment which imposes the sentence. This means that the judgment in this regard cannot be subject to modification based on Article 607s § 4 of the Criminal Code Proceedings.

For these reasons the Court held as at the outset.

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