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ACCESS TO DETAINEES' FILES IN THE LIGHT OF DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2012 ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS AND UNDER POLISH LAW

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1.

The Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[1] (hereinafter referred to as the Directive) is an element of the European Union activities aimed at the maintenance and development of an area of freedom, security and justice, including the implementation of the principle of mutual recognition of judgements in criminal matters, which assumes that the European Union Member States have trust in each other's criminal justice system. The scope of this principle, including mutual recognition of decisions in criminal matters, is dependent inter alia on mechanisms of safeguarding the rights of suspects, as well as the accused persons, in criminal proceedings. The necessity to maintain and strengthen mutual Member States' trust results, among others, from Article 47 and Article 48(2) of the Charter of the Fundamental Rights of the European Union[2] (the right to a fair trial and the rights of the defence) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental

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1 Official Journal of the European Union, L 142/1 of 1 June 2012.

2 Official Journal of the European Union, C 364/1 of 18 December 2000.

Freedoms of 4 November 1950[3] (hereinafter referred to as the ECHR) on the right to freedom and personal security as well as a fair trial.

The adoption of the Directive was preceded by the adoption of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[4] (hereinafter the Roadmap). The Roadmap called the European Union Member States to gradually adopt measures concerning the right to translation and interpretation (Measure A), the right to information on rights and information about the charges (Measure B), the right to legal advice and legal aid (Measure C), the right to communication with relatives, employers and consular authorities (Measure D), and special safeguards for suspected or accused persons who are vulnerable (Measure E).

The Directive refers to Measure B of the Roadmap. In order to strengthen the Member States' mutual trust, it establishes minimum common rules applicable to the rights of suspected and accused persons in criminal matters to information on their rights and information about the charges. The Directive is based on the rights laid down in the Charter of Fundamental Rights of the European Union, especially Articles 6, 47 and 48, and Articles 5 and 6 ECHR, which should be understood in accordance with the interpretation of the European Court of Human Rights (hereinafter referred to as the ECtHR). The Directive is applicable to suspected and accused persons, regardless of their legal status, citizenship or nationality, and the concept of "being charged" should be understood in the way it is used in Article 6(1) ECHR and the ECtHR judgements. The Directive is applicable from the moment persons are informed they are suspected or accused of committing crime by competent bodies of the Member State till the end of the proceedings understood as the final judgement on whether a suspected or accused person has committed crime, including, where appropriate, the issue of a sentence and judgements in connection with all possible appeal measures.

The discussed Directive is composed of two parts. The first contains the provisions constituting the right to information in criminal proceedings. The second consists of Annexes providing indicative model Letters of Rights. The first part of the Directive regulates the following rights: Article 3 – the right to information about rights, Article 4 – the Letter of Rights on arrest, Article 5 – the Letter of Rights in European Arrest Warrant proceedings, Article 6 – the right to information about the accusation, Article 7 – the right to access to the materials of the case. Further comments refer to the issues that are subject to Article 7 of the Directive. In accordance with this provision, where a person is arrested and detained at any stage of the criminal proceedings, it shall be ensured that documents related to the specific case in the possession of the competent authorities, which are essential to effectively challenge the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. Documents as well as photographs, audio and video recordings that are essential to effectively challenge the lawfulness of the arrest or detention are to be made available to arrested persons or to their lawyers at the latest upon submission of the merits of the accusation to the judgement of

[3] As amended, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[4] Official Journal of the European Union, C 295 of 4 December 2009.

a court in accordance with Article 5(4) ECHR in due time to allow the effective exercise of the right to effectively challenge the lawfulness of the arrest or detention.

Suspected or accused persons or their lawyers are granted access at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons in order to safeguard the fairness of the proceedings and to prepare the defence. Access to the materials is granted in due time to allow the effective exercise of the right of the defence, and at the latest upon submission of the merits of the accusation to the judgement of a court (an indictment or its substitute and an arrest motion). Where further material evidence comes into the possession of the competent authorities, access is granted to it in due time to allow for it to be considered by the accused and his lawyer.

By way of derogation, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. A decision to refuse access to certain materials is taken by a judicial authority or is at least subject to judicial review. Every decision is weighed in the light of the right of the defence of the accused (a suspect) taking into consideration various stages of the criminal proceedings. Limitation of this access is interpreted strictly in accordance with the right to a fair trial laid down in Article 6 ECHR and ECtHR judgements. Moreover, the accused (a suspect) and their lawyers have the right to challenge the refusal to provide information or give access to some materials of the case.

In accordance with Article 7 of the Directive, the reason for refusal to grant access to some material (evidence) in the preparatory proceedings is "serious threat" to the life or the fundamental rights of another person or if such refusal is "strictly necessary" to safeguard an important public interest. Access to the material may be refused in "extraordinary situations" where circumstances indicate serious threat to the above-mentioned legal interests and there is a strict necessity to protect an important public interest. A court shall make a decision to refuse access to the material related to the arrest or detention, and – in case it takes place – the accused and his lawyers at least have the right to appeal to a court against the decision. The condition for the appeal to a court against such decision is awareness of the refusal of access to some material, which requires that the accused and/or his judge be notified about the fact.

2.

In Polish criminal proceedings, access to material in the course of preparatory proceedings related to detention is regulated in Article 156 §5a Criminal Procedure Code[5] (hereinafter CPC). Until 28 August 2009, it had been provided for in Article 156 §5

[5] *Kodeks postępowania karnego*, Act of 6 June 1997, Journal of Laws [Dz.U.] of 1997, No. 89, item 555, as amended.

CPC. It is indicated in the Polish legal literature that in accordance with the ECtHR standards, in the light of Article 5(4) ECHR, the review proceedings concerning rightfulness and lawfulness of detention shall safeguard the fundamental principles of a fair trial, including the requirement for being judicial and contradictory in character, and shall respect the principle of equality of arms. Thus, formal equality of the parties should be ensured by providing them with equal opportunity to participate in the detention-related proceedings and equal access to the files of the case where detention has been applied, in order to safeguard the right to effectively challenge the arguments for the use of detention. As a result, information that is essential for the assessment of rightfulness and lawfulness of detention must always be made available to the counsel for the defence.[6] Reviewing the detention decision, a court cannot be exempt from the assessment whether refusal of access to case files violates a detainee's fundamental right to review the lawfulness and rightfulness of deprivation of liberty.[7]

The Constitutional Tribunal in its judgement K 42/07[8] of 3 June 2008 on the conformity of Article 156 §5 CPC with the Constitution of the Republic of Poland stated that the scope of files that should be made available to a detainee and his counsel for the defence must be determined by the effectiveness of the right of defence. Thus, all the material of preparatory proceedings that substantiates a prosecutor's motion to apply or prolong the application of detention must be overt. In case a prosecutor files a motion to apply or prolong detention, "the accused (…) has the right to review the material of the preparatory proceedings (this part of files), which constitutes the substantiation of the prosecutor's motion". The Supreme Court expressed a similar position and stated that when filing a motion to apply or prolong detention, a prosecutor should safeguard the right of the accused or his counsel for the defence to get to know at least that part of the preparatory proceedings files that contains material constituting grounds for the motion, because this is the requirement of the right of defence.[9]

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[6] See M. Wąsek-Wiaderek, *Dostęp do akt sprawy oskarżonego tymczasowo aresztowanego i jego obrońcy w postępowaniu przygotowawczym – standard europejski a prawo polskie* [Access of the remanded and accused and his counsel for the defence to the files in preparatory proceedings – European standard versus Polish law], Palestra Vol. 3–4, 2003, pp. 56–59; S. Steinborn, *Dostęp obrony do akt postępowania przygotowawczego w związku z procedurą habeas corpus – standard strasburski i jego realizacja w polskim procesie karnym* [Access of the counsel for the defence to files in preparatory proceedings due to *habeas corpus* principle – Strasbourg standard and its implementation in the Polish criminal procedure], [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (ed.), *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [Criminal justice issues. Professor Jan Skupiński jubilee book], Wolters Kluwer, Warsaw 2013, pp. 528–537; J. Skorupka, *W kwestii dostępu tymczasowo aresztowanego do wniosku w przedmiocie tymczasowego aresztowania oraz do akt sprawy w postępowaniu przygotowawczym na marginesie orzeczeń sądów powszechnych* [On the issue of access of the remanded to the motion for pre-trial detention and to case files in preparatory proceedings in the light of common court rulings], Palestra No. 7–8, 2008, p. 39.

[7] See the decision of the Appellate Court in Wrocław of 23 August 2007, II AKz 412/07, LEX No. 301497.

[8] OTK-A 2008, No. 5, item 77; Journal of Laws No. 100, item 648.

[9] See the decision of the Supreme Court of 11 March 2008, WZ 9/08, OSNKW 2008, No. 7, item 55 with a gloss of approval by W. Grzeszczyk, Prokuratura i Prawo No. 1, 2009.

As a result of the Constitutional Tribunal judgement K 42/07, the Act of 16 July 2009 amended Article 156 CPC adding §5a to it, because the provision had been unequivocally criticised from the very beginning due to the mode of determining conditions for refusal to make preparatory proceedings files available that infringed the standard laid down in the Constitution of the Republic of Poland, ECHR and ECtHR judgements.[10]

The Act of 27 September 2013 amended the provision of Article 156 §5a CPC. After the change, it laid down the principle that in case, in the course of preparatory proceedings, a prosecutor files a motion to apply or prolong detention, the accused and his counsel for the defence are immediately granted access to case files concerning the contents of evidence indicated in the motion. However, the possibility of exercising real (effective) defence in the detention proceedings depends, inter alia, on possessing the information about evidence indicating that the accused has committed crime he is charged with as well as circumstances indicating a threat of his obstructing the proceedings. The resource of this information limits the exercise of defence at the stage of the detention proceedings. Thus, access to preparatory proceedings files is essential for the accused and his counsel for the defence.

The provision of Article 156 §5a CPC referred not only to evidence in the case files but also to evidence stored on carriers attached to the files (e.g. a hard disc, CD-ROM, DVD) if they are listed in the prosecutor's motion. On the other hand, it is indicated in the legal literature that if there are a few separate means of evidence originating from the same evidence source (e.g. a witness has been interviewed several times in the course of a preparatory proceedings in connection with different circumstances), there is no obligation under Article 156 §5a CPC to make access available to all these means, and in case of a very extensive and multi-threaded witness's testimony, it is admissible to make access available only to some fragments of the testimony, provided they refer to different circumstances and a prosecutor uses the evidence in this scope as grounds for a motion to apply or prolong detention. Such selection of evidence is admissible, provided that its aim is to safeguard the appropriate course of the proceedings and not to obstruct the defence of the accused.

The provision of Article 156 §5a CPC was connected with the provision of Article 249a CPC added by the Act of 27 September 2013, in accordance with which only the establishment of facts based on overt evidence may constitute grounds for ruling on applying or prolonging detention. Having informed a prosecutor about it, a court was obliged to reveal circumstances not revealed by the prosecutor and

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[10] See, P. Hofmański, *Dostęp do akt postępowania przygotowawczego. Uwagi na tle nowelizacji art. 156 k.p.k.*, [Access to preparatory proceedings files. Comments in the light of Article 156 CPC amendment], [in:] V. Konarska-Wrzosek, J. Lachowski, J. Wójcikiewicz (ed.), *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi* [Key issues of criminal law, criminology and criminal policy. Professor Andrzej Marek jubilee book], Wolters Kluwer, Warsaw 2010, pp. 576–577; A. Tęcza-Paciorek, K. Wróblewski, *Dostęp podejrzanego do akt postępowania w przedmiocie tymczasowego aresztowania* [Access of the suspect to the proceedings files concerning pre-trial detention], Prokurature i Prawo No. 5, 2010, pp. 75–76.

take them into consideration in session if they were advantageous for the accused. Thus, Article 249a CPC laid down that a court could not rule detention based on circumstances constituting evidence included in the files that were not revealed to the accused and his counsel for the defence. Covert evidence included in the files submitted to a court did not constitute grounds for establishing general and specific reasons for detention. The provision of Article 249a CPC laid down formerly unknown evidence-related grounds for the detention decision.

The Act of 11 March 2016 amended both regulations. In accordance with Article 249a CPC, the grounds for ruling on the applying or prolonging detention may be findings established based on: (1) evidence revealed to the accused and his counsel for the defence, and (2) evidence originating from witnesses' testimonies laid down in Article 250 §2b CPC. In accordance with Article 250 §2b added by the Act of 11 March 2016, where there is a reasonable threat to the witness's or his relation's life, health or freedom, a prosecutor attaches evidence from the witness's testimony to the motion to apply or prolong detention. According to the quoted provision, the evidence indicated in it is not presented in the detention motion but is attached to this motion. The above-mentioned evidence is attached to the motion in a separate set of documents. On the other hand, the amended Article 156 §5a lays down an obligation to make available to the accused and his counsel for the defence the part of files containing evidence indicated in the detention motion, with the exception of evidence originating from witnesses' testimonies referred to in Article 250 §2b CPC.

In accordance with the new Article 249a §1 CPC, a detention court may use circumstances arising from evidence included in the files that have not been revealed to the accused (a suspect) and his counsel for the defence as real grounds for the detention decision. Thus, the evidence not revealed to the above-mentioned parties will constitute grounds for the findings concerning general and special reasons for detention. Evidence from witnesses' testimonies referred to in Article 250 §2b CPC may constitute grounds for the detention decision in spite of the fact that they have not been revealed to the accused and his counsel for the defence.

Article 249a §2 CPC obliges a court *ex officio* to also take into consideration circumstances a prosecutor has not revealed to the accused and his counsel for the defence, but only these that are advantageous to the accused. In such a case, having informed the prosecutor about that, the court reveals the circumstances in session, which allows the accused to defend and the prosecutor to take a position on the circumstances. Thus, the above-mentioned solution requires that the court takes cognisance not only of the prosecutor's motion but also case files submitted to the court together with the motion and the set of documents referred to in Article 250 §2b CPC. The counsel for the defence, on the other hand, may draw the court's attention to evidence in the case files that is advantageous to the suspect and has been ignored by the prosecutor.

If a witness's testimonies that a prosecutor has not revealed to the accused and his counsel for the defence based on Article 156 §5a CPC in connection with Article 250 §2b CPC results in circumstances advantageous to the accused, the court is obliged to reveal them in session and, having informed the prosecutor, consider them *ex officio*.

3.

Due to the obligation to interpret the provisions of the Directive 2012/13/EU in the way conforming to the judgements of the Court in Strasbourg, it must be reminded that the ECtHR in its judgement of 25 June 2002, in the case *Migoń v. Poland*,[11] referring to the principle of equality of arms between the parties, i.e. a prosecutor and a detained person, emphasised that in fact, "a certain degree of access to the case-file to such an extent as to afford the detainee an opportunity of effectively challenging evidence on which his detention was based may in certain instances be envisaged in proceedings concerning review of the lawfulness of detention on remand. (...) It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 §4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure. (...) Whatever method is chosen should ensure that the detained person will be aware that observations have been filed and will have a real opportunity to comment thereon".[12] Referring to the issue of granting access to preparatory proceedings files, the Court stated in the cited judgement that the need for criminal investigation to be conducted effectively may imply that part of the information collected during it is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. "However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer".[13] The ECtHR expressed an identical position in its judgement 34091/96 of 28 January 2003 in the case of *M.B. v. Poland*[14].

In another judgement, the European Court of Human Rights in Strasbourg states that the entitlement to be granted access to all evidence is not an absolute law. In each proceedings there may be competing (with the above-mentioned rights) interests such as national security, the necessity to protect witnesses against a risk of revenge or to keep police methods of investigation secret. These interests must be juxtaposed with the rights of the accused. Therefore, in some cases, it may be essential to refuse to grant the defence assess to some part of the evidence in order to protect fundamental rights of another person or important public interest. However, only such measures limiting the right of defence are admissible which are absolutely necessary.[15]

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[11] The ECtHR judgement of 25 June 2002, 24244/94, Case *Migoń v. Poland*, Lex No. 53649; see also B. Gronowska, *Wyrok Europejskiego Trybunału Praw Człowieka w Strasburgu z dnia 25 czerwca 2002 r. w sprawie Migoń przeciwko Polsce (dot. gwarancji procesowych dla osoby tymczasowo aresztowanej)* [Judgement of the European Court of Human Rights in Strasbourg of 25 June 2002 in case *Migoń v. Poland* (concerning procedural guarantees for the detained on remand)], Prokuratura i Prawo No. 12, 2002, p. 143.

[12] The ECtHR judgement of 25 June 2002, 24244/94, *Migoń v. Poland*, para. 79.

[13] *Ibid*., para. 80.

[14] Lex No. 74761.

[15] See the ECtHR judgement of 1 February 2000, 27052/95, Case *Jasper v. the United Kingdom*, Lex No. 76902; and the ECtHR judgement of 16 February 2000, 28901/95, Case *Rowe & Davis v. the United Kingdom*, Lex No. 76903.

The above-discussed judgements provide grounds for claiming that the ECtHR does not require that the detained on remand should be granted access to all materials of preparatory proceedings. However, the accused and his counsel for the defence should be granted access to files to the extent necessary to effectively challenge the rightfulness and lawfulness of detention.[16] The position is justified in the ECtHR judgement in the case of *Lamy v. Belgium*[17], which stipulates that ensuring the possibility of effective challenging statements or opinions, which the prosecution bases on documents included in the case files, may in some cases require that the defence should be granted access to those documents.[18] In the case of *Lamy v. Belgium*, the applicant and his lawyer did not have any access to the preparatory proceedings files for 30 days after the applicant had been detained. This way, the suspect and his lawyer were deprived of a possibility of effective challenging of the prosecutor's statements based on the material contained in the case files and the lawfulness of detention before court. The Court assessed that access to the case files was essential for the applicant when the court was taking the decision whether to prolong the detention or release the accused.

On the other hand, in the case of *Garcia Alva v. Germany*,[19] *Lietzow v. Germany*,[20] and *Schöps v. Germany*,[21] the ECtHR assumed that the proceedings in which a counsel for the defence of the accused has no access to the documents in the case files that are essential to effectively challenge the lawfulness of detention of the accused do not ensure the principle of equality of arms.[22] In the case of *Garcia Alva v. Germany*, the Court in Strasbourg drew attention to the fact that the most important thing for the court taking the decision to prolong detention was the testimony of a witness who had been convicted before and who was subject to successive proceedings concerning smuggling drugs. However, the counsel for the defence was deprived of the possibility of taking cognisance of those testimonies and challenging adequately their reliability, which was judged to be unfair proceedings and a violation of the principle of equality of arms. The ECtHR expressed the same position in the case of *Mooren v. Germany*,[23] where it indicated again that information that is essential for the assessment of lawfulness and rightfulness of detention on remand should be made available to the suspect's lawyer. In the case of *Piechowicz v. Poland*,[24] the Court in Strasbourg reiterated that any restrictions on the right of the detainee

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[16] Compare: M. Wąsek-Wiaderek, *Zasada równości stron w polskim procesie karnym w perspektywie porównawczej* [Principle of equality of the parties in the Polish criminal procedure from a comparative perspective], Zakamycze, Kraków 2003, p. 199.

[17] The ECtHR judgement of 30 March 1989, 10444/83, http://www.worldlii.org/eu/cases/ECHR/1989/5.html.

[18] Similarly, the ECtHR judgement of 22 June 2004, 29687/96, Case *Wesołowski v. Poland*, Biuletyn Biura Informacji Rady Europy 2004/3/117.

[19] The ECtHR judgement of 13 February 2001, 23541/94.

[20] The ECtHR judgement of 13 February 2001, 24479/94.

[21] The ECtHR judgement of 13 February 2001, 25116/94.

[22] See M. Wąsek-Wiaderek, *Zasada…* [Principle…], p. 200.

[23] See §121, 124 and 125 of the ECtHR judgement (Great Chamber) of 9 July 2009, 11364/03, Case *Mooren v. Germany*.

[24] See §203 and 204 of the ECtHR judgement of 17 April 2012, 20071/07, Case *Piechowicz v. Poland*.

or his counsel to have access to documents of the case files which form the basis of the prosecution case against him must be "strictly necessary" in the light of a countervailing public interest.

Thus, the ECtHR does not deny the necessity of keeping some information and evidence collected during the preparatory proceedings secret and unavailable to the counsel. It notes that the need to conduct effective preparatory proceedings may require that some information collected during it should be made secret in order to preclude the suspect from manipulating evidence and undermining the course of court proceedings. However, the ECtHR consistently emphasises that the aim of protecting the interest of the proceedings cannot be achieved at the expense of significant restriction of the right of defence. For this reason, information that is essential for the assessment of rightfulness and lawfulness of detention on remand should be adequately made available to the suspect's lawyer. It is inadmissible to absolutely deprive the defence of access to the material justifying detention on remand. Where full access to files is not possible, the resulting difficulties should be compensated in the way ensuring that the suspect has an opportunity to challenge charges against him.[25]

The German Federal Constitutional Court followed this stand. Namely, it stated that limitation of the procedural guarantee to have access to files makes bodies conducting preparatory proceedings privileged, because the proceedings are temporarily secret. At the same time, if the body conducting the proceedings takes a decision to refuse access to files, it should refrain from using measures that substantially interfere in the fundamental rights such as arrest (German: *Arrest*) or detention on remand (German: *Untersuchungshaft*).[26] The judgements delivered against the Member States of the Council of Europe indicate that for the assurance of the conformity with the principle of equality of arms in the detention proceedings, it is not sufficient that an adjudicating court knows the evidence relevant to the imposition or maintenance of this measure. Full compliance with the principle, thus providing a suspect and his counsel with the knowledge of this evidence is required.[27]

4.

The discussed provisions of Polish law indicate that in case an application for imposition or prolongation of detention is filed in the course of the preparatory proceedings, a suspect and his lawyer are not granted access to all evidence constituting grounds for ruling detention. The suspect and his lawyer are not granted access to evidence from a witness's testimony if there is a justified threat that this would jeopardise the life, health or freedom of the witness or his close relations. In such a case, the prosecutor does not list the evidence in his application for the imposition of detention on remand but attaches it to the application in a separate set of docu-

[25] See S. Steinborn, *Dostęp*... [Access...], p. 536.

[26] See the judgement of 19 January 2006, file No. 2 BvR 1075/05; similarly in the judgement of 11 July 1994, file No. 2 BvR 777/94.

[27] Compare: §33 of the ECtHR judgement of 26 November 2013, 21249/05, Case *Emilian-George Igna v. Romania*.

ments. The prosecutor does not inform a suspect and his counsel for the defence about the fact that there is other evidence than that listed in the application submitted to court. Thus, the suspect and his counsel for the defence take cognisance of such evidence and its submission to court only if the evidence is advantageous to the accused (which practically does not take place), because the court is obliged *ex officio* to take the circumstances into consideration having informed the prosecutor about that.

The only reason for "making this evidence secret" is a justified threat that it would jeopardise the life, health or freedom of a witness or his close relation.

The circumstance that the evidence mentioned is not listed in an application for the imposition of detention on remand but is attached to this application may challenge the standpoint of the Constitutional Tribunal expressed in its judgement K 42/07 of 3 June 2008 that in case a prosecutor applies for the imposition or prolongation of detention, the accused has the right of access to this material (evidence) of the preparatory proceedings that constitutes the justification for the prosecutor's application. However, the Constitutional Tribunal's position cannot be interpreted as referring only to the material (evidence) provided by a prosecutor in his application for the imposition or prolongation of detention, thus it does not concern the material attached to the application in accordance with Article 250 §2b CPC. The intention and essence of the Constitutional Tribunal's standpoint is to emphasise that a suspect and his counsel can be granted access to the material (evidence) that constitutes grounds for a decision to impose or prolong detention, regardless of the fact whether it is listed in the application or only attached to it.

The ECtHR expresses the same stand. The material (evidence) that is essential for the imposition or maintenance of detention on remand and the assessment of lawfulness of this measure should be adequately made available to a suspect and his defence counsel. It should be reiterated that the Court in Strasbourg does not rule on revealing all the material justifying detention to the accused and his counsel and acknowledges a possibility that the defence cannot be granted access to some material. However, it treats restriction on access to evidence essential for justifying the suspicion of committing crime, and thus relevant for the imposition of detention, as inadmissible.

In accordance with the Directive 2012/13/EU, granting a suspect and his defence counsel access to evidence that is essential to effectively challenging lawfulness of detention is a rule. Nevertheless, the Directive envisages a possibility of refusing access to some evidence under the following conditions. Firstly, the refusal to grant access to a part of the investigation material should be treated as an exception to the principle of open access to this material, which requires that this condition is strictly interpreted as "serious threat to the life or fundamental rights of another person" and "an absolute necessity to protect important public interests". Secondly, the refusal to grant access to a part of evidence cannot infringe "the right to a fair trial" understood in accordance with Article 6 ECHR and the ECtHR judgements. Thirdly, the refusal to grant access to some investigation material should be subject to a court decision or judicial review. Fourthly, a suspect and his counsel for the defence must be informed about some evidence secrecy.

Assessing Polish procedural regulations concerning access to "detention files" in the light of the Directive 2012/13/EU, it must be stated that they do not meet the requirements laid down in this Directive. Polish legal regulations envisage the possibility of basing a court's decision on the imposition or prolongation of detention on remand on evidence that is essential for this decision but has not been revealed to a suspect and his counsel. As a result of this regulation, a suspect and his counsel are deprived of a possibility of challenging evidence relevant to a detention ruling that a prosecutor has submitted to court. This deprives the court proceedings of equality of arms and thus is unfair.

Moreover, a suspect and his defence counsel are not notified of the secrecy of some evidence, and thus deprived of the possibility of appealing to court against a prosecutor's decision.

The regulation allowing a refusal to grant a suspect and his counsel access to a witness's testimonies, where there is a justified threat that this would jeopardise the life, health or freedom of the witness or his close relation, does not contain conditions (restrictions) such as "extraordinary situation" or "non-violation of the right to a fair trial" and "serious threat" to a given legal interest.

It is also necessary to note that Polish regulations do not refer to the issue of access to material of the preparatory proceedings in case of arrest of a suspect or the accused and their appeal against arrest and detention under Article 247 §1 CPC (Article 247 §6 in connection with Article 246 CPC), as well as an appeal of the accused against the decision on the application for quashing or changing detention on remand (Article 254 §2 CPC). However, the Directive as well as Article 5(4) ECHR and a standard based on this provision developed in Strasbourg judgements refer not only to court review of detention but also review of arrest.

Non-conformity of the discussed provisions of Polish law with the Directive results in a possibility of referring to the provision of Article 91(3) of the Constitution of the Republic of Poland. In accordance with it, "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws". The cited provision refers, inter alia, to the EU directives. Although the legal regulations enacted by the European Union have not been directly called "sources of common law", the status awarded to these acts by the Constitution allows including them in the catalogue of such sources.[28]

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[28] Compare: the Constitutional Tribunal judgement of 1 December 1998, K 21/98, OTK 1998, No. 7, item 116.

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ACCESS TO DETAINEES' FILES IN THE LIGHT OF DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2012 ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS AND UNDER POLISH LAW

Summary

The author analyses whether the currently binding Polish regulations of the Code of Criminal Procedure concerning access to detainees' files comply with the provisions of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in the criminal proceedings. Assessing Polish regulations, the author concludes that they do not meet the requirements laid down in the Directive. The provisions of Polish law admit the possibility of making a decision on the imposition or prolongation of detention

on remand by a court based on evidence that is significant for taking this decision but has not been revealed to the accused and his counsel for the defence. As a result, a suspect and his lawyer are deprived of the possibility of challenging evidence submitted by the prosecutor. This makes the proceedings concerning detention on remand stripped of the equality of arms, and thus they are not fair.

Key words: criminal procedure, equality of arms, remand/pre-trial detention, access to preparatory proceedings files

DOSTĘP DO „AKT ARESZTOWYCH" W ŚWIETLE DYREKTYWY PARLAMENTU EUROPEJSKIEGO I RADY 2012/13/UE Z DNIA 22 MAJA 2012 R. W SPRAWIE PRAWA DO INFORMACJI W POSTĘPOWANIU KARNYM ORAZ PRAWA POLSKIEGO

Streszczenie

Autor analizuje zgodność obowiązujących przepisów polskiego Kodeksu postępowania karnego dotyczących dostępu do „akt aresztowych" z przepisami Dyrektywy Parlamentu Europejskiego i Rady 2012/13/UE z dnia 22 maja 2012 r. w sprawie prawa do informacji w postępowaniu karnym. Oceniając polskie regulacje proceduralne, autor stwierdza, że nie spełniają one warunków określonych w wymienionej Dyrektywie. Przepisy prawa polskiego dopuszczają możliwość oparcia decyzji sądu o zastosowaniu lub przedłużeniu tymczasowego aresztowania na dowodach mających istotne znaczenie dla podjęcia takiej decyzji, które nie zostały ujawnione podejrzanemu i jego obrońcy. Konsekwencją tego jest pozbawienie podejrzanego i jego obrońcy możliwości kwestionowania dowodów przedstawionych sądowi przez prokuratora. Powoduje to, że postępowanie sądowe w przedmiocie tymczasowego aresztowania pozbawione jest równości broni, a tym samym, jest nierzetelne.

Słowa kluczowe: proces karny, równość broni, tymczasowe aresztowanie, dostęp do akt postępowania przygotowawczego