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Extradition and Interpol notices

Dr Artur Pietryka
Łukasz Lasek

OCTOBER 2022

A GUIDE TO PROCEDURES

Introduction

Extradition is an instrument of international cooperation between countries in criminal cases. It allows one state to request the other state to turn over a person accused or convicted or a crime so the person can face criminal responsibility (by holding a criminal trial or enforcing an existing sentence or other sanctions).

The rules for mutually turning over wanted persons are mainly governed by international treaties—bilateral or multilateral.[1] When there is no treaty in place, extradition is not excluded, but may be carried out under the principle of reciprocity. Extradition between EU member states and affiliated countries (e.g. Norway or Iceland) is known as a European arrest warrant (EAW). The EAW is governed by acts of EU law.[2]

In this guide we discuss the procedure and rules for conducting extradition cases initiated in Poland based on requests submitted by countries outside the EU. We also explain the rights enjoyed by a person facing the risk of extradition.

The search for a fugitive

Before commencing extradition proceedings, the country seeking extradition must determine the whereabouts of the wanted person. Only then can they approach the proper state, assure that state that the person is still sought, and file an extradition request. If the authorities of the requesting state do not know the whereabouts of the wanted person, they can pursue an international search using various avenues. The most common of these is the International Criminal Police Organization, commonly known as "Interpol."

1 A list of agreements under which Poland is obligated to conduct extradition proceedings is enclosed with this guide.

2 In particular Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) and Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

Interpol—red notices and diffusions

"Red Notices" and "diffusions" are Interpol instruments used to search for fugitives for arrest or detention.[3] They authorise the police in each Interpol member state to detain the person sought, and detention may subsequently lead to the person's extradition. These instruments contain detailed data concerning the fugitive for identification purposes as well as information on the grounds for the search efforts (e.g. temporary arrest orders).

Red Notices are more formalised. They are issued by the General Secretariat of Interpol and are placed in the Interpol database at the request of a member state. They are visible to all member states. Some of them are also posted on the Interpol website.[4] Diffusions, in turn, are issued by the member state itself and distributed through Interpol channels to all member states or selected member states. Unlike notices, diffusions are not subject to systematic verification for compliance with the Interpol Constitution.

Neither of these instruments is absolutely binding. Every state has the right to decide whether to respect the request of the requesting state and detain the wanted person. Refusal to cooperate despite issuance of a diffusion or Red Notice does not invalidate these instruments, but is communicated to other states (in the form of an annex with information about release of the wanted person). Another state in whose territory the wanted person is found may cooperate with the requesting state and conduct an independent extradition proceeding. These instruments remain in force until the search is called off by the requesting state or the notice is vacated by Interpol.

Detention and extradition arrest

In extradition proceedings, as in standard criminal proceedings, preventive measures may be applied against the wanted person, primarily with the aim of enabling the future judicial proceedings to go forward.

The most common measure is a form of temporary or provisional arrest, also known as "extradition arrest," ordered by the regional court at the request of the regional prosecutor conducting the proceeding, to prevent the wanted person from absconding from Poland. Otherwise, if the person absconded, it

3 The main regulations for these two instruments are set forth in Chapter II of Interpol's Rules on the Processing of Data.

4 Red Notices are published and updated at https://www.interpol.int/How-we-work/Notices/View-Red-Notices

would lead to discontinuance of the proceeding,[5] or at least would prevent execution of an extradition order.[6] As in the case of a typical temporary arrest, the Polish regulations do not specify a maximum duration for applying this measure. However, this does not mean that extradition arrest can be prolonged without limitation.[7] But the grounds for applying extradition arrest are different from those for ordinary temporary arrest.

Maximum period of extradition arrest	Grounds for extradition arrest
Up to 7 days from detention	The requesting state has not yet filed an extradition request or arrest warrant, but has made an entry in the Interpol database or in the Schengen Information System, assuring that a legally final conviction or arrest warrant for the wanted person has been issued, and that an extradition request will be filed.
Total of up to 40 days from detention	The requesting state has transmitted a request for arrest of the wanted person, assuring that a legally final conviction or arrest warrant has been issued.
For successive periods no longer than 3 months, including after legally final completion of the judicial proceeding	The requesting state has filed an extradition request. The general and specific conditions for temporary arrest have been met (e.g. concerns over obstruction of justice or going into hiding).

In practice, the regional court will rule on an extradition arrest application based on the documents transmitted by the requesting state and the extradition request. The key ground for imposing extradition arrest is a finding that the case involves an extraditable offence and the documents transmitted make a *prima facie* showing of commission of the offence.[8]

The prosecutor filing the arrest application, as well as the regional court, both have a duty to objectively analyse the documents submitted by the requesting state. In particular, if there are any doubts whether the Red Notice or diffusion is still current, the prosecutor may not apply for extradition arrest. And if the documents submitted do not meet the recognised standards in this respect,

5 Przemyśl Regional Court order of 31 January 2020 (case no. II Kop 52/19).

6 Przemyśl Regional Court order of 18 June 2020 (case no. II Kop 14/20).

7 See *Komissarov v Czech Republic*, Application no. 20611/17 (judgment of 3 February 2022), in which the European Court of Human Rights found a violation of Art. 5 of the European Convention on Human Rights because the applicant was held for one-and-a-half years in detention pending extradition, and *Saadi v UK*, Application no. 13229/03 (judgment of 29 January 2008), holding that the length of detention cannot exceed a reasonable period.

8 Lublin Court of Appeal order of 24 February 1992 (case no. II Akr 32/92).

the courts may refuse to impose preventive measures. For example, the prosecutor may decline to seek arrest if arrest was ordered in the requesting state by a prosecutor rather than a judicial body.[9]

Moreover, extradition arrest is not mandatory. If sufficient to ensure proper conduct of the proceeding and extradition of the wanted person to a foreign country, the regional court may order preventive measures other than arrest (e.g. a bond, police supervision, or a ban on leaving the country combined with seizure of the person's passport).[10]

Extradition proceedings

Extradition proceedings comprise two stages:

- Judicial stage, in which the courts at two instances assess whether extradition is legally permissible
- Political stage, in which the Minister of Justice decides whether Poland agrees to extradition.

Judicial stage

Judicial extradition proceedings are held at two instances. They are initiated by filing of an extradition application by the prosecutor, who acts *de facto* as an agent of the requesting state and is in regular contact with its authorities.

At the first instance, the case is heard by the competent regional court. Venue depends on the place where the wanted person is detained. In practice, selection of the court may affect how fast the case goes, as some courts are more overburdened than others. The same applies to the experience of the judges hearing extradition cases. For purely geographical reasons, courts located near the EU's external borders or major airports handle more extradition cases than others, and thus have more experience conducting such cases.

After conducting the proceeding, the regional court rules on the legal permissibility of extradition of the wanted person. An interlocutory appeal may be filed within seven days with the court of appeal, which can set aside the

9 For example, a court in Poland refused extradition and temporary arrest because the arrest warrant was issued by a prosecutor (from Grodno, Belarus), rather than an independent judicial authority. Regional Court for Warsaw-Praga order of 25 February 2020 (case no. V Kop 55/19).

10 Katowice Court of Appeal order of 9 May 2014 (case no. II AKz 169/14).

regional court ruling, modify it (e.g. in the description and classification of the act that is the basis for the extradition), or uphold it.

An order of the court of appeal upholding the order of the regional court is legally final, and the wanted person has no right to file a cassation appeal with the Supreme Court of Poland. This extraordinary means of review can be sought only by the Prosecutor General or the Ombudsman, also applying to stay enforcement of the order of the court of appeal until the matter is heard by the Supreme Court.

Extradition request

An extradition request (to arrest and turn over the wanted person) is essential to initiate the judicial stage of the extradition. The role of the extradition request is comparable to an indictment filed by the prosecutor in ordinary criminal proceedings. Most often the extradition request is transmitted via diplomatic channels. The requesting state should also enclose documentation from the proceeding conducted against the wanted person.

Based on the request and the enclosed documents, the regional court may issue a decision on the legal permissibility of the extradition.[11] The request should in particular identify the offence that is the basis for extradition, determining the scope of the decision on permissibility of extradition, and make a *prima facie* showing of the existence of the alleged offence and commission of the offence by the wanted person.

If the information in the request raises doubts, the prosecutor or the court may demand that the information be supplemented by the authorities of the requesting state. If this is not done within one month, the regional court must set aside the provisional arrest of the wanted person. This measure must also be vacated, among other circumstances, if the extradition request is withdrawn by the requesting state.

The regulations do not specify exactly which documents must be enclosed with the extradition request. The requesting state will most often submit

11 See Białystok Court of Appeal order of 3 March 2020 (case no. II AKz 27/20), in which the court held that in supporting the extradition request, the prosecutor's office should have relied on the documents transmitted and the wording of the Interpol notice, not on the overall correspondence with the requesting state, which greatly expanded the scope of the acts for which the wanted person could be held responsible in the requesting state.

documents involving the presentation of charges, temporary arrest, a legally final conviction, or a statement that evidence confirming the allegations against the wanted person has been collected in the requesting state.[12] Rarely are source documents transmitted, e.g. the record of witness testimony, to substantiate the offence and the identity of the perpetrator. The Polish courts typically do not expect source documents to be filed, trusting that such evidence is in the possession of the authorities of the requesting state.[13] The courts also stress that they are not authorised to review, and thus to dispute the reliability of, findings made by the authorities of the requesting state.[14]

The submitted documents should be translated into Polish by the requesting state, but it does not have to be a sworn translation. The documents should be submitted in compliance with the agreements in place between the states (e.g. authenticated by the competent authorities of the requesting state). Further authentication, e.g. by consular representatives, is not required.[15]

Diplomatic assurances

An extradition request should also contain what are called "diplomatic assurances." These are undertakings by the requesting state that if the request for extradition is granted, the authorities of the requesting state will respect the rights and freedoms of the wanted person guaranteed *inter alia* by the European Convention on Extradition and the European Convention on Human Rights. This involves in particular assurances that:

- The extradition is not aimed at prosecution for political reasons or due to race, religion, nationality or political views
- The wanted person will be afforded a fair trial
- The wanted person will not be subjected to torture or to cruel or degrading treatment or punishment
- The wanted person will be tried under appropriate conditions

12 See Rzeszów Court of Appeal order of 1 June 2021 (case no. II AKz 69/21), where a sworn statement by a special agent on the existence of such evidence was found to be reliable.

13 See Elbląg Regional Court order of 15 October 2020 (case no. II Kop 59/20), stating that extradition proceedings are based on trust, and courts ruling on extradition have little ability to examine the soundness of the allegations against the wanted person.

14 See Lublin Court of Appeal order of 7 February 2020 (case no. II AKz 900/19), finding violence against the wanted person at penal institutions not to be a manifestation of a danger to his rights and freedoms. In the court's view, this was abusive behaviour on the part of individual corrections officers, not evidence of a structural problem in the requesting state.

15 Lublin Court of Appeal order of 26 August 2020 (case no. II AKz 603/20); Lublin Regional Court order of 8 July 2020 (case no. II Kop 301/19).

- The authorities of the country of which the wanted person is a citizen will have an opportunity to monitor compliance with the assurances.

The statements by the requesting state must not be limited to generalities, but should be capable of assessment. All authorities involved in the extradition proceeding in the requested state have a duty to verify the reliability of the assurances. In *Othman v UK*,[16] the European Court of Human Rights stressed the secondary importance of the diplomatic assurances, which should be understood to mean that in every examination of whether there is a real risk of exposure of the wanted person to ill-treatment, the overall situation of human rights protection in the requesting state should be considered, as well as the specific circumstances involving the wanted person.

The ECtHR also presented the criteria that should guide the courts when assessing the weight and effectiveness of diplomatic assurances. The court indicated that after assurances are presented, it should be examined whether in practice they will adequately protect the specific person against the risk of ill-treatment. And in assessing the practical operation of the assurances and their significance, it should first be determined whether the general human rights situation in the requesting state generally allows such assurances to be deemed reliable. The court took the view that some member states of the Council of Europe use assurances instrumentally, assuming in advance that following extradition of wanted persons, the guarantees will be duly realised.

Meanwhile, groups such as Human Rights Watch have spoken out on the fictitiousness and unreliability of the assurances from certain countries, arguing that there is an obvious danger in treating diplomatic assurances as guarantees against torture. In places where torture is widespread but governments deny its use, official assurances cannot be deemed reliable.

The ECtHR also requires assessment of the quality of the assurances, and second, whether the assurances can be relied upon, based on the following minimal criteria:

- Whether the terms of the assurances have been disclosed to the parties
- Whether the assurances are specific, or are general and vague
- Who has given the assurances, and whether that person can bind the receiving state
- If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them
- Whether the assurances concern treatment that is legal or illegal in the receiving state

16 *Othman v UK*, Application no. 8139/09 (judgment of 9 May 2012).

- Whether the assurances have been given by a state bound by the European Convention on Human Rights
- The length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances
- Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers
- Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible
- Whether the applicant has previously been ill-treated in the receiving state
- Whether the reliability of the assurances has been examined by the domestic courts of the sending state.

Despite these established standards, Polish courts usually do not examine the reliability of diplomatic assurances presented by requesting states.[17] Instead, they expect the wanted person and defence counsel to show grounds for the legal impermissibility of extradition and that the diplomatic assurances are unreliable.[18] The courts also point out that they have no tools for verifying the assurances, which should instead be verified by authorities other than the judiciary.[19]

This is not the correct approach. In particular, the courts are empowered to question the reliability of the diplomatic assurances based on all the circumstances of the case, including information presented in reports on the situation in the requesting state and the personal circumstances of the wanted person.[20] As the Wrocław Regional Court correctly held, "Assurance by the state requesting extradition of compliance with human rights, or assurance of the possibility of a defence, does not in itself eliminate the risk of exposure of the wanted person to ill-treatment—in particular if there is a discrepancy in the assessment of the effectiveness of the system for protection against

17 Rzeszów Court of Appeal order of 3 June 2020 (case no. II AKz 164/20).

18 Lublin Court of Appeal order of 1 April 2020 (case no. II AKz 207/20). But the courts often find that assertions by wanted persons themselves in this respect are insufficient; see Zamość Regional Court order of 20 February 2020 (case no. II Kop 98/19).

19 Rzeszów Court of Appeal order of 15 December 2020 (case no. II AKz 385/20).

20 See Warsaw Regional Court order of 8 January 2020 (case no. VIII Kop 305/19), in which assurances made by the Russian Federation were found to be "declarative and unpersuasive." See also Rzeszów Court of Appeal order of 10 February 2020 (case no. II AKz 34/20).

torture, the willingness to cooperate with international authorities, or the will to effectively prosecute persons guilty of ill-treatment. Such assurances do not in themselves constitute a sufficient guarantee of appropriate protection against the risk of ill-treatment. A duty arises to examine whether in their practical dimension, these assurances provide a sufficient guarantee that the person will be protected against the risk of impermissible treatment."[21]

Proceedings before the Polish Minister of Justice

Judicial extradition proceedings may end in a decision finding that the extradition is permissible or impermissible. The court's decision is advisory in nature, and is binding on the Minister of Justice only if the court finds the existence of absolute bars to extradition.

If an order finding the impermissibility of extradition does not become legally final, the Minister of Justice is informed accordingly. Otherwise, the court will transmit the legally final order along with the case file to the Minister of Justice, who may, but is not required to, take a decision to extradite (e.g. for political reasons). If the Minister of Justice takes a decision to extradite, the wanted person will be surrendered to the authorities of the requesting state. The court of first instance should then establish contact with the police and authorities of the requesting state in order to determine the conditions for surrender (e.g. delivery at the airport, or a convoy to the border). It should be stressed that the regulations do not specify a deadline for the Minister of Justice to take a decision, and in practice such proceedings can even last one or more years.

Bars to extradition

Bars to extradition are circumstances which the court must examine before making a finding of the permissibility of extradition of the wanted person. They are set forth in the Polish Criminal Procedure Code and in the international treaties to which Poland is a party, which apply directly. Bars to extradition are divided into relative and absolute bars. The existence of an absolute bar prevents extradition of the wanted person. The existence of a relative bar means that the requested state may reserve the right to refuse extradition.

21 Wrocław Regional Court order of 30 June 2020 (case no. III Kop 60/20).

Absolute bars

The court hearing an extradition request must examine whether there are absolute bars to extradition, and thus whether the extradition is permissible.

Citizenship

If the extradition request concerns a Polish citizen, as a rule extradition is impermissible. But this bar is irrelevant if the possibility of extraditing a Polish citizen arises under other regulations, e.g. an international treaty ratified by Poland[22] or an act executing a law established by an international organisation. This bar comes into play when the wanted person actually holds Polish citizenship, not when the person is merely eligible to apply for Polish citizenship (e.g. due to family ties or the origin of the person's ancestors). But denial of extradition due to citizenship does not mean a refusal to prosecute the person. International treaties provide that in such situation, upon application of the requesting state, the requested state shall consider initiating criminal proceedings against the wanted person.[23]

Asylum

A person who has received asylum in Poland enjoys a guarantee that he or she will not be extradited to the requesting state of which that person is a citizen. Mere initiation of the asylum procedure is not enough to raise this bar, but it is indicated that the Polish authorities should withhold a decision on extradition until the proceeding seeking international protection is completed.[24] Moreover, there is no barrier to extraditing a person with asylum to another country, so long as the extradition request does not involve activity in connection with which the person has obtained international protection.

Dual criminality

Dual criminality of the act is a major factor impacting decisions on the legal permissibility of extradition. This occurs when an identical type of offence is provided for in Polish law and in the law of the requesting state, or if an offence provided for in Polish law fulfils at least some elements of the offence covered by the extradition request. To determine whether the extradition offence meets the condition of dual criminality, the description of the offence indicated in the extradition request, in particular the elements of the

22 This possibility is provided for e.g. in the treaty with the United States.

23 Provided for e.g. in the treaty between Poland and Australia.

24 Rzeszów Court of Appeal order of 19 July 2022 (case no. II AKz 274/22).

offence, should be compared with provisions of Polish substantive law defining criminal acts and criminal sanctions. This examination is necessary at every stage of the extradition proceeding, as it may prove, for example, that the offence indicated in the diffusion or notice has been decriminalised in the requesting state.[25]

In practice, Polish courts have often issued decisions finding that extradition is legally impermissible based on this condition. This issue has arisen in cases involving export of goods of strategic importance, e.g. glass microspheres.[26] Extradition was also refused in cases where the alleged extraditable offence was failure by the wanted person to comply with civil obligations in the requesting state.[27]

Statute of limitations

The running of the limitations period may also result in a decision finding extradition to be legally impermissible. This applies to a time-bar on the punishability of the act (i.e. expiration of the period in which the act may be prosecuted) or of enforcement of the penalty. If the limitations period provided for in Polish law has expired, it will be irrelevant that the matter is not yet time-barred under the regulations of the requesting state. Then the court must find that there is a bar to extradition. Conversely, if the limitations period has expired in the requesting state, the authorities of the requested state should apply the regulations more advantageous for the wanted person, and refuse extradition.

Res judicata

Extradition is impermissible if a criminal proceeding with respect to the same act by the same person has been completed in Poland with legal finality. It is irrelevant in this respect whether the proceeding ended in a judgment or in discontinuance. However, discontinuance for formal reasons, e.g. due to the absence of an application to prosecute the person, or the existence of immunity in the case, will not be a bar to extradition.

25 A recent example of a case of this sort was the detention of persons wanted for a cheque-kiting scheme in the United Arab Emirates.

26 See Warsaw Court of Appeal orders of 15 September 2020 (case no. II AKz 1004/200) and 23 November 2020 (case no. II AKz 1224/20).

27 See Warsaw Regional Court order of 10 June 2020 (case no. VIII Kop 19/20), where failure to make up a shortfall in the payment for the sale of goods was found to be a criminal matter but not felonious.

Extradition contrary to Polish law

Extradition is not possible if it would conflict with Polish law. The assessment of whether this bar exists must include an analysis of the sources of binding law. In practice this means that the courts ruling on extradition are vested with the discretion to determine whether extradition to the requesting state is permissible or impermissible under applicable regulations, including international treaties to which Poland is a party.[28] The likelihood of failure to comply with the European Convention on Human Rights is particularly relevant in this respect. This is grounds for refusing extradition if determined on a persuasive showing of an actual risk that the given person would be treated in violation of such provisions.[29]

Political offences

Extradition is impermissible if the extradition request concerns prosecution for commission of a nonviolent offence on political grounds. An offence is committed on political grounds if the perpetrator's aim is to pursue a political battle, particularly the fight for authority, when the perpetrator's action was motivated by participation in a conflict over the aims, forms and means of activity by the state, or the act expresses a desire to fight with the political system or opposition to the actions of public authorities. This therefore involves an assessment of the intentions and aims accompanying the act alleged against the wanted person.[30]

Relative bars to extradition

Relative bars to extradition are subject to examination by the Minister of Justice when taking a decision on extradition. There is an open-ended catalogue of such grounds. In particular, the minister can take a decision on political grounds not expressly provided for in the regulations.

28 In the past the Supreme Court of Poland recognised that this condition would exist if in the event of extradition there was a likelihood that the wanted person would for example be subjected to torture, see Supreme Court order of 29 July 1997 (case no. II KKN 313/97).

29 B. Augustyniak in *Criminal Procedure Code, vol. 2: Updated commentary,* ed. D. Świecki (Lex 2022).

30 Rzeszów Court of Appeal order of 3 March 2021 (case no. II AKz 43/21).

Residence in Poland

In extradition proceedings, wanted persons often assert their ties to Poland, including holding permanent residence in Polish territory. The courts interpret this condition narrowly. They expect the person to demonstrate specific circumstances concerning their stay, e.g. tax or insurance documents confirming their registered residence, the existence of an employment relationship,[31] or family ties to Poland.[32]

Place of commission of the offence and the pendency of a case in Poland

If the extradition offence was committed in Poland, Polish law enforcement authorities should initiate and conduct proceedings themselves, which may result in refusal of extradition.

However, this should not be interpreted as a requirement that the offence be committed in the territory of the requesting state. It is sufficient if the authorities of the requesting state may prosecute the perpetrator under the relevant national regulations (e.g. when the injured parties are citizens of the requesting state or commercial entities operating in that country).[33]

Privately prosecuted offence

When determining the dual criminality of the act, the courts are required to examine in detail the description of the extradition offence and the possible legal classification of the act. If the act would be prosecutable in Poland pursuant to a private indictment (e.g. in the case of defamation or minor injury to health), the Minister of Justice may refuse to extradite the wanted person.

Offence punishable by up to one year in prison or milder penalty, or a milder sentence is actually ordered

A finding that under Polish law the act covered by the extradition request is punishable by one year in prison or a milder penalty, or the court in the requesting state has imposed a lesser sentence, can also be grounds for refusing extradition. The bilateral treaties to which Poland is a party may also address

31 Warsaw Court of Appeal order of 5 February 2020 (case no. II AKz 93/20).

32 Warsaw Regional Court order of 25 September 2020 (case no. VIII Kop 84/20).

33 Zamość Regional Court order of 12 May 2020 (case no. II Kop 88/19).

this issue differently, providing for stricter requirements with respect to the extent of penalties that can be imposed in the event of extradition.[34]

Military, fiscal or political offences

If the extradition offence is of a military nature (e.g. desertion or insubordination), rather than a common crime that happened to be committed by a soldier, the Minister of Justice may refuse extradition.

Similarly, extradition may be refused in the case of offences to the detriment of the fiscal interests of the requesting state. In practice, such situations often arise in proceedings initiated by the Belarusian authorities arguing for the need for extradition to face fiscal penal proceedings for acts to the detriment of the fiscal interests of Belarus. In such cases the Polish courts often find a lack of dual criminality, and thus hold that extradition is impermissible.[35]

With respect to the political "character" of the offence, this should be distinguished from the absolute bar in the case of an offence committed "for political reasons." This provides broad grounds for refusing extradition, also with respect to violent offences.

Lack of reciprocity in the requesting state

This bar is rarely encountered in practice, but could be applied in the event of the absence of a treaty between Poland and the requesting state, or in the case of interstate cooperation in criminal matters. And it should be anticipated that due to the Russian invasion of Ukraine, the Minister of Justice may exercise this bar in order to deny extradition.[36]

34 See Regional Court for Warsaw-Praga order of 10 December 2020 (case no. V Kop 40/20), in which extradition was refused because the act covered by the request was punishable by up to one year in prison under Polish law, while under the treaty with Belarus, extradition could involve acts punishable by a maximum exceeding one year in prison.

35 See Suwałki Regional Court order of 13 January 2020 (case no. II Kop 44/19).

36 A. Pietryka & Ł. Lasek, "Extradition should finally be treated seriously," *Dziennik Gazeta Prawna*, 22 March 2022.

Rights of the wanted person

The wanted person can exercise numerous procedural rights during the course of the extradition proceedings. In particular, the wanted person can examine the case file, submit explanations or statements, and move to admit evidence from documents or witness testimony. The wanted person in an extradition proceeding may also exercise the right to defence counsel (*adwokat* or attorney-at-law), whether appointed or of the person's own choosing. Due to the cross-border nature of extradition proceedings, the wanted person should have a realistic right to a defence. Thus this right should not be limited to the bare assistance of defence counsel, but should also include an adequate time to prepare a line of defence, and to use a translator in contacts with defence counsel.[37]

It should be remembered that the extradition proceeding does not reach the issue of criminal responsibility for the offences defined in the extradition request. The wanted person should present evidence only concerning the existence of grounds for legal impermissibility of extradition. The courts cannot consider evidence irrelevant for deciding the extradition request.[38] On the other hand, testimony of experts on facts related to legitimate concern over violation of rights and freedoms in the requesting state in the event of extradition will be particularly relevant. Such experts testify as witnesses, and their purpose is to present concrete, non-hypothetical circumstances involving the condition of the rule of law in the requesting state, problems prevailing in penal institutions, or deficiencies in the operation of the justice system.[39]

Strasbourg protection

When the order of the court of appeal recognising the legal permissibility of extradition becomes legally final, or the Minister of Justice issues a decision, the wanted person may file an application with the European Court of Human Rights in Strasbourg, within four months after issuance or service of the final ruling in the matter. This deadline is not extended by filing a request for a assation appeal with the Prosecutor General or the Ombudsman.

37 See Warsaw Court of Appeal order of 15 September 2020 (case no. II AKz 1004/20).

38 Przemyśl Regional Court order of 18 June 2020 (case no. II Kop 14/200); cf. Lublin Court of Appeal order of 7 February 2020 (case no. II AKz 900/19).

39 See Bielsko-Biała Regional Court order of 24 September 2019 (case no. III Kop 22/19).

In the application, the wanted person may allege violation of the European Convention on Human Rights involving the ban on torture or inhuman or degrading treatment (Art. 3), the right to liberty (Art. 5), or the right to respect for private and family life (Art. 8). However, an allegation of infringement of the right to a fair trial (Art. 6) will not be considered. The ECtHR consistently holds that an extradition proceeding is not a criminal proceeding, in the sense that its purpose is not to rule on the wanted person's criminal liability. Thus the court recognises that not all of the guarantees under Art. 6 (e.g. the presumption of innocence) apply in extradition proceedings.

Along with the application to the ECtHR, the wanted person may also apply for an interim measure, i.e. to stay enforcement of the extradition decision. In the application, the wanted person should demonstrate that an interim measure is essential due to the real possibility of violation of his rights and freedoms in the requesting state, and thus a real risk of serious, irreparable damage.[40] The wanted person must specify the basis for his concrete concerns, the nature of the risk, and the provisions of the convention allegedly infringed. It is not enough to cite a position taken in other documents or in the national proceedings. All the essential documents supporting the application must be enclosed, in particular the decisions issued by the national courts or other authorities and any other documents backing the allegations, and in the event of extradition, the date and time of enforcement of the decision, the applicant's address or the place of detention, and the official case number. The court should also be notified as soon as possible of any change in the date and time of extradition, address, etc.

The application for interim measures may be submitted by post or fax, but not by email. The ECtHR has established a separate fax number for filing applications for interim measures. If the application is submitted by fax (not post) before 4:00 pm on a business day, it will be considered the same day.

Extradition of eu citizens to third countries

Cases arise in which the Polish authorities receive a request to extradite a citizen of another EU member state. In that case, the Polish authorities must allow the authorities of the state of which the wanted person is a citizen to file a request to surrender the person pursuant to a European arrest warrant. In

40 See judgments of the European Court of Human Rights in *Mamatkulov and Askarov v Turkey*, Application nos. 46827/99 and 46951/99 (4 February 2005), and *Paladi v Moldova*, Application no. 39806/05 (10 May 2009).

particular, they should notify the other country of the extradition request, the legal and factual circumstances presented in the application, and changes in the situation of the wanted person, and should also set a date for submission of an EAW. The Polish authorities are not required to stay the proceeding. They may continue to pursue the extradition proceeding and ultimately execute the extradition if an EAW is not submitted within a reasonable time.[41]

Refusal of extradition—what next?

Issuance of a decision refusing extradition in Poland does not necessarily mean the problems of the wanted person are over. This ruling is binding only on Polish authorities. If the person leaves Polish territory, he or she can still be detained based on a notice or diffusion abroad, by the authorities of another country who feel bound to arrest the person and conduct another extradition case.

A person sought under a Red Notice or diffusion may apply to take it down from the Interpol database. This request may be filed with the judicial authorities of the state that issued the alert, or through the person's own country, to Interpol's Commission for the Control of Interpol's Files. In the request, the person may show that:

- The prosecution is politically, religiously or racially motivated
- Extradition will lead to an infringement of human rights
- The matter is not sufficiently serious (e.g. the threatened punishment is not severe)
- The offence indicated in the diffusion or Red Notice raises "controversial" issues of moral or cultural norms (e.g. adultery)
- The extradition offence arises from violation of administrative regulations or private disputes.

Pursuant to a request, the commission will examine whether there are grounds for retaining the notice or diffusion in the system, and communicate its findings to the interested party.

Moreover, any interested person may request the commission to determine whether at the given time the person is subject to an Interpol notice or diffusion. This is an important right, as not all notices and diffusions are published on the Interpol website.

41 *Generalstaatsanwaltschaft Berlin*, C-398/19 (Court of Justice, 19 December 2020).

Meanwhile, there is no institution at the level of the Council of Europe or the EU for mutual recognition of rulings refusing extradition which would function like a ban on retrial of the same matter. Member states have different regulations on the grounds for refusing extradition, which in practice can limit the free movement of wanted persons between member states. Defence lawyers affiliated with the European Criminal Bar Association have identified this problem and presented a recommendation for resolving it.[42]

The ECBA proposes to introduce a mechanism under which states would be bound by a decision refusing extradition previously taken in another country. This would apply to a refusal of extradition due to a finding that the prosecution is based on sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. A finding that extradition would be disproportionate should also be grounds for mutual recognition of refusal, as would a finding that extradition would infringe the rights and freedoms of the wanted person, or a risk of infringement of the right to a fair trial in the requesting state. Adoption of this form of mutual recognition would require changes in operation of the Schengen Information System to reflect decisions refusing extradition.

42 https://ecba.org/extdocserv/publ/ECBA_STATEMENT_Mutualrecognitionextradition-decisions_21June2022.pdf

APPENDIX

List of countries outside the EU with which Poland maintains cooperation in extradition[43]

	Multilateral treaties (European Convention on Extradition)	Bilateral treaties	Reciprocity
Europe	Albania, Andorra, Bosnia & Herzegovina, Croatia, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Russia, San Marino, Serbia, Switzerland, Turkey, Ukraine, United Kingdom (from 1 January 2021)	Belarus	
Asia	Armenia, Azerbaijan, Georgia, Israel, South Korea	India, Iraq, Mongolia, North Korea, Syria, Thailand, Uzbekistan, Vietnam	Indonesia, Jordan, Kyrgyzstan, Lebanon, Pakistan, Qatar, Saudi Arabia, Tajikistan, Turkmenistan, United Arab Emirates
Africa	South Africa	Algeria, Egypt, Libya, Morocco, Tunesia	
North America		CUBA, UNITED STATES	Dominica, Mexico, Panama
South America		Argentina	Brazil, Ecuador, Peru
Australia and Oceania		Australia	

43 Response to parliamentary inquiry https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=5951FABF (accessed 22 August 2022), and information obtained through access to public information.

Wardyński & Partners
Al. Ujazdowskie 10, 00-478 Warsaw
Tel.: +48 22 437 82 00, 22 537 82 00
Fax: +48 22 437 82 01, 22 537 82 01
E-mail: warsaw@wardynski.com.pl