POLAND / POLOGNE
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1. Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The reopening of criminal proceedings following a ruling of the European Court of Human Rights (the ECtHR) has a clear legal basis under Polish law and is applied successfully in practice. According to the jurisprudence of the Supreme Court, the possibility of reopening applies not only to the applicant and to the criminal proceedings examined by the ECtHR, but also to other persons in a similar situation (*de facto erga omnes* effect).

Legal regulations in force

The Polish Code of Criminal Procedure (PCCP) contains the following provision:

> *Article 540 § 3. Criminal proceedings shall be reopened to the benefit of the accused if such a need results from a ruling of an international body acting on the basis of an international treaty ratified by Poland.*

As interpreted by the Supreme Court, the possibility of reopening proceedings applies not only to the rulings of the ECtHR but also of the UN Human Rights Committee, the Court of Justice of the European Union or the International Court of Justice, among others.

Criminal proceedings may be reopened upon request and only to the applicant's benefit. The procedure is not restricted by any time-limits. A next of kin can file a request for reopening proceedings to the benefit of the deceased accused person.

A decision on reopening is not automatic but is based on a case-by-case assessment of whether a need for reopening arises. As clarified by the Supreme Court, such a need arises if in light of ECtHR findings a ruling adopted in criminal proceedings has violated the Convention. In the interpretative resolution of 26 June 2014 (ref. no. I KZP 14/14), the Supreme Court has pointed out two types of violations which justify the reopening in light of the ECtHR rulings:

- procedural shortcomings which have occurred in the course of criminal proceedings, which – in view of their structural and complex character – could have had an impact on the content of the final ruling adopted in the domestic proceedings;
- substantive shortcomings, *i.e.* when the findings of the violation of the Convention stem from the very content of the final ruling adopted in the domestic proceedings.

In contrast, incidental shortcomings in criminal proceedings which did not have a direct impact on the final ruling on the merits, those which did not concern the main course of the proceedings and were outside their main object (*i.e.* the question of guilt and criminal liability), would in principle not justify a reopening. This applies, for instance, to the excessive length of criminal proceedings or shortcomings of the application of preventive measures (*e.g.* pre-trial detention).

Examples of successful reopening of criminal proceedings

By 1 March 2015 the Supreme Court has examined approximately 20 requests for the reopening of criminal proceedings on the basis of the ECtHR judgments. In the vast majority of cases it allowed such requests. Only two requests were not approved: in one case the ECtHR findings concerned excessive length of criminal proceedings and of pre-trial detention; in the other case the applicant's request did not comply with the formal requirements despite the fact that the applicant was ordered by the court to comply with them.

In several cases, the reopening of proceedings led to the discontinuation of criminal proceedings in respect of the applicants (*e.g.* because the trial courts ultimately considered that the act of which the applicants were accused did not constitute a crime or due to the lapse of statutory time-limits for prosecution). In other cases, the shortcomings identified by the ECtHR in the initial proceedings were rectified in the course of the reopened proceedings (*e.g.* documents in vetting proceedings were declassified).

In addition, in many other cases the ECtHR case-law was referred to when examining the requests for the reopening of criminal proceedings based on other grounds.

Erga omnes effect in the case-law of the Supreme Court

In its interpretative resolution of 26 June 2014 (ref. no. I KZP 14/14), the Supreme Court has recognized that "the need to reopen criminal proceedings resulting from a ruling of an international body" could arise not only with respect to an applicant who has received a favourable ECtHR ruling but could also involve co-accused and even other persons accused in other criminal proceedings – provided that the same violation of the Convention (in terms of a combination of factual and legal circumstances) has occurred.

As the Supreme Court noted, the "need" for reopening in the meaning of Article 540 para. 3 of the PCCP may also arise in order to prevent a finding of another violation of the Convention in another judgment against Poland. The finding by the ECtHR of a human rights violation should produce effects also in other cases where the same violation of the Convention has taken place. This will ensure a full realisation of the principle of subsidiarity of the Convention system, according to which domestic authorities are primarily responsible for ensuring appropriate protection of rights guaranteed under the Convention to everyone within their jurisdiction. This obligation should be met not only with respect to future criminal proceedings, but also with respect to criminal proceedings which have already been closed. The protection of human rights would otherwise be incomplete and that would result in unjustified differences in the situation of the accused depending on whether their cases were examined before or after the ECtHR ruling.

The above approach applies only to ECtHR rulings adopted in respect of Poland and not those adopted in respect of other States Parties (since the Supreme Court assumes that the ECtHR judgments bind *inter partes*).

According to the Supreme Court, the question whether a case concerns the same violation of the Convention should be assessed narrowly bearing in mind the extraordinary nature of the institution of reopening. In essence, the possibility of reopening other criminal proceedings applies to situations when the violation of the Convention is so similar (in terms of the combination of legal and factual circumstances) as to assume a favourable ECtHR ruling finding a violation of the Convention on the same grounds should an accused decide to file an application with the Strasbourg Court.

2) What practical or procedural difficulties have been encountered in practice? How have they been overcome?

No difficulties have been encountered so far.

One could, however, note that the possibility of reopening may be useful not only in criminal proceedings but also in the event of a violation of the right to compensation for victims of arrest or detention in contravention of Article 5 (Article 5 para. 5 of the Convention). Under Polish law, compensation for unjustified detention is granted under a special procedure for compensation. Nevertheless, even if Article 540 § 3 of the PCCP refers only to the reopening of criminal proceedings to the benefit of the accused, in its judgment of 12 June 2012 (relating to the case of Adam Włoch v. Poland, no. 33475/08, ECtHR judgment of 10 May 2011) the Supreme Court went beyond the literal interpretation of that provision and applied it to proceedings for compensation for unjustified detention and to the formerly accused, invoking the need to interpret the law mindful of its purpose and Article 46 of the Convention.

3) Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?

Under Polish law it is possible to reopen criminal proceedings also on the basis of ECtHR decisions that approve unilateral declarations. The wording of Article 540 § 3 of the PCCP is general and refers to any "ruling" of an international body, not only judgments.

Example: On 23 July 2012 the Warsaw Court of Appeals reopened criminal proceedings in respect of the applicant recognising that such need arises under the ECtHR decision approving a unilateral declaration in the applicant's case (Jarosław Sroka v. Poland, no. 42801/07, (dec.) 6 March 2012). The Warsaw Court of Appeals found a basis in the ECtHR decision for reopening and also took into account the unequivocal acknowledgment by the Polish Government that the applicant's freedom of expression had been violated. In consequence, it quashed earlier judgments and discontinued criminal proceedings in respect of the applicant having found that the act he had been accused of did not constitute a criminal offence anymore since in the meantime the relevant statutory provision had been repealed.

In turn, opinions of the legal doctrine differ with respect to the possibility of reopening of criminal proceedings in the case of friendly settlements (no such cases have been examined by courts so far).

2. Civil proceedings

1) How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?

The issue of reopening civil proceedings on the basis of an ECtHR judgment has not been addressed by Polish law. Although there was one case of successfully reopened civil proceedings relying on an ECtHR judgment, the Supreme Court ultimately adopted an interpretative resolution whereby it considered that Polish law does not provide for such a possibility. It did not rule out, however, that other means of *restitutio in integrum* could apply to such cases.

What were the obstacles?

On 30 November 2010 a resolution of seven Supreme Court judges was adopted whereby the Supreme Court excluded the possibility of reopening civil proceedings directly on the basis of an ECtHR judgment. It noted that the Convention did not impose an absolute obligation to introduce such a possibility in civil cases leaving a margin of appreciation to domestic law-makers. The Supreme Court questioned the adequacy of such a solution in civil proceedings invoking the need to respect the stability of final judgments and the rights acquired *bona fidae* by third parties.

Following this resolution, discussion on this issue has continued in Poland. No progress has been achieved as yet and the following arguments have been put forward against amending the law:

– there is no obligation to introduce such a possibility under the Convention, also as interpreted by the ECtHR[1],

– principles of *res iudicata, ne bis in idem* and the stability of final judgments constitute important values and form part of the fundamental principle of the rule of law;

– civil proceedings are of particular nature as compared to criminal or administrative court proceedings; a departure from the principle of *res iudicata* in such proceedings could affect relations between the parties and the burden of such departure would be shifted to third parties;

– third parties do not participate in proceedings before the ECtHR and are deprived of a possibility to defend their interests in these proceedings;

– in view of the dynamic nature of private-law relations, a rectification of old rulings' shortcomings may be unrealistic and impossible;

– in civil proceedings it would be more appropriate to establish adequate compensatory procedures instead (*nb.* some possibilities to seek compensation in case of unlawful final judgments are already secured under the Polish law).

How have the obstacles been overcome?

There are some alternative possibilities open to the applicants.

Firstly, as the Supreme Court observed in the above mentioned interpretative resolution, other legal remedies could be available to the applicants in some situations, for instance, an action against enforcement of a final domestic judgment, a complaint to declare a final court ruling incompatible with the law[2] and an action for compensation against the State Treasury on the basis of the so-called court delict.

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[1] In light of the ECtHR case-law, the Court requires re-examination of proceedings in which a violation of Article 6 of the Convention has occurred only in respect of criminal cases. Although in some cases the Court noted that the reopening of civil proceedings in the applicant's case would be the most suitable individual measure, this concerned situations where the possibility of such reopening has already been provided in the domestic law of the respondent State. The Court has never referred to this issue *e.g.* in Polish cases. It could also be argued that Article 41 of the Convention explicitly recognises that there could be no possibility of *restitutio in integrum* under domestic law as it provides that the ECtHR may grant just satisfaction in such situations.

[2] Incompatibility of a final judgment with the law extends also to situations of incompatibility with provisions of international law binding upon Poland.

Secondly, depending on the circumstances of the case, a violation of the right to a fair trial can constitute a basis for reopening under general provisions governing invalidity of civil proceedings. Some of these provisions concern aspects of the right to a fair trial in the meaning of Article 6 of the Convention (*e.g.* violation of the right to an impartial court or deprivation of the party of a possibility to act)[3].

Example: in the decision of 17 October 2007, ref. no. I PZ 5/07, the Supreme Court held that the ECtHR judgment finding a violation of the party's right to a fair trial could constitute a circumstance justifying the reopening of proceedings in view of their invalidity. Assessing the case in light of the ECtHR findings (*Tabor v. Poland,* no. 12825/02, judgment of 27 June 2006 concerning the refusal of legal aid in cassation proceedings) the Supreme Court considered that the applicant had been deprived of the possibility to act in civil proceedings in the meaning of Article 401 point 2 of the Code of Civil Procedure.

Thirdly, family and guardianship law contains some special provisions that provide for wide possibilities of changing even final court rulings. In particular, in many cases examined under the guardianship law domestic courts can change their decisions, even final, if the interests of the person concerned so require. Furthermore, courts can change rulings on parental authority and the way in which it is exercised and on contacts with a child if the interests of the child so require. The relevant provisions do not require any change of circumstances. It seems that on this basis there is a wide scope for changing final court rulings, if they are considered to be contrary to the Convention, violating the interests of the child or of other persons concerned, etc.

2) If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.

The above interpretative resolution of the Supreme Court does not envisage such a possibility under the current legal framework.

3. Administrative proceedings

At the outset it would be useful to clarify that in Poland administrative courts exercise judicial oversight of administrative decisions issued by administrative authorities. There are separate procedural regulations governing administrative proceedings (before administrative authorities) and administrative court proceedings.

1) How has the reopening of administrative proceedings been addressed and have there been examples of successful reopening in such cases?

In the field of administrative law there are the following two possibilities to reopen the proceedings on the basis of ECtHR rulings:

[3] It is worth noting that in Poland all kinds of proceedings – criminal, civil, administrative – may be reopened in case the Constitutional Court finds a given normative act that served as a basis for final decisions, to be incompatible with the Constitution or an international treaty.

1. The 2002 Act on Proceedings before Administrative Courts provides for the possibility to reopen **administrative court proceedings** following an ECtHR ruling:

> *Article 272 § 3. The reopening of proceedings can be demanded also if such a need results from a ruling of an international body acting on the basis of an international treaty ratified by Poland. The provision of [Article 272] § 2 applies accordingly, however the time-limit for lodging a complaint for reopening shall run from the date such ruling of an international body is served on the party or his/her representative.*

This provision refers to a "ruling of an international body", which means that ECtHR decisions, not only judgments, may also serve as a basis for reopening.

Example: In the judgment of 9 October 2014 (ref. no. I OSK 1463/14), the Supreme Administrative Court examined the possibility of reopening following a friendly settlement concluded in the proceedings before the ECtHR. The request for reopening was rejected due to the lapse of the maximum statutory time-limit of 5 years from the date on which the impugned ruling of a domestic court becomes final. However, the applicability of Article 272 § 3 to friendly settlements reached before the ECtHR was not questioned by the Supreme Administrative Court.

The time-limit for lodging a request for reopening is three months from the date an ECtHR ruling is served on the applicant or his representative. There is also a maximum time-limit for lodging a request for reopening, which is five years from the date on which the impugned ruling of a domestic court becomes final, the only exception being cases in which a party was deprived of the possibility to act or was not properly represented. This maximum time-limit applies generally, not only to reopenings based on ECtHR rulings.

2. Reopening of **administrative proceedings** can be requested if a court has adopted a ruling finding a violation of the principle of equal treatment, in accordance with the 2010 Act on Implementing Certain Legislative Provisions of the European Union in Respect of Equal Treatment. Proceedings may be reopened if a violation of the principle of equal treatment principle has affected the outcome of administrative proceedings ending in a final decision (Article 145b of the Code of Administrative Procedure).

It is understood that the term "court ruling finding violation of the principle of equal treatment" covers not only domestic courts but also the ECtHR or CJEU. A request for reopening can be submitted within one month from the date on which the court ruling becomes final.

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The above possibilities have been introduced to Polish law relatively recently and only one request for reopening has been examined so far, but it did not lead to reopening of the administrative court proceedings concerned for the reasons explained below.

What were the obstacles / How have they been overcome?

1. The main obstacle encountered so far was linked with the maximum five-year time-limit for reopening of administrative court proceedings. This time-limit is calculated from the date a domestic court ruling becomes final (the only exception being cases in which a party was deprived of the possibility to act or was not properly represented). Bearing in mind the length of proceedings before the ECtHR, this could be an obstacle, as was demonstrated in the case examined by the Supreme Administrative Court in its judgment of 9 October 2014.

On that occasion the Supreme Administrative Court expressed the opinion that the introduction of such a maximum time-limit did not raise any doubts as to its constitutionality in view of the need to protect the stability of legal relations in a democratic society.

2. As regards the reopening of administrative proceedings on the basis of an ECtHR judgment, the law explicitly allows it only in cases dealing with a violation of the equal treatment principle. However, general regulations governing the reopening of administrative proceedings may cover many shortcomings to which the ECtHR rulings under Article 6 of the Convention may refer.

For instance, it is possible to reopen administrative proceedings in the event that an administrative decision was adopted by an official or public administration authority which should have been excluded from proceedings, or a party did not participate in proceedings not of his/her fault, or a decision was based on another court ruling or on a decision that was subsequently changed or revoked (see also footnote no. 3 above).

Also, flawed administrative decisions that violate the Convention can be quashed following the reopening of proceedings before administrative courts.

What are the remaining gaps?

The possibility of reopening administrative court proceedings applies in principle only if violations of the Convention found by the ECtHR occurred in proceedings before administrative courts, and not in earlier proceedings conducted before administrative authorities.

Except for violations of the principle of equal treatment, there is no provision in the Code of Administrative Procedure that would explicitly provide for the possibility of reopening of administrative proceedings directly on the basis of ECtHR judgments.