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Krzysztof Woźniewski

University of Gdańsk
ORCID: 0000-0001-9502-8521

THE PROBLEM OF EFFECTIVENESS OF A PROCEDURAL ACT PERFORMED "PREMATURELY" – A FEW COMMENTS IN RELATION TO THE DECISION BY THE EUROPEAN COURT OF HUMAN RIGHTS ON 13 DECEMBER 2018, 21497/14 (WITKOWSKI)

Provisions of procedural criminal law, awarding participants of criminal proceedings with the right to perform specific procedural acts in order to elicit related procedural effects, often simultaneously specify a deadline for performing such acts. A failure to meet such a deadline as a rule leads to a negative consequence, i.e. ineffectiveness of the procedural act carried out in violation of the said deadline. The Code of Criminal Procedure (CCP) sets forth the basic standard in regard to this in Art. 122 § 1 CCP, according to which a procedural action effected after the final time-limit has lapsed shall be without legal effect[1].

According to the Code of Criminal Procedure, final time-limits defined for a party to the proceedings, or the victim in the case of a decision conditionally dismissed during a sitting, include the time limits for filing a written request to the court to have the statement of reason for the judgement prepared in writing and served (Art. 422 § 1 CCP). Submission of such request within the final time--limit of seven days from the date of passing the judgment is a prerequisite for an eligible participant of the litigation to initiate an appeal procedure. If the above

[1] Polish criminal procedure distinguishes three types of procedural time-limits, relative to their legal nature. Final time-limits, i.e. deadlines for filing appeals, as well as those deadlines which the act deems to be final,); final time-limits may be reinstated if certain conditions are met, b) preclusive time-limits, or deadlines following which a given action has no legal effect, and they cannot be reinstated; c) instructional time-limits are deadlines following which a given action has legal effect, however a failure to meet such time-limit may lead to disciplinary action or official proceeding against the individuals guilty of such violation. Cf. P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2018, p. 64; M. Cieslak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984, p. 342.

action is not taken, the decision shall become final after seven days, and if a decision is passed by a court of first instance, the court shall be released from the obligation to issue a statement of reason. The obligation to submit a motion to have a statement of reason served also applies to decisions subject to *ex officio* delivery[2], and this obligation is not excluded by the act even in the case of decisions for which statement of reason is issued ex officio (Art. 422 § 1 second sentence CCP). Negative consequences of a failure to file the motion within the time limit include invalidity of such motion, whereby the president of the court shall refuse to accept it pursuant to Art. 422 § 3 CCP, however the negative ruling of the president of the court shall be subject to interlocutory appeal.

Despite the moderately complicated legal and structural nature of this provision, the practice of applying the provisions of Art. 422 § 1 CCP is associated with some problems; one of these is connected with premature submission of a relevant request, i.e. before the court delivers the judgment, whereby the promulgation of the judgment is a precondition for the lack of defects in the said judgment and for establishment of the condition of a matter judged (*res iudicata*), even if it is not legally binding[3]. The problem of a request filed by a legible entity for the reasons to be delivered with the judgment, if such request is submitted before the said judgment has been handed down, is not new in Polish jurisdiction[4]; it was also examined by the European Court of Human Rights, in the case Witkowski v. Poland, and in the decision dated 13 December 2018 (21497/14).

The legal problem in its essence is related to the assessment of the legal effect of a procedural act performed prior to another procedural act, where only completion of the latter makes it possible to perform other acts with respect to the original act. In other words, a justification for performing one procedural act lies in the previous completion of another procedural act. A postulatory declaration of intent by a party, comprising a request for a delivery of a judgment with reasons, becomes legally justified in connection with an existing imperative statement of intent by the court, i.e. the issued and announced judgment containing a resolution to the object of a criminal proceeding. The procedural act of

[2] This requirement applies to decisions issued with respect to an accused person under detention, who has no defense counsel and was absent when the judgment was pronounced despite the fact they requested to be brought to the trial when the judgment was pronounced (Art. 422 § 2a CCP), and to the issuance of decision to the accused in a speedy proceeding (Art. 517h § 1 CCP)

[3] The act of promulgation consists in a number of other activities, such as public announcement of its content by the presiding judge, communication about a dissenting opinion, and oral presentation of the reasons for the judgment (Art. 418 § 1–3 CCP) as well as instruction of the participant of the litigation about their right of appeal, the time-limit and method thereof, or information that the decision or ruling may not be appealed (Art. 100 § 8 CCP)

[4] See e.g. decision by the Supreme Court dated 11 Oct 2002, WA 53/02, OSNKW 2003, No. 1–2, Item 15; decision by the SC dated 6 July 2005, IV KZ 18/05, OSNwSK 2005, No. 1, Item 1335; decision of the Administrative Court in Gdańsk dated 15 Nov. 2006, II AKa 330/06, POSAG 2008, No. 1, Item 159; decision by the SC dated 19 Feb.2013, II KZ 5/13, KZS 2013, No. 4, Item 41).

judgment promulgation is always marked with a specific date and hour when it was performed. Hence, there is a question whether the legible party may effectively lodge a request to have a written expression of the ruling delivered, if such request be filed prior to the time of its promulgation, conditionally in a way. The opposite situation whereby the said motion is lodged after the time-limit stipulated in Art. 422 § 1 CCP is directly regulated in § 3 of the same article, which provides that the court shall refuse to examine a motion filed after such time limit[5], on the other hand no provision regulates the proceeding in a reverse situation. Before the ECtHR issued the decision in the case Witkowski v. Poland, the prevailing opinion was that there is a seven-day time-limit for filing a request for a statement of reasons to be prepared in writing and served, and the relevant period starts only after the date the judgment is delivered, which is directly conveyed by Art. 422 § 1 CCP, which means that if a request for reasons to be given for a judgment is lodged before the start of that period, it is ineffective[6]. The related discussions, evoking *arg. ad absurdum*, claimed that a contrary opinion would lead to an absurd conclusion that this type of request may be filed at any time prior to delivery of judgment, even after a notification about the date of trial has been served[7]. The most substantial argument for the opinion about the inadmissibility was, however, derived from the wording of Art. 422 § 1 CCP as in accordance with the opinion presented by the Supreme Court (SC) in its decision dated 19 February 2013 (II KZ 5/13), which said that "since the disposition set forth in Art. 422 § 1 CCP stipulates that the request may be lodged by the party «within a final time-limit of seven days from the day on which the judgement is pronounced», this means that it can be done only during this period (…) therefore no doubts should be raised by the requirement that the action be performed after «the judgment is pronounced», because generally this is when, in accordance with the act, the time limit defined for this action starts to run, and it is only after this precondition is met that the action will (formally) be effective and valid". This opinion repeats the position presented by the SC in 2005 where the justification referred to the wording of the relevant provision, with particular

[5] The prevailing opinion in judicature and the doctrine says that if the time-limit specified in Art. 422 § 1 CCP (Art. 370 § 1 CCP from 1969) is exceeded, the request, being ineffective, does not produce legal effects (cf. resolution SN of 19 Dec. 1973, VI KZP 44/73, OSNKW 1974, vol. 4, Item 59; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, vol. 2, Warszawa 1999, p. 467 thesis 4 for Art. 422 § 1 CCP; D. Świecki, *Kodeks postępowania karnego*, vol. 1: *Komentarz aktualizowany*).

[6] See: decision by the SC dated 19 Feb. 2013, II KZ 5/13, KZS 2013, No. 4, Item 41; decision by the SC dated 1 June 2010, IV KZ 30/10, OSNwSK 2010/1/1142.

[7] Cf. decisions by the SC dated 11 Oct. 2002, WA 53/02, OSNKW 2003, Vol. 1–2, Item 15; 19 Aug. 2009, IV KZ 38/09; 1 June 2010, IV KZ 30/10, OSNwSK 2010/1/1142); it was also approved in the literature (cf. T. Grzegorczyk, *Komentarz do Kodeksu postępowania karnego*, Warszawa 2008, p. 886).

emphasis placed on the phrase seven days from the day on which the **judgement is pronounced** (emphasis added by KW). This formal approach is deemed by the SC to be reasonable since a decision about challenging a verdict can only be taken after one becomes aware of its content[8]. It seems, however, that in this adjudication the SC is aware of the risk that the interested parties may lose the opportunity to lodge the said request in an effective manner, and consequently it suggests that in such a situation, i.e. when a legible party files a request prior to the delivery of the judgment, they should be informed, in accordance with the provisions of Art. 16 § 2 CCP, about the duty related to this and about negative consequences resulting from a failure to comply, or more specifically in this case about the necessity to re-apply or to sustain the request within the time limit specified in Art. 422 § 1 CCP[9]. In other words, this would be convalidation of an ineffective procedural act by means of re-application.

In the light of the above, a notable Decision was issued by the European Court of Human Rights on 13 December 2018 (21497/14, SIPLex No. 2597619) in the case Witkowski v. Poland, where the applicant complained of a violation of Art. 6 clause 1 of the Convention on Human Rights, i.e. the right of access to a court, which is an important aspect of the right to a fair trial, the said violation resulting from the refusal of the competent court to accept a request for a statement of reasons to be prepared in writing and served with the judgment pronounced in the case in which the applicant was the defendant[10], the ground for the refusal was the fact that the said request had been lodged two hours before the judgment was pronounced. The regional court refused to accept the request, evoking Art. 422 § 1 CCP, and to an extent drawing on the prevailing opinions resulting from application of the said provisions in practice and implying legal invalidity of the so-called "premature" requests lodged thereunder, the said opinions to be encountered both in adjudications and in the

[8] Pronouncement of a judgment in this case is a procedural fact which constitutes a precondition for an action to be taken pursuant to Art. 422 § 1 CCP; without this fact, there are no grounds for taking the action.

[9] As implied by the justification to this decision, the SCo acknowledged that a request for reasons to be given for a judgment was lodged ineffectively, i.e. prematurely, due to lack of awareness about the relevant legal regulation, hence in such case the directives related to information on the proceeding should be applied along with the directive on loyalty towards parties and participants of a proceeding.

[10] Important element of the actual status of the proceeding includes the procedural act whereby the court closed the hearing on 12 March 2013 and postponed pronouncement of the decision until 19 March, at 10.45. The applicant, who had been unable to attend and hear the judgment, lodged the request for reasons to be given for the judgment on 19 March, at 9.00 o'clock, i.e. less than two hours before the judgment was pronounced. However, the decision on the refusal to accept the request for a statement of reasons to be served, even though it was issued on 25 March, was delivered to the defendant only on 15 April, while the deadline for filing the request was on 26 March.

science of criminal procedure law. Importantly, a refusal to accept a request for a statement of reasons to be delivered is made in a ruling, subject to appeal (Art. 422 § 3 second sentence CCP)[11]. During the proceedings in the ECtHR in Strasbourg, the opinion of the Polish government, based on adjudications of the Supreme Court, presented an argument that the applicant should have confirmed the relevant request or should have filed a new request of the same kind within the time limit set forth in Art. 422 § 1 CCP, in line with the way of proceeding in such situations suggested earlier in decisions of the SC (see the comments above). However, the ECtHR rightly observed that in the specific case the court had not asked the applicant whether he wished to confirm his request for the establishment of the reasons within the time limit defined for that. Hence the domestic court did not comply even with the related national standard set forth by the SC, and during the proceeding, the national authorities were unable to explain why the court failed to do that.

Hence, the ECtHR decided that the right of access to court had been violated, because by refusing to consider the request at issue, in a situation where the said request is filed prematurely and the applicant is not asked, in line with the principle of fair trial and the right to be informed (Art. 16 § 2 CCP), to confirm or file a new request, particularly given the fact that the defendant has no professional legal counsel, the relevant court may deprive the defendant of the right to challenge the decision on criminal liability in the case at issue. A convincing opinion was expressed by K. Warecka regarding the excessively formalistic interpretation of Art. 422 § 1 CCP adopted by the Polish court and creating a barrier for the applicant to challenge the decision of the court of first instance, as a consequence of which the applicant had lost the right to file an appeal[12].

This leads, however, to a question concerning applicability of the legal opinion based on the above decision of ECtHR on acceptability of requests filed pursuant to Art. 422 § 1 CCP, before a judgment is delivered, and whether it may effectively be applied as a general rule for assessing validity of a procedural statement filed by a party not only after the time limit defined by the regulations for a procedural action or before its end, but even before a specific procedural activity is completed, providing grounds for other related procedural actions, without which the latter are immaterial. In other words, does the decision of the ECtHR provide grounds for assuming procedural effectiveness if a request for a statement of reasons is lodged once the accused person

[11] The ground for lodging a complaint with regard to the ruling of the president of the court is provided by Art. 422 § 3 sentence 2 CCP, unless the said ruling is issued by the court referendary and is subject to interlocutory appeal (§ 3 Art. 422 CCP).

[12] K. Warecka, *Wniosek o doręczenie wyroku wraz z uzasadnieniem można złożyć przed ogłoszeniem wyroku. Omówienie wyroku ETPC z dnia 13 grudnia 2018 r., 21497/14 (Witkowski)*, System Informacji Prawnej LEX 2018.

has received a copy of the bill of indictment, served in accordance with the decision of the president of the court pursuant to Art. 338 § 1 CCP, whereby such request may be acted upon only after the relevant judgment is pronounced; likewise, is it possible to assume procedural effectiveness if such request is filed by a victim along with his/her statement on the intention to act as subsidiary prosecutor. Obviously, it is possible to point out many examples of specific situations where such request could be lodged before the verdict is pronounced, however analysis of acceptability and potential validity of requests for judgment to be delivered with reasons in the context of any possible procedural situation will contribute nothing more than a list of casuistic nature. The legal arguments contained in the decision of the ECtHR lead to one recommendation for the Polish judicial practice. Namely, a "premature" request lodged pursuant to Art. 422 § 1 CCP should be recognised as acceptable and effective if it is filed on the day set by the court for the delivery of the judgment, but before the specific hour of the verdict promulgation, and even – in my opinion – if such request is filed within a period of time after the hearing is closed and the decision is postponed, until the announcement of the verdict, as indicated in the decision on the postponement. It seems that these timelines of the procedure – and these indeed were considered by the ECtHR in its analysis of the complaint 21497/14 – are related to the very advanced stage of the main litigation, including the court trial, where such action, taken by the parties mainly as a precaution, does not violate the procedural law. On the other hand, expanding the scope to include a possibility to perform the relevant procedural act during earlier stages of the main litigation raises doubts also in view of the functions played by time-limits in a criminal proceeding. Science of criminal procedure law names functions related to the dynamics and order of the criminal proceeding and to assurance and stability of the procedural resolution[13]. From this viewpoint, the domestic court, through its decision, generally implemented the procedural functions of time limits, in particular the function stabilising the resolution, however by realising the other functions it ultimately deprived the defendant of the right of appeal, which was recognised as a behaviour violating the right to a fair trial. In this case *summum ius* proved to be *summa iniuria.*

To sum up our *de lege lata* considerations, requests lodged by parties pursuant to Art. 422 § 1 CCP should be deemed acceptable and effective at least in the case of the timelines indicated *implicite* in the decision of the ECtHR, while earlier submission of such requests should produce procedural effects resulting from Polish adjudications related to the directives defined in Art. 16 § 2 CCP securing the right to be adequately informed, in particular in situations when parties to the proceedings do not have professional legal counsel.

[13] I. Nowikowski, *Terminy w kodeksie postępowania karnego*, Lublin 1988, p. 12 et seq.

Bibliography

Cieslak M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warszawa 1984.
Grzegorczyk T., *Komentarz do Kodeksu postępowania karnego*, Warszawa 2008.
Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz*, vol. 2, Warszawa 1999.
Hofmański P., Waltoś S., *Proces karny. Zarys systemu*, Warszawa 2018.
Nowikowski I., *Terminy w kodeksie postępowania karnego*, Lublin 1988.
Świecki D., *Kodeks postępowania karnego*, vol. 1: *Komentarz aktualizowany*.
Warecka K., *Wniosek o doręczenie wyroku wraz z uzasadnieniem można złożyć przed ogłoszeniem wyroku. Omówienie wyroku ETPC z dnia 13 grudnia 2018 r., 21497/14 (Witkowski)*, System Informacji Prawnej LEX 2018.

Summary

Provisions of procedural criminal law, awarding participants of criminal proceedings with the right to perform specific procedural acts in order to elicit related procedural effects, often simultaneously specify a deadline for performing such acts. A failure to meet such a deadline as a rule leads to a negative consequence, i.e. ineffectiveness of the procedural act carried out in violation of the said deadline. The problem also occurs when making a procedural action prematurely. The article will be devoted to these issues.

Keywords: effectiveness of procedural action, judgment, premature

PROBLEM SKUTECZNOŚCI CZYNNOŚCI PROCESOWEJ DOKONANEJ „PRZEDWCZEŚNIE" – KILKA UWAG NA TLE WYROKU EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA Z DNIA 13 GRUDNIA 2018 R., 21497/14 (WITKOWSKI)

Streszczenie

Przepisy prawa karnego procesowego, przyznając poszczególnym uczestnikom postępowania karnego uprawnienia do dokonywania określonych czynności procesowych w celu wywołania związanych z nimi skutków procesowych, często jednocześnie określają termin dla ich dokonania. Niedotrzymanie tego terminu zazwyczaj pociąga za sobą negatywną konsekwencję procesową w postaci bezskuteczności czynności procesowej dokonanej z naruszeniem terminu do jej dokonania. Problem wystepuje także przy dokonaniu czynności procesowej przedwcześnie. Tym właśnie zagadnieniom poswięcony został artykuł.

Słowa kluczowe: skuteczność czynności procesowej, wyrok, przedwcześnie