



KOPEC & ZABOROWSKI

LAW FIRM

# Guideline

# Extradition

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## INTRODUCTION

**Extradition** is a procedure under which the authorities of one country (the requesting country) request the authorities of another country (the requested country) to extradite a person sought in order to hold him or her criminally responsible – i.e. to conduct criminal proceedings against such person or to enforce the imposed penalty or preventive measure.

**Extradition** has its legal basis in numerous international agreements, the most important of which is the European Convention on Extradition of 13 December 1957 (*Journal of Laws 1994, No. 70, item 307*) along with additional protocols.

In the Polish legal system, extradition is regulated by the Constitution of the Republic of Poland (*Article 55*), the Code of Criminal Procedure (*Articles 593–607*), the Regulations of Internal Operation of General Prosecution Authorities 47 (§ 295–301), as well as the Regulation on Detailed Activities of Courts in Matters in the Field of International Civil and Criminal Proceedings in International Relations 48 (§ 65–70), and the provisions of the Penal Code (*Article 5 and Article 111 of the Penal Code*).

Moreover, Poland is bound by bilateral extradition treaties, which regulate extradition proceedings between countries in a specific way, including with **Australia, Belarus, Egypt, Iraq, North Korea, Cuba, Libya, Morocco, Mongolia, USA, Syria, Thailand, Tunisia and Vietnam**.

The Community law provides for a special procedure for surrendering persons sought between Member States of the European Union and associated countries, the so-called European Arrest Warrant (**EAW**), discussed in a separate article. Extradition between countries outside the legal system of the European Union is carried out under bilateral or multilateral international treaties, as well as the so-called principles of reciprocity.

## DEFENSE IN EXTRADITION PROCEEDINGS

At every stage of proceedings, from search to proceedings after the extradition decision becomes final, the person sought has the right to defense, in particular the right to appoint a defense attorney or use a public defense counsel.

The right to defense of the person sought covers various procedural rights and guarantees, including the right of access to the case files and to provide and refuse to provide explanations. The person sought has also the right to use an interpreter, including in contacts with the defense counsel.

It should be noted, however, that the subject-matter of extradition proceedings is not the criminal liability of the person sought for the acts covered by the extradition request. The national court is not authorized to conduct proceedings regarding the guilt of the person sought – steps in this respect should be taken before the authorities of the requesting state.

**Defense in extradition proceedings** consists in demonstrating the existence of extradition obstacles, i.e. circumstances that prove the legal inadmissibility of surrendering the person sought in the light of national regulations and international, including European, standards – and this should also be the subject of evidence requests.

## GROUND FOR EXTRADITION – EXTRADITION OBSTACLES

**In extradition proceedings**, the court is obliged to examine all the grounds for extradition, i.e. circumstances that may affect the possibility of surrendering the person sought, specified in national regulations and international treaties. If an extradition treaty has been concluded between the states in question, the conditions specified in national regulations will apply only if the international treaty does not provide otherwise.

**Extradition grounds** may be absolute, which must exist or be absent for extradition to be possible, or relative, which enable the requested state to reserve the right to refuse extradition.

## ABSOLUTE GROUNDS FOR EXTRADITION

Polish national regulations set out absolute grounds for extradition in **Article 604 § 1 of the Code of Criminal Procedure**, according to which extradition of the person sought is inadmissible if:

- the person sought is a Polish citizen or enjoys the right of asylum in the Republic of Poland;
- the act in question does not contain any elements of a prohibited act or when the law determines that such an act is not a crime or that the perpetrator does not commit a crime or is not subject to punishment;
- the statute of limitations has expired;
- criminal proceedings relating to the same act committed by the same person have been finally concluded;
- it would be contrary to Polish law;
- there is a well-grounded fear that the death penalty may be imposed or enforced in the requesting state;
- there is a well-grounded fear that the freedoms and rights of the surrendered person may be violated in the requesting state;
- it concerns a person sought for committing a non-violent crime for political reasons.



## RELATIVE GROUNDS FOR EXTRADITION

Polish national regulations set out absolute grounds for extradition in **Article 604 § 1 of the Code of Criminal Procedure**, according to which extradition of the person sought is inadmissible if:

- the person sought has a permanent place of residence in the Republic of Poland;
- the offense was committed in the territory of the Republic of Poland or against a Polish ship or aircraft;
- criminal proceedings are pending for the same act committed by the same person;
- the offense is subject to private prosecution;
- under the law of the requesting state, the offense is punishable by imprisonment for up to one year or a less severe penalty, or such a penalty has been imposed;
- the offense for which extradition is requested is a crime of a military or fiscal nature, or of a political nature other than those specified in § 1 point 8;
- the requesting state does not ensure reciprocity.

## SEARCHING FOR A PERSON SOUGHT

**Extradition proceedings** may be initiated officially if the whereabouts of the person sought are known. Most often, searches are conducted via **the International Criminal Police Organization (INTERPOL)**.

Police officers of an Interpol member country have the right to arrest a person sought based on the following messages published in INTERPOL's internal system:

- **red notices** - formalized messages or warnings addressed to all national offices of Interpol member countries, published by Interpol's General Secretariat at the request of an INTERPOL member country;
- **red diffusions** - a request for international cooperation or an alert sent by a national Interpol office to one or more Interpol offices of other member countries (specific geographical area).

Some **red notices are published** on the publicly accessible **INTERPOL website**, but most of them can only be viewed by law enforcement agencies.

However, everyone has the right to request access to data about themselves contained in INTERPOL files through the Commission for the Control of INTERPOL's Files (**CCF**). Such a request is free of charge and confidential.

## DETENTION OF A PERSON SOUGHT AND ARREST BEFORE AN EXTRADITION REQUEST IS SUBMITTED

In the event of arrest of a person sought in Poland, **the Department of International Cooperation of the National Prosecutor's Office** and, in the case of foreigners, the appropriate diplomatic mission or consular office should be notified immediately. A person who is a citizen of two or more countries is treated as a citizen of the country whose travel document was used for entry into the territory of the Republic of Poland.

Before an extradition request is submitted, the court, at the request of an authority of a foreign country, may issue a decision to put the person sought under provisional arrest for a period not longer than 40 days. Such a request should reveal the intention to apply for extradition and specify the crime for which extradition will be requested, the place and time of the crime, as well as it should include all available data of the person sought and must also include an assurance that a final convicting judgment or a decision on provisional arrest has been issued against this person in this country.

After detaining the person sought based on the request of the party requesting provisional arrest for the purpose of extradition, the prosecutor will assess whether the person sought may be surrendered and whether there are grounds for provisional arrest under the law.

If it is found that such grounds exist, the prosecutor submits a request to the court to apply provisional arrest.

The regional court decides on provisional arrest in a session attended by the prosecutor. An appeal may be filed against the court's decision **within 7 days** of the day the court's decision was announced or its copy was delivered if the party was not present when the decision was announced.

If no extradition request is received within the time limit provided for by the relevant international treaty or national law, the person sought must be released immediately, but when the request is filed later on, provisional arrest may be re-imposed.

Neither international treaties nor Polish law permit the use of freedom-restricting preventive measures before an extradition request is filed.



## STAGES OF EXTRADITION PROCEEDINGS

Extradition proceedings are formally opened by the submission of an extradition request by the requesting state and consist of three stages.

- **proceedings before the prosecutor**, which always end with the submission of an extradition request to the court, regardless of the prosecutor's view on its admissibility and grounds;
- **two-instance court proceedings** which are to assess the admissibility of extradition, and not to make a “surrender or not surrender” decision;
- **proceedings before the Minister of Justice**, who makes the final decision concerning the requested surrender.



## EXTRADITION REQUEST

An **extradition request** is usually sent through diplomatic channels and should contain all information, documents and diplomatic assurances relevant to the assessment of extradition grounds specified in international treaties and national regulations.

In particular, an **extradition request** must specify the offenses it is based on, indicate the circumstances proving that they can trigger extradition, and furthermore substantiate the occurrence of the acts of which the person sought is accused and the fact that that person committed them.

The regulations do not specify what documents should be attached to the request. In practice, what is most often sent are documents regarding the presentation of charges, indictments, decisions regarding search or arrest, or statements by investigators regarding the collection of evidence proving that the person sought has committed prohibited acts.

Sending source evidence is rare, and failure to send it, in the event that the requesting state provides sufficient explanations and declarations, will not, in principle, constitute an obstacle to issue a decision on extradition, because, as indicated above, courts do not examine evidence to determine if the acts covered by **the extradition request** were committed and are not entitled to challenge the findings made by the authorities of the requesting state.

An extradition request must also include the necessary diplomatic assurances, i.e. declarations by the requesting state that in the event of extradition of the person sought the authorities of that state will respect the rights and freedoms specified, among other things, by **the European Convention on Extradition and the European Convention on Human Rights**. These declarations should be presented in a way that enables their assessment by the authorities of the requested state, which must verify the reliability of these assurances.

In practice, however, the failure to properly examine diplomatic assurances is a frequent error of Polish courts, which assume a certain presumption of truthfulness of the assurances, shifting the burden of proving that the assurances are fictitious onto the person sought and the defense. The active role of the defense counsel in the proceedings is even more important as he or she is able to demonstrate the unreliability of diplomatic assurances and the existence of circumstances proving the existence of legal obstacles to extradition by providing appropriate evidence, such as scientific publications, reports of non-governmental organizations or testimonies of experts.

## PROCEEDINGS BEFORE THE PROSECUTOR

If the authority of a foreign country submits an extradition request in order to conduct criminal proceedings against the person in question or to execute a sentence or a preventive measure imposed on that person, the prosecutor of the relevant regional prosecutor's office will interrogate this person and, if necessary, secure evidence available in the country (the prosecutor interrogates witnesses and performs other necessary procedures in accordance with national regulations).



Moreover, in accordance with the regulations governing the functioning of **the Public Prosecutor's Office**, the prosecutor's task is also to determine the citizenship of the person sought and if there are any doubts, the prosecutor should clarify them by contacting the competent authority.

If, before submitting an extradition request, no request for provisional arrest was submitted at the request of the foreign state, the prosecutor may, at this stage, apply to the court for provisional arrest whether or not it has been requested by the foreign state.

If, in the course of these activities, there is a need to obtain additional information from the authority requesting extradition, the prosecutor will submit the collected materials together with an appropriate request to **the National Prosecutor's Office**.

After completing these activities and regardless of their result, the prosecutor brings the case to the competent regional court along with a request for a decision if the extradition is legal admissible. The prosecutor has no legal possibility to take other actions and is not authorized to independently assess the admissibility of extradition. The prosecutor may only request that the court issue a decision containing a positive opinion or take a negative position on the possibility of extradition.

## COURT PROCEEDINGS

If a decision to issue provisional arrest warrant has not been made by the time the prosecutor submits the extradition request to the regional court, the regional court may issue it ex officio at the stage of court proceedings without a separate request of the prosecutor.



The regional court examines the request of the foreign state in a session which both prosecutor and defense counsel have the right to attend. While the regulations guarantee the participation of the defense counsel in the session, they do not give such right to the person sought. However, the court must allow the person sought to present explanations orally or in writing, which in practice usually means that the person sought will be brought to the court hearing. If the case is not completed in one session due to the need to carry out further activities, after receiving explanations from the person sought, the court is no longer obliged to bring this person back for another session and will do so only upon a well-grounded request.

At the justified request of the person sought or his or her defense counsel, the court should also examine evidence available in the country.

International treaties may also make it possible for the court to request additional information if it considers that the information provided to justify an extradition request does not meet the requirements (e.g. the treaty between Poland and the USA).

After considering the case, the regional court issues a decision whether the extradition of the person sought is legally admissible or not. This decision may be subject to a complaint, which must be submitted **within 7 days** from the announcement of the decision or its delivery if the party was not present when the decision was announced.

**The complaint is examined by the court of appeal.**

The court forwards the final decision together with the case files to **the Minister of Justice**, who decides whether the person sought is to be surrendered or not.

## PROCEEDINGS BEFORE THE MINISTER OF JUSTICE

If a decision is issued that extradition is inadmissible, i.e. the court has found that there are absolute obstacles to extradition, surrender cannot take place. **The Minister of Justice** must issue a decision to refuse the extradition of the person sought.

In turn, the court's decision that extradition is admissible is only an opinion and is not binding on **the Minister of Justice**. This means that **the Minister of Justice** may, but does not have to, decide to surrender the person sought, either by concluding that there are some relative obstacles to extradition or for political reasons.

If **the Minister of Justice** decides to surrender the person sought, it will be sent to the authorities of the country requesting extradition.

The terms of surrender are agreed with the authorities of the requesting country through the Court of First Instance.

## PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE POSSIBILITY TO SUSPEND A FINALLY ORDERED EXTRADITION

After the court's decision that extradition is legally admissible becomes final, the person sought may immediately use extraordinary measures, regardless of waiting for the decision of **the Minister of Justice** and any possible actions in this regard.

The person sought does not have the right to file a cassation appeal against the final extradition judgment but may file a request to the Prosecutor to submit such a cassation appeal. At the national level, the person sought may submit a request **to the Prosecutor General - the Minister of Justice or the Ombudsman**. However, submitting such a request does not suspend extradition.

The person sought may also apply for Strasbourg protection by submitting a complaint to **the European Court of Human Rights** within 4 months of the issuance or delivery of the decision. The complaint may be based on violations of the European Convention on Human Rights, in particular regarding the right to life (*Article 2*), the prohibition of torture, inhuman or degrading treatment (*Article 3*), the right to liberty and security (*Article 5*) and the right to a fair trial (*Article 6*) in situations where there is concern about a blatant denial of legal protection or the right to privacy or protection of family life (*Article 8*).



Such a complaint may be filed against both the decision of the appellate court and the decision of the Minister of Justice.

Crucially, based on violations of the provisions of the ECHR, it is possible to request **the Court for the so-called an interim order under which the national authorities must suspend extradition until the complaint is examined.** Such a request may be submitted before filing the complaint itself, immediately after the court's decision or the Minister's decision is issued. Moreover, it can be sent not only by post, but also via a dedicated website or to a special fax number, and the Court will examine applications immediately, even within one working day. Therefore, this procedure enables a real and effective stoppage of a legally imposed extradition.

## CONSEQUENCES OF A FINAL DECISION TO REFUSE TO SURRENDER THE PERSON SOUGHT

It should be noted that a final decision refusing to surrender the person sought is only valid in the country where it was issued and does not protect the person sought prosecuted in other countries. This also applies to **the Member States of the European Union: Community regulations do not provide for recognition of judgments refusing extradition in this respect.**

Consequently, a national refusal to extradite has no legally binding effect on the person's international status as the person sought and the obligation to detain such a person and subject him or her to extradition proceedings in the territory of another state. A refusal by the authorities of one country may only be of advisory nature and does not prevent the authorities of another country from making a different decision and surrendering the person sought to the requesting country.

The person sought may file a request with **the INTERPOL Data Control Commission** to remove the red notice or diffusion from **the INTERPOL** databases.

The possibility of taking actions to defend one's rights in the country requesting extradition, in particular through a defense counsel, is regulated by the national law of the requesting country.

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