Globalization, the State and the Individual, No 1 (13)/2017, s. 49–62

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Right of the detained person of the defence in the light of domestic and european standards

Право задержанного человека обороны в свете внутренних и европейских стандартов

Summary

The article is devoted to the subject of detainee's right to defend with the special emphasis of the right to contact the attorney. The precise establishing of the limits concerning the detainee's right to defend and indicating regulations that guarantee the legality of the detainment as well as its control seems to be the key factor in respecting detainee's rights that result from both national regulations and international standards. Due to that fact, the author starts from the analysis of the regulation found in the contents of Art. 42 (2) Polish Constitution, and continues through more elaborated provisions resulting from Art. 245 Polish Code of Criminal Procedure by analyzing its premises and the conditions of detainee's unrestricted contact with the lawyer and indicating the weightiness and significance of the premises found in these provisions in the context of the right to defend. These deliberations are complemented by the references to the stance of European Court of Human Rights which on the account of its judicial decisions provided standards that make the confidentiality of the consultations between the detainee and the attorney even more important.

Keywords: detained person, right to defend, contact with the lawyer

Аннотация

Статья посвящена вопросу права задержанного на защиту с особым акцентом на право контактировать с адвокатом. Точное установление ограничений в отношении права задержанного на защиту и указание правил, которые гарантируют законность задержания, а также его контроль, по-видимому, является ключевым фактором уважения прав задержанного, которые являются результатом как национальных положений, так и международных стандартов. В связи с этим автор исходит из анализа регулирования, содержащегося в содержании ст. (2) Польская Конституция, и продолжает более детально разработанные положения, вытекающие из ст. 245 польского Уголовно-процессуального кодекса, проанализировав его помещения и условия неограниченного контакта задержанного с адвокатом и указав весомость и значимость помещений, содержащихся в этих положениях, в контексте права на защиту. Эти обсуждения дополняются ссылками на позицию Европейского суда по правам человека, которая за счет своих судебных решений предоставляет стандарты, которые делают конфиденциальность консультаций между задержанным и адвокатом еще более важным.

Ключевые слова: задержанное лицо, право на защиту, контакт с адвокатом

1. Introduction

Trial detention, being a legally acceptable breach from the constitutionally guaranteed right of liberty, determined in contents of Art. 41 Polish Constitution, constitutes one of the most neuralgic trial institutions. Triggered by "short-term depriving the man of freedom by competent state agencies"[1] interference in the liberty of the subject, constitutionally provided for the individual, does not mean the lack of determined mechanisms by law pointing to the scope and character of this intervention. On the contrary, it forces the need for precise determining its limits as well as equipping the detained person with the number of rights guaranteeing the legality of apprehension and the control of its correctness, both in the light of constitutional and trial assumptions.

One of the key guaranteeing rights of the detained person is the right of the defence, which should be understood as broadly as possible, on the account of the fact that it is not only a fundamental rule of a criminal trial but also an elementary standard of the legal democratic state, finding its expression in constitutional provisions. Equipping the detained person with the right of the defence both in the constitutional as well as procedural presentation cannot raise any doubts, if we take into consideration that premises of the right of the defence are being updated at the moment of apprehension. It does not only justify the possibility of defending personal interest by the detained person (e.g. possibility of the refusal to testify, the right to inspect the fact files and submit the motion to present evidence), but also to use the help of the lawyer appointed by the defendant or ex officio[2].

Equipping the detained person with the right of the defence is even more justified if attention is paid to a difficult situation of the detained person who does not still have the status of suspected person, and who does not often have knowledge and experience letting him take care about his own rights and interests correctly[3]. In turn, it can cause that decisions made without consultation with the lawyer, can be leading the detained person to behaviours incompatible with his legally protected businesses.

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1 Constitutional Tribunal Judgement from 6 December 2004, SK 29/04, OTK ZU n. 11/A/2004, pos.. 114, pt V and Constitutional Tribunal Judgement from 5 February 2008, K 34/06, OTK ZU n. 1/A/2008, pos. 2, pt III.1.

2 Constitutional Tribunal Judgement from 17 February 2004, SK 39/02, OTK ZU n. 2/A/2004, pos.. 7, pt III 3.; and Judgements from : 6 December 2004, sygn. SK 29/04; 19 March 2007, K 47/05, OTK ZU n. 3/A/2007, pos. 27; 28 April 2009 P 22/07, OTK ZU n. 4/A/2009, pos. 55.

3 Polish Bar Council opinion from 07 May 2013 NRA-56/1/13, http://www.adwokatura.pl/admin/wgrane_pliki/adwokatura-tresc-7580.pdf.

2. Right of the defence of the detained person in the light of Art. 42 par. 2 Polish Constitution and the provisions of the Polish Code of Criminal Procedure

Art. 42 par. 2 Polish Constitution offers essential settling in this regard. It constitutes that everyone against whom criminal proceedings are being conducted, has the right of the defence at all stages of proceedings. Phrase used in this provision "at all stages of proceedings" means that the right of the defence should appear both at prejudical stages as well as before adjudicating bodies, that is courts of all instances.

What is essential from a point of view of the detained person, wording used the Art. 42 par. 2 Polish Constitution "at all stages of such proceedings" should be related to the stage of proceedings which precedes charging the detained person, that is the stage at which the justified presumption exists that person could commit a crime. Right of the defence which is talked about in the Art. of 42 par. 2 Polish Constitution refers to this phase of proceedings which precedes formal charging of a given person.

In connection with constitutional assumptions, the number of rights of the detained person can be found among the provisions of Polish Code of Criminal Procedure. They embrace both the right to obtain information about reasons for the apprehension and the rights asserted to the detained person, and additionally the right of listening to the detained person (Art. 244 § 2 Polish Code of Criminal Procedure), the right to contact the lawyer (Art. 245 § 1 Polish Code of Criminal Procedure), right to notify the closest person about the apprehension (Art. 245 § 2 Polish Code of Criminal Procedure) right to the complaint to the court (Art. 246 § 1 Polish Code of Criminal Procedure).

The scope of these rights finds fulfilment in the situation of justified suspicion of committing a crime by the detained person, not his formal charging, because indicated rights materialize upon starting by investigator bodies first activity aimed at prosecution of the determined person exactly in connection with the justified presumption that the person had committed a crime, or there is a possibility of escape or hiding of the person or covering up evidence of the crime or it is not possible to determine the identity of the person or there are premises to the conduct accelerated procedure. It results in the fact that at the very moment, the

person becomes an entity asserted to use the complete catalogue of rights within the broadly comprehended right of the defence[4].

3. The nature of the right of the detained person to the contact with a lawyer in the light of the regulation of Art. 245 of the Polish Code of Criminal Procedure

From a point of view of the right of the defence of the detained person, the biggest significance is attached to a right of the detained person to contact a lawyer stipulated in contents of Art. 245 Polish Code of Criminal Procedure. It is realization on the level of the procedural act of the right of the defence, stipulated in the Art. 42 par.2 of Polish Constitution, because making a decision to detain is indicative of the existence of justified assumption of committing a crime which updates guarantees determined in the Art. 42 par. 2 of Polish Constitution. It should be underlined that the moment of the apprehension and the first procedural activities are associated with the stress and surprise of the detained person which can lead, especially a person who is the first time is this position, to take premature decisions which can have negative influence. Due to the fact that the behaviour of the suspect in the initial phase of proceedings can be significant for a more distant course of the process and have influence on a possibility to exercise his rights[5], equipping the detained person with the right to contact the lawyer seems fully legitimate. It allows the detained person to avoid the critical mistakes for his legal situation. The mistakes can be avoided by providing the possibility for the detained person to have a professional (as well as unrestricted with presence of the detaining authority) legal advice.

On account of these circumstances, it is essential to enable the detained person to have the effective and professional legal advice at the preliminary stage of criminal proceedings. Such a conversation can effectively serve its purposes – and serve in realization of the right of the defence – only when it is an unrestricted

[4] Judgement of Polish Supreme Court SN from 9 February 2004, V KK 194/03, Prok. i Pr. 2004, n. 7–8, pos. 11 and approbatory opinions: M. Szewczyk, OSP 2004, z. 11, p. 160, S. Pałka, Mon. Praw. 2006, n. 16, p. 891, critical note, A. Sakowicz, PS 2005, n. 9, p. 141; Judgement of Polish Supreme Court from: 26 April 2007, I KZP 4/07, OSNKW n. 6/2007, pos. 45 and from 20 September 2007, akt I KZP 26/07, OSNKW n. 10/2007, pos. 71; Supreme Court opinion adduced by Constitutional Tribunal in judgement in the case K 42/07, jw., pt. III 3., see: A. M. Tęcza-Paciorek, *Pojęcie osoby podejrzanej i jej uprawnienia*, Prok. i Pr. 2011, n. 11, p. 56–57 and B. Nita, *Dostęp osoby zatrzymanej do pomocy obrońcy*. Remarks connected with the judgement of European Court of Human Rights a from 10 March 2009 in Płonka against Poland case, Pal., 2011, n. 11–12, p. 43.

[5] P. Hofmański, A. Wróbel [w:] *Konwencja o ochronie praw człowieka i podstawowych wolności*. Comments to article. 1–18, t. I, ed. L. Garlicki, Warszawa 2010, p. 434.

conversation[6]. Only in conditions of confidentiality, the lawyer can assume that the statements of the detained person are sincere and full. From a perspective of the fundamental principle of equality of arms, it is crucial that the detained person can have access to the professional legal assistance as soon as possible, but also to unrestricted presence of third party. This contact cannot only be boiled down to looking through the records of criminal proceedings and reading the evidence of subject matter, but should, above all, include the contact of the lawyer with his client. The right to obtain the unrestricted legal advice by the detained person – in the preliminary stage of criminal proceedings - has a key importance for guaranteeing the effective possibility to defend on the later stage of the proceeding.

Direct conversation should serve to obtain by the detained person the effective legal advice. It is not only about explaining to the detained person rights asserted to him, but also the consequence for not using them. The contact of the detained person (suspected person, in case of the occurrence of justified assumption of committing a crime) with the lawyer is crucial for ensuring the right to an effective preliminary line of defence in the course of the entire criminal proceedings, if information shared with the lawyer by the detaining person results in possible charging the detained person. The contact of the detained person with the lawyer can be decisive to later course of proceedings and help choose the effective defence.

Taking all above aspects into account, it should be pointed out, that thanks to the personal contact with the client, the defender acquires factual knowledge about the acts of the alleged perpetrator and circumstances of the event being a subject matter of the proceedings, builds the defence strategy, files motions of evidence, if necessary cooperates with other defenders acting in the case. The purpose of the contact and a direct conversation which are mentioned in Art. 245 § 1 Polish Code of Criminal Procedure should be understood exactly this way. Emphasizing the difficult situation of the detained person was a will of the legislator formulating presented code solutions which should guarantee the detainee the possibility of obtaining the direct legal advice from the lawyer, which is undoubtedly the purpose of a real opportunity of contact and conversation between the detained person and the lawyer.

On a side note, one should notice that direct conversation which is mentioned in Art. 245 § 1 Polish Code of Penal Procedure, can also consist in the conversation using modern technologies, so also unrestricted conversation in such a form should be allowed by the detaining authority[7]. However, the contact with the lawyer means the contact with the person who meets the requirements determined by provisions of the structure of the Bar. It can be a counsel appointed as the defender of the detained person in already pending proceedings (Art. 82 and

[6] Polish Bar Council opinion, in the work cited.

[7] Constitutional Tribunal Judgement from 11December 2012 akt K37/11, http://www.dziennikustaw.gov.pl/du/2012/1447/1.

next) or every other counsel, also when the detained person has an already appointed defender in pending proceedings[8].

Attention also be paid to scope of the regulation stipulated in the contents of Art. 245 § 1 Polish Code of Criminal Procedure. Apart from the need to enable detainee on his demand immediate contact with the defender, it also contains essential limitation of the scope of this contact through in fine expression in sentence 1: that "in special cases, justified by exceptional circumstances, detaining authority may reserve his presence".

4. The premise of exceptional circumstances and the contents of the regulation Art. of 245 Code of Penal Procedure

The current wording of contents of the Art. 245 Polish Code of Criminal Procedure is a result of improving procedural guarantees of the detained person. It is an effect of the Constitutional Tribunal (CT) decision from 11 December 2012 K 37 / 11, in which CT recognised, in that in its original notation Art. 245 § 1 was not incompatible with Art. 42 par. 2 in relation to Art. 31 par. 3 Polish Constitution, on this account, it did not show the premise which justified the presence of detaining authority during the conversation between the detainee and the lawyer. Current contents of the regulation Art. 245 Polish Code of Criminal Procedure, amended by the act from 27 September 2013 about the amendment to the act – Polish Code of Criminal Procedure (Journal of Laws of the Republic of Poland pos. 1282) envisage that as for the principle literal wording of the act the exceptional admissibility of reserving the presence of detaining authority during the conversation between the detained person and the lawyer, as the premise points out "in exceptional cases, justified by special circumstances".

Amendment changes of the contents of Art. 245 § 1 Polish Code of Criminal Procedure, being the result of the unconstitutionalities of prior records, justify the participation of detaining authority in a direct conversation with the detained person, exclusively in the situation of the need to protect the correct course of the activities taken in relation to the detention. It should be underlined that the presence of detaining authority at such a conversation may aggravate to exercise the right to the defence for the detained person in proceedings that are about to start or the pending ones[9]. That way, the detained person cannot communicate freely with the lawyer. In particular, he cannot inform the defender of these facts which in his evaluation can indicate his fault. Consequently, this situation can make it

[8] L.K. Paprzycki, Comment to article. 245 Polish Code of Criminal Procedure, [w:] *Kodeks postępowania karnego. Komentarz aktualizowany*, Paprzycki L.K. (ed.), Steinborn S., Grajewski J., LEX/el. 2015.

[9] Ibid.

difficult or even impossible for the lawyer to give the full legal advice to the detained person.

In case of the detention, a general principle should be a direct conversation of the detained person with the defender in absentia of third parties, and reserving the presence of detaining authority should be regarded as the exception. However, it should be underlined that in spite of implementing the limiting premise in the form "exceptional circumstances justifying the presence of detaining authority during the direct contact between the detainee and the lawyer" the verification of the circumstances allowing such presence would be cause a lot of interpretational problems, creating the opportunity for over interpretation, and consequently for abuses in applying the premise on the side of the detaining authority.

The lack of precise determination of circumstances which justify invoking the premise of exceptional circumstances causes the justified concerns that officers of law enforcement agencies will effectively and arbitrarily hinder the direct, not--disrupted contact of the detained person with the lawyer. They will try to prevent the detained person from agreeing on statements or explanations, or the possibility of sharing information via lawyers with other people It can be raised as effectively fulfilled premise of exceptional circumstances justifying, in the assessment of detaining authority, its presence during the direct conversation between a detained person and his lawyer as essential to ensure the correct course of proceedings.

Today law enforcement agencies point out that the presence of the detaining authority during conversations between a detained person and the lawyer is necessary because of:

1. the need to prevent phone contacts of the detained person with other persons than enumerated in the Polish Code of Criminal Procedure, the contacts which are not authorised to the detained person;
2. making impossible the communication of detainee with other persons in order to cover up the tracks, destroy or hide evidence being significant for criminal proceedings or evidence of helping the detained person in hiding;
3. the need to reduce the threat to life and the health of officers and third parties;
4. the need to protect the correctness and the usefulness of performing other procedural activities in the case.

Especially alarming are these arguments which point out to the need of the presence of detaining authority during the conversation between detained person and the lawyer due to concerns that information shared by the detained person to the lawyer will concern preparatory proceedings and consequently will be made available to third parties. It must be strongly emphasized that the lawyer is a profession of the public trust as defined in the Art. 17 Polish Constitution. The lawyer is as trustworthy as police officers, the public prosecutor or the court. On account of ethical and legal norms, it is not possible for the lawyer to share information

obtained from the client with other persons or to perform other actions having features of the aiding and abetting. Assuming that information received from the detained person will be used in order to hamper criminal proceedings is objectionable.

On side note of above deliberations, it should be noticed that in spite of enforcing applied regulations justifying the presence of detaining authority as an exception to the rule, in practice, there are still cases when the representative of the detaining authority invoke the exceptional circumstances, without authenticating them, reserves their presence during the conversation between the detained person and the lawyer. It occurs at equal frequency that the representative of detaining authority is present during such a conversation even without formal stipulating of such presence. It often happens that officers suggest the detainees (prior to their meeting with the lawyer), what consequences they will face if they do not admit to the charges (e.g. applying the temporary detention), as well as situations in which from the moment of detention until the arrival of the lawyer, the detaining authorities conduct unofficial talks with the detained person, aiming at convincing him about the pointlessness of using the help of the lawyer, or even that his presence or the compliance to his advice, will be resulting for the detained person in adverse and negative effects. The practical form of bypassing new regulations is conducting so-called operating activities together with the detained person which actually result in questioning the detained person.

According to the reports of the Ministry of Internal Affairs, the organizational units of Police and Border Guard do not keep statistics determining the number of people exercising a right to the contact with the lawyer, as well as the number of cases, in which officers are present during the conversation between the lawyer and the detainee. The contact of the detained person with the lawyer usually consists in the phone call made in the presence of the police officer, in the course of which the lawyer is officially appointed as the defender in given case. It also happens that the same lawyer appears at the organizational unit of Police and demands the contact with many detained persons in the same case. Few persons exercise the right to contact the lawyer in the moment of detention. In the majority of cases, there is no such a contact, simultaneously police officers often discourage from the contact with the lawyer. Demanding the contact with the lawyer is often ineffective and is not reflected in the records of undertaken activities.

Filing the appropriate stipulation by the detaining authority resulting in his presence in the course of the conversation between detainee and the lawyer, is still supported by the need to protect the public interest, to which Art. 245 § 1 in fine Polish Code of Criminal Procedure should serve, and which in this case is the public safety. The possibility of the stipulation of the detaining authority presence is supposed to counteract sharing information hampering the conduct of criminal proceedings. However, it should be underlined, that collecting evi-

dence indicating the crime, is independent of limiting the free contact between the detained person and the lawyer. It is irrational to treat the presence of the detaining authority during the direct conversation between the detainee and the lawyer as the instrument which serves as a way to gather evidence of the crime in criminal trial. The account of the effectiveness of the proceedings cannot lead to disproportionate limiting the right of the defence[10].

Art. 245 § 1 in fine of the Polish Code of Criminal Procedure does not specify what in fact is the presence of the detaining authority during the direct conversation between the detainee and the lawyer. Practically, it often happens that detaining authority representative is in the same room as the detained person and his lawyer and listens to their conversation.

Art. 245 § 1 in fine of the Polish Code of Criminal Procedure does not also regulate, whether and in what way the detaining authority can use the information obtained because of the presence during the direct conversation between the detainee and the lawyer. Art. 245 § 1 in fine of the Polish Code of Criminal Procedure does not decide in any way, that this information should be encompassed by exclusionary rule. It also does not point out to circumstances which justify filing by detaining authority stipulation. the provision does not determine a form, in which a stipulation should be filed.

In the context of made adjudications, it must be noticed that in spite of the fact that the lawyer providing legal advice to the detainee in the mode of Art. 245 § 1 Polish Code of Criminal Procedure is not a defender, but only a legal adviser of the detained person, in terms of facts he learnt while giving the advice, there is an exclusionary rule of questioning as the witness, so provisions determined in the Art. 178 Polish Code of Criminal Procedure of the impossibility of questioning as a witness are applicable. If during the period of the detention, a detainee is charged with committing a crime (Art. 313), the proxy will acquire the status of the defender[11].

5. Right of the detained person to the contact with the lawyer in ETPC (Convention for the Protection of Human Rights and Fundamental Freedoms) judicature

In the light of above dilatations, attention should be paid to judicature standards developed by ETPC, which in many occasions emphasized the significance of the confidentiality of consultation between the detained person and his lawyer.

[10] Constitutional Tribunal Judgement from 03 June 2008. Akt K 42/07, pt. III.3, http://isip.sejm.gov.pl/Download?id=WDU20081000648 01&type=1.

[11] B. Nita, in the work cited, p. 43.

The crucial conclusion in this respect contained in the context of right of defence can be found in Art. 6 par. 3 c) Convention for the Protection of Human Rights and Fundamental Freedoms which assumes the right to defend personally or by the personally appointed defender, and if there are insufficient funds to cover the costs of the defence, to use the free help to the public defender, appointed ex officio, when interest of justice requires it[12]. The similar scope of the regulation is stipulated in Art. 14 par. 3 d) International Covenant on Civil and Political Rights (EKPC). It grants the right of the presence at the trial, to defend personally or by the chosen defender; to receive information, if the person does not have the defender, about the existence of the above mentioned right and to have an appointed defender for the person in every case, when interests of justices require it, without bearing the costs of the defence in cases when the accused does not have sufficient funds to bear them.

It should be pointed out that ETPC relates a right of the defence determined in Art. 6 par. 3 EKPC also to the preliminary stage of criminal proceedings. Art. 6 EKPC shall apply from the moment in which the position of a given person is changed, even if he was not officially charged (e.g. ETPC judgement from 19 February 2009 on Shabelnik against Ukraine, No. 16404 / 03, § 57)[13].

According to judicature of Strasbourg Tribunal, supervision is acceptable only in case of "very weighty reasons" justifying using it, and the supervision in the form of the authorised person should always constitute the "ultimate remedy" (ultimum remedium)[14].

From the perspective of EKPC, it is unacceptable to conduct acts of legal procedure such as unofficial interrogation (so-called inquiring) of the detainee without the presence of the lawyer in frames of the listening mentioned in Art. 244 § 2 in fine Polish Code of Criminal Procedure[15]. It can create temptation to force incriminating testimony which next can be used as evidence in the case. ETPC point out, that person who demands the legal advice should not be subjected to procedural activities until the advice is obtained (ETPC judgement from 24 September 2009 on Pishchalnikov against Russia, No. 7025 / 04, § 79)[16].

ETPC assumptions and judicature based on it, make it possible to state that also the infringement of the right of the defence takes place when the detained person

[12] International Covenant on Civil and Political Rights from 16 December 1966 r., Journal of Laws of the Republic of Poland 1977 n. 38 pos.167.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms judgement from 19 February 2009 in Shabelnik against Ukraine case, n. 16404/03, § 57.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms judgement from 13 January 2009, *Rybacki against. Poland*, complaint n. 52479/99,§ 57 i n.

[15] J. Skorupka, *W kwestii konstytucyjnych uprawnień zatrzymanego*, [in:] *Węzłowe problemy procesu karnego*, P. Hofmański (red.), Warszawa 2010, p. 455–456.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms judgements from 24 September 2009 in *Pishchalnikov against Russia* case, n. 7025/04, § 79.

is not provided with legal advice (contact with the lawyer) which in consequence will lead to testify which will become a base of pressing charges (ETPC judgement from 27 November 2008 on Salduz against Turkey, No. 36391 / 02, § 55; judgement on Brusco case, § 44–45)[17].

ETPC regulations clearly state that there is a requirement to provide the access to the lawyer from the moment of the first police interrogation. It is even confirmed in ETPC judgement from 17 January 2012 in Fidancı against Turkey case, No. 17730 / 07, § 38[18]. In the light of the ETPC judgement in Salduz case, the help of the lawyer must be already ensured at the first police interrogation, "unless – in the light of particular circumstances of the given case – the appearance of compelling reasons will be demonstrated for limiting the right to lawyer. Even if such compelling reason can exceptionally justify the refusal of the access to the lawyer, such a restriction – whatever its justifying would be – cannot illegitimately violate the rights of the accused, guaranteed in Art. 6. EKPC. The right of the defence is, in principle, violated in the irreparable way when incriminating explanations, submitted during police interrogation without the participation of the defender, are used for later conviction"[19] (also ETPC in the judgement from 17 January 2012 in Fidancı case, § 38).

ETPC directly assumes that a possibility of the contact with the lawyer is one of basic components of the right of the defence outside the scope of the listening of third parties (see ETPC judgements in the John Murray case, § 63 and from 13 January 2009 in the Fishing against Poland case, No. 52479 / 99, § 56) which enables open and honest conversation between the lawyer and his client (ETPC judgement from 19 December 2006 in the Oferta Plus SRL against Mołdowia case, No. 14385 / 04, § 145). The lack of possibility of confidential communication, also receiving secret orders from the client, causes the legal advice to lose much of its effectiveness, while EKPC requires the protection of rights in the practical and effective way (ETPC judgement from 28 November 1991 S. against Switzerland case, No. 12629 / 87, § 48). In Brennan case, ETPC acknowledged that presence of the police officer within hearing range during first consultation between suing person with his lawyer violated his right of the defence (§ 58–63 judgement). ETPC assumed that: "the right to communicate with the lawyer out of hearing range of third parties is one of the primary requirements of the reliable process and results from Art. 6 § 3 c) EKPC (…) If the lawyer is not able to confer

[17] Convention for the Protection of Human Rights and Fundamental Freedoms judgement from 27 November 2008 in *Salduz against Turkey*, n. 36391/02, § 55; judgement in *Brusco case*, § 44–45.

[18] Convention for the Protection of Human Rights and Fundamental Freedoms judgement from 17 January 2012 in *Fidancı against Turkey*, n. 17730/07, § 38.

[19] J. Skorupka*, W kwestii konstytucyjnych uprawnień zatrzymanego,* [in:] *Węzłowe problemy procesu karnego,* P. Hofmański, Warszawa 2010, p. 434–435 and Convention for the Protection of Human Rights and Fundamental Freedom in judgement from 17 January 2012 in *Fidancı* case, § 38.

informally and receive orders from the client, the legal advice loses much of its usefulness, while EKPC requires the guarantee of rights and freedoms which are practical and effective" (judgement §58).

ETPC allows the possibility of certain limitations in the unrestricted contact between the imprisoned client and his lawyer (judgement in the Rybacki case, § 56 and 58), on one condition, there must be an important reason which requires evaluation, whether from a perspective of the entire proceedings this restriction does not cause the violation of right for the reliable process (ETPC judgement from 08 February 1996 in John Murray against the United Kingdom case, No. 18731 / 91, § 63).

What is particularly essential, ETPC in the judgement from 16 October 2001 in Brennan against Great Britain case, No. 39846 / 98, accepted - by stating the EKPC infringement – that presence of the police officer within hearing range during first consultation between suing person with his lawyer, violates his right of the defence (judgement § 58–63). ETPC made such a conclusion in the case of the Irish citizen detained on charges of terrorist activity in Northern Ireland. Limiting the confidentiality of the legal advice in the suing person case was based on the specific regulation (Northern Ireland Emergency Provisions Act 1991, sec. 45) envisaging – exclusively as the exception to the rule – the possibility of the limited access to the lawyer and the confidentiality of the legal advice only if it leads to hampering proceedings concerning acts of terrorism.

ETPC stated the infringement of Art. 6 EKPC in the indicated scope also in the Polish case. Violation of the right of the defence took place due to the fact that the public prosecutor was permanently present, for a few months, during contacts between person in pretrial detention and his defender (judgement in Rybacki case § 57–61). ETPC, allowing the possibility of limiting the right to the unrestricted contact with the defender (see judgement § 58), pointed at the arbitrary character of a decision of the public prosecutor from the account of the lack of abilities of hampering preparatory proceedings in progress as a result of the unrestricted contact between person in pretrial detention with his defender (Ibid., § 59). It was noticed that there had been no accusation of illegal or unethical practices on the side of the defender (Ibid.,, see also a judgement in S. against Switzerland case, § 49).

What is more, the lack of the access to the lawyer in the initial phase of criminal proceedings was one of the essential arguments leading to the infringement of Art. 6 c) EKPC (ETPC judgement from 31 March 2009 in Płonka case § 40 and from 2 March 2010 in the Adamkiewicz against Poland case, No. 54729 / 00, § 89–91.

ETPC explicitly supported providing the detained person with the access to the lawyer. Consequently, it means that ETPC allows a possibility of introducing restrictions in this respect, but on condition of the existence of good cause and provided that from a perspective of the entire proceedings it does not transla-

te into the violation of the right to the reliable process (ETPC judgement from 8 February 1996 in John Murray against the United Kingdom case, No. 18731 / 91, § 63). ETPC is of the opinion that a legal advice should be provided for the imprisoned person in a way, that a conversation with the lawyer about the subject of the case is possible, as well as preparing the defence, collecting evidence beneficial for the suspected person, the preparation for interrogation, supporting the accused and controlling conditions of the detention (ETPC judgement from 13 October 2009 in Dayanan against Turkey case, no. 7377 / 03, § 32).

Conclusions

Examples of the European judicial decision which were presented above, as well as domestic regulation of the right to the contact between detainee with the lawyer, and hence his right of defence emphasize the significance of discussed solutions. The need of the unrestricted contact of the detained person with the professional attorney constitutes the sign of the exercise of the right of the defence, but first of all actual applying equality of arms which in the light of the amendment of the Code of Criminal Procedure seems to be the core of the problem.

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