

# GLOSS

## ON THE JUDGEMENT OF THE SUPREME COURT OF 28 FEBRUARY 2023, I KZP 13/22 (EXPRESSING APPROVAL)

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### ABSTRACT

The present gloss refers to the thesis and considerations expressed in the Supreme Court judgement of 28 February 2023, I KZP 13/22, concerning the exception to the rule of speciality stipulated in Article 14(1)(b) of the European Convention on Extradition. The author presents arguments concerning the broad international legal context of the analysed regulation, which develops and confirms the accuracy of the Supreme Court's stance on a broader than lexical interpretation of the term 'final discharge'. Moreover, the paper discusses the nature of the exception in question in the light of the standard of protection laid down in Article 52(4) of the Constitution of the Republic of Poland.

Keywords: extradition, rule of speciality, European Convention on Extradition, cumulative sentence, cumulative penalty

In the glossed judgement, the Supreme Court addressed the interpretation of one of the exceptions to the rule of speciality, as regulated in Article 14(1)(b) of the European Convention on Extradition (ECE).<sup>1</sup>

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<sup>1</sup> Done at Paris on 13 December 1957, together with the Additional Protocol to the European Convention on Extradition done at Strasbourg on 15 October 1957 and the Second Additional Protocol to the European Convention on Extradition done at Strasbourg on 17 March 1978, Journal of Laws of 1994, No. 70, item 307; Article 14(1)(b): 'A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he



As the procedural realities of the case, on which the aforementioned judgement was based, show, the issue raised has considerable practical significance. It influences the scope of application of the rule of speciality under certain procedural circumstances. In the case that raised doubts of the Appellate Court, the convict was subject to a cumulative sentence of deprivation of liberty, which was imposed in violation of the rule of speciality. Following the execution of another single penalty within the extradition procedure, based on Article 9 § 4 PEC,<sup>2</sup> the execution of the defective cumulative sentence was suspended. This suspension prevented the execution of the cumulative penalty of deprivation of liberty and the accompanying fine.<sup>3</sup> Having left prison, the convict stayed in the territory of the Republic of Poland continuously for over 45 days. It should be added that he was properly informed about the possible consequences of staying in Poland. Eventually, as a result of another conviction, a new sentence combining single penalties not covered by the extradition was issued in accordance with the exception to the rule of speciality laid down in Article 14(1)(b) ECE. Hearing the appeal lodged by counsel for the defence, the Appellate Court posed a legal question:

‘Whether the phrase »his final discharge in the territory of the Party to which he has been surrendered«, co-defining the exception under Article 14(1)(b) to the rule limiting the prosecution laid down in Article 14(1) of the European Convention on Extradition of 13 December 1957 (together with the Additional Protocols of 15 October 1975 and 17 March 1978; Journal of Laws of 1994, No. 70, item 307), should be interpreted as applicable to the situation where a convicted person did not leave the territory of Poland within 45 days of his final discharge due to legal obstacles to executing a penalty laid down in Article 14(1), in connection with which he was extradited, or has returned after such discharge and leaving the territory of Poland within 45 days, provided that no restrictions on his personal freedoms, including his place of residence, were imposed on the person when he was discharged from prison.’

Determining the limits of the rule of speciality presents a significant challenge to the axiology of the legal system. As pointed out in the literature,

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was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases: (...)

(b) when that person having had the opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.’

<sup>2</sup> Act of 6 June 1997: Penalty Execution Code, consolidated text, Journal of Laws of 2023, item 127, as amended; hereinafter ‘PEC’.

<sup>3</sup> There is an established opinion in case law according to which: ‘the rule of speciality formulated in Article 607e § 1 CCP constitutes a negative premise for imposing a cumulative penalty including the penalty of deprivation of liberty imposed for offences other than those that constituted grounds for the issuance of the European arrest warrant. Both the issuance of a cumulative imprisonment sentence not covered by the decision on extradition and the execution of a prior cumulative sentence covering such penalties constitute flagrant infringement of Article 607e § 1 CCP’ (Supreme Court judgement of 12 October 2022, I KK 343/22, LEX, No. 3521321; also see the judgements referred to therein: the Supreme Court judgement of 6 February 2020, II KK 2/20, LEX, No. 3078349; the Supreme Court judgement of 14 January 2014, V KK 357/13, OSNKW 2014/8/61, LEX, No. 1491071; the Supreme Court judgement of 20 October 2011, III KK 140/11, LEX, No. 1044023).

'on the one hand, an overly broad application of the rule of speciality is considered a factor limiting the possibility of punishing individuals for acts prohibited within the criminal jurisdiction of the country requesting extradition. This limitation, resulting from the state's sovereignty, consequently reduces the effectiveness of the extradition system. On the other hand, an excessively narrow application of this principle may result in the infringement of the procedural rights of the extradited person.'<sup>4</sup>

Furthermore, regardless of the assumptions concerning the pursued goal, achieving it necessitates the use of a specific legislative technique. This technique, based on international law, must accommodate the diversity of legal systems in the States-Parties to the Convention. Consequently, it employs general terms, whose adaptation within a particular domestic legal system seems feasible only through case law. This appears to be the role of the Supreme Court judgement of 28 February 2023, I KZP 13/22,<sup>5</sup> which expresses the thesis that: **'the concept of »his final discharge in the territory of the Party to which he has been surrendered«, co-defining the exception under Article 14(1)(b) to the rule limiting prosecution laid down in Article 14(1) first sentence of the European Convention on Extradition of 13 December 1957 (...), may also be applied to situations where the individual was discharged due to the recognition of obstacles to the execution of the deprivation of liberty penalty resulting from the rule of speciality.'**

In extradition-related literature, it is highlighted that the rule of speciality is not unlimited in time but ceases after a certain period if the fugitive voluntarily stays in the requesting state post-discharge.<sup>6</sup> Therefore, it is pertinent to emphasise the convict's intent to remain in the country to which he was surrendered for a period that leaves no doubt about his decision. In this context, the pragmatic aspect of the discussed exception to the rule of speciality, where the exercise of actual personal freedoms is crucial, becomes evident.

The discussed exception pertains to the very nature of the rule of speciality. Literature, referencing the stance of the Supreme Court of Cassation in Italy, points out that

'the limitation of the scope of prosecution, constituting an exception to the principle of full criminal jurisdiction over all persons in the territory of the state, must end with the expiry of certain deadlines. This is why international agreements stipulate such deadlines. If the discharged individual does not leave the country within the specified period, despite having the opportunity to do so, he manifests the intent to stay in that territory, thereby subjecting himself to national legislation without restrictions.'<sup>7</sup>

The interpretational dilemma resolved by the Supreme Court concerns a fundamental understanding of the concept of 'final discharge'. The question is whether its content should be perceived through the prism of the ontological aspect,

<sup>4</sup> Milczanowski, S., 'Uwagi na temat zasady specjalności jako przesłanki ekstradycyjnej', *Nowa Kodyfikacja Prawa Karnego*, Volume XXV, AUW No 3165, Wrocław, 2009, p. 129.

<sup>5</sup> OSNK 2023/3/10, LEX, No. 3500602.

<sup>6</sup> Vogler, T., 'The rule of speciality in extradition law', *International Review of Penal Law. Extradition*, 1991, Vol. 62, No. 1–2, p. 238.

<sup>7</sup> Knypl, Z., *Europejska konwencja o ekstradycji. Komentarz*, Sopot, 1994, p. 157.

i.e., the actual situation of the person surrendered, in terms of their unrestricted personal freedoms, or whether it is necessary to consider a normative aspect, i.e., case law applicable in legal transactions concerning a convict's personal freedoms, even if it is impossible to implement the decisions therein.

It should be emphasised that the problematic phrase ought to be interpreted autonomously, independent of the content of the provisions of the Code of Criminal Procedure,<sup>8</sup> i.e. Article 599 CCP or Article 607e § 3(2) CCP, as suggested by the Appellate Court in the legal question. The Supreme Court rightly pointed out that referencing these provisions for the purpose of interpreting the stipulations of the Convention would constitute an infringement of the prohibition of synonymous interpretation. The aforementioned regulations refer directly to the moment of 'final termination of a proceeding',<sup>9</sup> and not 'final discharge', which in turn is present in other acts of international law based on analogous regulations: in Article 27(3)(a) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,<sup>10</sup> and in Article LAW. SURR.106(2)(a) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part.<sup>11</sup>

In the glossed judgement, the Supreme Court emphasised that

'the possibility of such broader interpretation is confirmed by the different wording of Article 14(1)(b) ECE in comparison to Article 599 CCP and Article 607e § 3(2) CCP, which refer to legal occurrences that have a strict normative »anchoring« (grounds), i.e., the final termination of a criminal proceeding or the completion of service or execution of a penalty, and not only ontological, such as an actual discharge that is supposed to be final, but where there are no clear normative criteria for assessing this final nature (which is understandable given the international character of Article 14(1)(b) ECE)'.

Furthermore, literature notes a distinction between the analogous regulations in the national system and the Framework Decision on the EAW.<sup>12</sup> It is also highlighted that, even based on Polish regulations, the hypothesis concerns specific behaviour, while the stipulation is that the rule of speciality should be abrogated, 'moreover, this occurs in a situation where a person formerly convicted is (still or again) within the territory of the Republic of Poland, i.e., within the limits of the rule of territoriality of the application of criminal law (Article 5 CC<sup>13</sup>). In other words,

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<sup>8</sup> Act of 6 June 1997: Code of Criminal Procedure, consolidated text, Journal of Laws of 2022, item 1375, as amended; hereinafter 'CCP'.

<sup>9</sup> In Article 529 CCP of 1969: 'within one month of the date of valid termination of a proceeding, and in the event of conviction: within two months of the completion of serving the penalty or its remission.'

<sup>10</sup> OJ L 190, 18.7.2002, p. 1.

<sup>11</sup> OJ L 149, 30.4.2021; [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)) [accessed on 14 August 2023].

<sup>12</sup> Stepkowski, Ł., 'Zasada specjalności europejskiego nakazu aresztowania i art. 607e § 3 pkt 2 k.p.k. a możliwość ścigania wydanego obywatela polskiego za przestępstwa nieobjęte tym nakazem', *Przegląd Sądowy*, 2022, No. 5, pp. 101–102.

<sup>13</sup> Act of 6 June 1997: Criminal Code, consolidated text, Journal of Laws 2022.1138, as amended; hereinafter 'CC'.

the stipulation is that a certain additional legal protection (a guarantee of impunity) of the person surrendered should be abolished.<sup>14</sup> The main premise for applying the discussed exception to the rule of speciality, related to the convict's attitude, lies in the nature of the course of the proceeding.

Regardless of this, the Supreme Court rightly drew attention to the subsidiary nature of the provisions contained in Section XIII CCP ('Proceedings in criminal cases connected with international relations'), *inter alia*, in relation to international agreements to which Poland is bound, due to the principle of the conflict of laws established in Article 615 § 2 CCP. The priority of a ratified international agreement also stems from constitutional regulations.<sup>15</sup> Therefore, although provisions of Article 599 CCP and Article 607e CCP introduced in 2003 and 2004 respectively, were intended to adapt Polish regulations to international and European law,<sup>16</sup> their wording does not mirror the content of analogous provisions laid down in the Framework Decision on the EAW or Article 14(1)(b) ECE.

Differences in the wording of the discussed exception to the extradition-related rule of speciality are also evident in bilateral agreements to which the Republic of Poland is a party. Some treaties explicitly refer to factual issues concerning freedom of movement. For example, the Extradition Treaty between the Republic of India and the Republic of Poland<sup>17</sup> and the Extradition Treaty between the United States of America and the Republic of Poland<sup>18</sup> stipulate a period of 30 days from the day the person surrendered **had the opportunity to leave freely**. The extradition agreement between the USA and France of 1996 was similarly formulated.<sup>19</sup> In literature on the American extradition model emphasis is placed on the surrendered person's freedom to leave the US and the consequences of remaining in its territory.<sup>20</sup> Although the indicated circumstances granting this freedom include only a judgement on the exclusion of being subject to extradition, acquittal, or the completion of the service of a sentence, there is little doubt that the physical possibility of leaving the United States is a decisive factor.

However, some agreements use phrases referring to the extradited person's legal situation. The Convention between the Polish People's Republic and the

<sup>14</sup> *Ibidem*, p. 102.

<sup>15</sup> See the Supreme Court ruling of 29 August 2007, II KK 134/07, OSNwSK 2007/1/1887, LEX, No. 310647.

<sup>16</sup> Mozgawa-Saj, M., *Ekstradycja w polskim postępowaniu karnym*, Warszawa, 2015, pp. 42–43.

<sup>17</sup> Signed at New Delhi on 17 February 2003, Journal of Laws of 2005, No. 156, item 1304, Article 10(3)(b).

<sup>18</sup> Signed at Washington on 10 July 1996, Journal of Laws of 1999, No. 93, item 1066, Article 19(3)(b).

<sup>19</sup> The following phrase was used therein: '(...) when having had the opportunity to do so, the person extradited did not leave the territory of the Requesting State within 30 days of his **final release** (emphasis by Sz.K.); Article 19(1)(b) of the Extradition Treaty between the United States of America and the Republic of France, signed on 23 April 1996, <https://www.state.gov/wp-content/uploads/2019/02/02-201-France-Extradition.pdf#:~:text=The%20President%20of%20the%20United%20States%20of%20America,Exchanges%20of%20Letters%20of%20June%202%20and%2011> [accessed on 16 August 2023].

<sup>20</sup> Bassiouni, M.Ch., 'Extradition: the United States Model', *International Review of Penal Law. Extradition*, 1991, Vol. 62, No. 1–2, p. 495.

Republic of Turkey on legal assistance in criminal matters, on extradition, and on the transfer of sentenced persons states<sup>21</sup>: ‘the consent shall not be required in the following cases: (...) the person extradited fails to quit the territory of the Contracting Party to which he or she had been extradited within one month after termination of the proceeding or after the date of the completion of the sentence if one has been imposed’. Similarly, the agreement with Australia refers to the person who ‘has had an opportunity to leave the territory of the Requesting Party and has not done so within 45 days of final discharge in respect of the offence for which that person was extradited.’<sup>22</sup>

Z. Knypl asserts that

‘final discharge within the meaning of Article 14(1)(b) Convention occurs when the person extradited no longer has any obligations in relation to the proceeding or the execution of the penalty. Conditional release is not final if it is combined with specific restrictions imposed on the released person’s freedom. The possibility of leaving the territory referred to in this provision means a real possibility, which does not occur, for example, if the person is bedridden.’<sup>23</sup>

The commentator discusses obligations, which seem to refer to the normative layer of ‘final discharge’ as used in Article 14(1)(b) ECE, in contrast to ‘final release’, which refers to actual liberation.<sup>24</sup> However, this author also emphasises the released person’s physical freedom, dependent on the nature of the probation obligations imposed under Article 159 PEC. While such freedom may be limited, or, in the event of the will to leave the country, may exclude supervision by a probation officer, trustworthy person, association, organisation, or institution aiming to care for upbringing, prevent demoralisation or assist convicts, most obligations laid down in Article 72 § 1 CC do not appear to involve the obligation to stay in the territory of Poland. Therefore, imposing them does not challenge the assertion that conditional release was final within the meaning of Article 14(1)(b) ECE.

Despite some terminological differences, it appears that international legal provisions, including those in the regulation mentioned above, base the premise of the discussed exception to the rule of speciality on an ontological nature. That is, it refers to the actual situation of the person extradited, which corresponds to the content of Article 14(1) ECE: ‘A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence (...), nor shall he be for any other reason **restricted in his personal freedom**.’<sup>25</sup> It is unsurprising that, given the international legal

<sup>21</sup> Signed at Ankara on 9 January 1989, Journal of Laws of 1991, No. 52, item 224; Article 21(2)(a).

<sup>22</sup> Treaty between Australia and the Republic of Poland on Extradition, done at Canberra on 3 June 1998, Journal of Laws of 2000, No. 5, item 51; Article 12(3).

<sup>23</sup> Knypl, Z., *Europejska konwencja...*, op. cit., p. 162.

<sup>24</sup> See footnote 16.

<sup>25</sup> It is necessary to quote the observation made by Z. Knypl, who points out that ‘the English words used in Article 14(1): ‘nor shall he be for any other reason restricted in his personal freedom’ were translated into Polish: “ani też poddana jakimkolwiek ograniczeniom wolności osobistej za jakiegokolwiek przestępstwo popełnione przed wydaniem” [meaning ‘nor shall he be restricted in his personal freedom for any offence committed prior to his surrender’]; Knypl, Z., *ibidem*, p. 144.

nature of the act, stipulations contained within it must be characterised by greater flexibility. This flexibility allows for the application of specific treaty provisions across various legal systems, i.e., regardless of the specific institutions of national law that may apply to the person extradited.

This is confirmed by the content of some declarations and reservations of States-Parties to Article 14(1)(b) ECE.<sup>26</sup>

'The Swiss Federal Council declares that the Swiss authorities consider release to be final within the meaning of Article 14 if it allows the person extradited to move freely without violating the rules of conduct and other conditions imposed by the competent authority. For the Swiss authorities, the extradited person shall, in any case, be deemed to be able to leave the State within the meaning of this Article, provided there is no **actual obstacle** [emphasised by Sz.K.] to leave it, such as illness or another real limitation of his freedom to move.'

Similarly,

'Israel shall not give consent to extradition by means of derogating from the rule of limitation of prosecution (...) provided that there is no proceeding against the person sought, and he is not convicted or detained in order to execute a penalty, unless he voluntarily returns to the Requesting State or, **having the opportunity to do so**, does not leave the Requesting State within 60 days.'

The stances of Switzerland and Israel leave no doubt that these countries make the application of the exception to the rule of speciality dependent only on the occurrence of the physical possibility of leaving the State to which the person was extradited, which confirms the accuracy of the Supreme Court's interpretation presented in the glossed judgement.

Regarding the procedural situation that formed the basis for asking a legal question and the expression of the opinion by the Supreme Court, it should be emphasised that a cumulative sentence issued with the infringement of the rule of speciality will always be defective and will never be enforced in conformity with the law. Obtaining the extraditing State's consent to extend extradition would also be irrelevant to this issue as such a measure would not validate a cumulative sentence. Therefore, if a convict is released following a recognition of this sentence's defectiveness, which definitively prevents the execution of the imposed cumulative penalty, the release of the convict resulting from the suspension of the sentence's execution will be final in both factual and legal sense. The mode of suspending execution of a sentence laid down in Article 9 § 4 PEC does not provide for any limitation of the extradited person's personal freedom. For this reason, both literal and functional interpretations of the analysed premise of the exception to the rule of speciality confirm the possibility of extending prosecution, regardless of the occurrence of a defective and unenforceable cumulative sentence in legal transactions.

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<sup>26</sup> Government declaration of 31 March 1994 concerning the ratification of the European Convention on Extradition, done at Paris on 13 December 1957 by the Republic of Poland, Journal of Laws, 1994, No. 70 item 308.



It is also worth noting that the expiry of the principle of limitation of prosecution may result in the regulation of the convict's legal and criminal situation. For example, in the present case, this can result from the issuance of a new cumulative sentence. One cannot also exclude a situation in which a person, who has been extradited, intentionally stays in the territory of the requesting state, which is his homeland, in order to regulate their legal and criminal situation, or 'settle accounts' with the justice system. After serving potential penalties, to live freely in their country of origin.

Finally, it should be noted that the Court's question *ad quem* is also conditional. In the event of a positive answer concerning the first issue:

'whether the above-mentioned exception to the rule of the limitation of prosecution (the rule of speciality) may be applied in relation to a Polish citizen in the light of the provisions laid down in Article 52(4) Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483, as amended) and in conjunction with the content of international law laid down in Article 3 Protocol No. 4 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1995, No. 36, item 175) and in Article 12(4) International Covenant on Civil and Political Rights (Journal of Laws of 1997, No. 38, item 167); in this regard, the Supreme Court's stance.'

Dealing with the issue, the Supreme Court rightly pointed out that in the judgement of the Appellate Court in Gdańsk on 31 May 2016,<sup>27</sup> as well as in the commentaries expressing the opinion that applying the exception to the rule of speciality in relation to the failure to leave the country by a Polish citizen was inadmissible, there was no detailed justification of the opinion, as opposed to the stance that allows for such a possibility.<sup>28</sup> Moreover, it is difficult to demonstrate a logical connection between the phenomenon of extraditing a country's own citizens or prohibiting their return to the country and the aforementioned exception to the rule of speciality. The premises of this exception, as already shown, are the physical freedom of the extradited person and the freedom to make a conscious (proper provision of information) decision to stay in the country with a relatively long time to consider it in accordance with the rule: *volenti non fit iniuria*. It should be emphasised that this is a specific exception to the exception provided by the rule of speciality in relation to the State's exercise of jurisdiction over persons staying in its territory. In fact, it expresses nothing other than the rule of territoriality, which obviously cannot be perceived as unconstitutional in the light of the applicable standard laid down in Article 52(4) of the Constitution. Therefore, the adopted solution does not infringe national or international standards of human rights protection; thus, the Supreme Court's stance on the issue also deserves approval.

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<sup>27</sup> II Akzw 921/16, LEX, No. 2087808, KSAG 2016/3/208-213.

<sup>28</sup> See e.g. Mozgawa-Saj, M., *Ekstradycja...*, op. cit., pp. 107–109.



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