

73/8/A/2010

JUDGMENT
of 5 October 2010
Ref. No. SK 26/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Maria Gintowt-Jankowicz – Presiding Judge
Wojciech Hermeliński – Judge Rapporteur
Adam Jamróz
Marek Kotlinowski
Andrzej Rzepliński,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 5 October 2010, in the presence of the complainant, the Sejm and the Public Prosecutor-General, a constitutional complaint submitted by Mr Jakub Tomczak, in which he requested the Tribunal to examine the conformity of:

Article 607k, Article 607l, Article 607m as well as Article 607p of the Act of 6 June 1997 – the Polish Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure) to Article 45(1), Article 42(2) and Article 55(4) of the Constitution, as well as to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended), and Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977 No. 38, item 167),

adjudicates as follows:

Article 607p(1)(5) of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended), **insofar as it contains a ground for refusal to execute a European arrest warrant issued against a Polish citizen for the purpose of conducting a criminal prosecution, in the case where:**

a) it is obvious for the court adjudicating on the execution of the European arrest warrant that a person who is the subject of the said warrant has not committed an act on the basis of which the European arrest warrant has been issued,

b) the description of the act on the basis of which the European arrest warrant has been issued makes it impossible to carry out the legal classification of the act,

is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution of the Republic of Poland.

* The operative part of the judgment was published on 11 October 2010 in the Journal of Laws - Dz. U. No. 189, item 1273.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417 as well as of 2009 No. 56, item 459 and No. 178, item 1375), **to discontinue the proceedings as to the remainder, on the grounds that issuing a judgment is inadmissible.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. Formal issues.

Before carrying out a substantive assessment of allegations raised in the present case, what should be considered is a number of formal issues related, on the one hand, to provisions indicated as the subject of the allegation, and on the other – to provisions selected as higher-level norms for the review.

In the case under examination, the provisions specified as the subject of the review and those set forth as the basis of the review were indicated not only in a constitutional complaint of 5 June 2007, but also in a procedural letter of 17 October 2007, which submitted with reference to the order of 9 October 2007 issued by a judge of the Constitutional Tribunal, which called for the formal defects in the complaint to be eliminated by: 1) precise indication of the way in which the constitutional rights and freedoms of the complainant - as expressed in Article 45(1) of the Constitution - have been infringed by challenged Article 607k, Article 607l, Article 607m as well as Article 607p of the Code of Criminal Procedure; 2) precise indication of the way in which the constitutional rights and freedoms of the complainant - as expressed in Article 55(4) of the Constitution - have been infringed by challenged Article 607k, Article 607l, Article 607m as well as Article 607p of the Code of Criminal Procedure.

In the original wording of the constitutional complaint, the complainant challenged Article 607k, Article 607l, Article 607m as well as Article 607p of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 89, item 555, as amended). In the procedural letter of 17 October 2007, submitted with reference to the above-mentioned order calling for the elimination of formal defects in the complaint, the complainant repeated the formulation of the subject of the allegation from the original wording of the complaint.

1.1. The reconstruction of the allegations on the basis of the analysis of the *petitum* and substantiation of the constitutional complaint.

In the substantiation for the constitutional complaint (in its original wording), the complainant made reference to the wording of Article 607r(1)(6) of the Code of Criminal Procedure, in accordance with which it is possible to refuse to execute the European arrest warrant, if a prohibited act on which the arrest warrant is based may be punishable by the penalty of deprivation of liberty for life or by another measure involving the deprivation of liberty, the period of which may not be reduced. In this context, he indicated that the Code of Criminal Procedure did not specify the way in which the court is to examine those

circumstances. In the complainant's view, this is tantamount to the infringement of the constitutional right to a fair trial (Article 45(1) of the Constitution).

Proceedings before the Constitutional Tribunal are bound by the principle of *falsa demonstratio non nocet*, within the meaning of which a decisive issue is the essence of the case presented to the Tribunal, and not its designation. In that situation, it is necessary to reconstruct the indicated allegation both from the content of the *petitum* of the complaint and from its substantiation (cf. the ruling of the Constitutional Tribunal of 3 December 1996, Ref. No. K 25/95, OTK ZU No. 6/1996, item 52, and the Tribunal's judgment of 6 March 2007, Ref. No. SK 54/06, OTK ZU No. 3/A/2007, item 23).

The said principle must also be applied in the present case. Indeed, it follows from the substantiation for the submitted constitutional complaint, in a manner that raises no doubts, that regardless of the allegations formulated in the *petitum* of the complaint, the complainant also questions the conformity of Article 607r(1)(6) of the Code of Criminal Procedure to Article 45(1) of the Constitution.

1.2. The reconstruction of higher-level norms for the constitutional review indicated in the complaint.

In the substantiation of the constitutional complaint (and not in the *petitum* thereof), in its original wording, the complainant indicates that the execution of the European arrest warrant would be inconsistent with the right to defence, which arises from Article 42(2) of the Constitution. The complainant argues that the said right has to be understood not only as the right to assistance of a defence counsel, but it must also comprise the right to prepare a proper defence and to counteract allegations, which is not guaranteed by the provisions on the European arrest warrant. Moreover, the complainant argues that the right to defence was also infringed by the fact that he was not informed of the precise content of the allegations raised against him. As he indicates, this resulted from an erroneous translation of the European arrest warrant issued in his case.

As it has been indicated above, proceedings before the Constitutional Tribunal are bound by the principle of *falsa demonstratio non nocet*, within the meaning of which a decisive issue is the essence of the case presented to the Tribunal, and not its designation. This results in a necessity to reconstruct the allegation both from the content of the *petitum* of the complaint and from its substantiation. In the case under examination, it clearly follows from the substantiation of the submitted constitutional complaint that, apart from the higher-level norms for the constitutional review presented in the *petitum* of the complaint, the complainant also indicates Article 42(2) of the Constitution as a higher-level norm for the review.

1.3. The admissibility of constitutional review of a legislative omission.

Moreover, with regard to the subject of the allegation, the following should be noted.

The formulation of the allegations concerning all the challenged provisions indicates that the complainant challenges a legislative omission.

To justify his allegation of the non-conformity of the challenged provisions to the indicated higher-level norms for the review, the complainant argued that the amendment to the Code of Criminal Procedure, which implemented the Framework Decision on the European arrest warrant into the Polish legal system, contained gaps that "made it impossible to implement the provisions of the Framework Decision in a way which was proper and free from defects".

In the light of the wording of Article 79(1) of the Constitution, in accordance with which a constitutional complaint may only concern a normative act, i.e. a specific

regulation contained in a normative act, it is not possible, by means of that complaint, to challenge a legislative omission, i.e. the lack of specific regulation, by indicating that such lack is inconsistent with the Constitution.

Making reference to the previous jurisprudence of the Constitutional Tribunal (cf. the judgment of the Constitutional Tribunal of 6 May 1998, Ref. No. K 37/97, OTK ZU No. 3/1998, item 33), it should be stressed that a legislative omission may not, in principle, constitute the subject of a constitutional complaint. Indeed, the Constitutional Tribunal has no jurisdiction to adjudicate on legislative omissions that consist in not issuing a normative act, even if the obligation to issue a particular normative act arises from constitutional norms. However, the Tribunal juxtaposes such a review of constitutionality of legislative omissions with a situation where the review of constitutionality concerns a binding normative act, in the context of a question whether the provisions of the act do not lack regulations without which they may raise constitutional doubts.

The substantiation of the constitutional complaint under examination indicates that the complainant challenges a legislative omission which consists in the incomplete formulation of grounds for refusal to execute the European arrest warrant.

1.4. The requirement that a challenged provision should constitute the legal basis of a final decision in the complainant's case.

The above statement does not solve all formal problems related to the assessment of the allegations raised by the complainant.

Pursuant to Article 79(1) of the Constitution, a constitutional complaint may only concern a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. Thus, the provision imposes an obligation on the Constitutional Tribunal to determine, each time, in pending proceedings whether a final decision has been made on the basis of a given challenged provision by a court or organ of public administration with regard to the constitutional freedoms, rights or obligations of a complainant (cf. the judgment of the Constitutional Tribunal of 8 May 2006, Ref. No. SK 32/05, OTK ZU No. 5/A/2006, item 54).

Therefore, what needs to be determined is whether all the provisions indicated by the complainant as the subject of the review constituted the legal basis of the final decision in his case, in relation to which the allegation of the infringement of his constitutional rights or freedoms has been formulated.

The determination of that issue should be preceded by an analysis of the content of the provisions indicated as the subject of the review by the complainant.

Challenged Article 607k of the Code of Criminal Procedure, in the version in force at the time of adjudication in the complainant's case, read as follows:

“§ 1. The surrender of a person who is the subject of the European arrest warrant, referred to in this chapter as «the European warrant», from the territory of the Republic of Poland to another EU Member State for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

§ 2. In the event of receiving the European warrant, the prosecutor interrogates the person who is the subject of the European arrest warrant, informing him/her about the content of the said warrant and about the possibility of expressing consent to surrender or consent to the non-application of the provision of Article 607e(1), and then the prosecutor refers the case to a circuit court which has territorial jurisdiction in that regard.

§ 3. The European warrant may be accompanied by a request for provisional arrest or another preventive measure.

§ 4. If separate provisions of Polish law stipulate that the prosecution of the person who is the subject of the European warrant is contingent upon the permission of a competent authority, before the case is referred to a court, the provision of Article 13 shall apply.

§ 5. If, apart from issuing the European warrant, a given EU Member State, at the same time, requests that the person who is the subject of the warrant be interrogated, the said person should be interrogated before the warrant is examined. The interrogation is carried out in the presence of a person indicated in the European warrant. The provision of Article 588(4) shall apply accordingly”.

The above-quoted provision specifies the purpose for surrendering the person who is the subject of the European warrant from the territory of the Republic of Poland (Article 607k(1)). It sets out the procedure in the event of receiving the European warrant (Article 607k(2) and (4)) as well as the procedure in the case where the European warrant is accompanied by a request to interrogate the person who is the subject of the said warrant (Article 607k(5)). Moreover, it provides for the possibility of issuing the European warrant together with a request to apply a preventive measure (Article 607k(3)).

As it has already been indicated, the complainant challenges the constitutionality of Article 607k of the Code of Criminal Procedure, insofar as it: 1) allows for the surrender of the person who is the subject of the European arrest warrant, even if it has not been made probable that alleged offences have been committed; 2) does not specify formal requirements which should be met by the European arrest warrant; 3) does not specify formal requirements which should be met by a translation of the European arrest warrant; 4) does not specify a requirement to attach, to the European arrest warrant, a decision on which the warrant is based; 5) does not specify a requirement to present evidence indicating that it is probable that an offence has been committed by the person who is the subject of the European arrest warrant.

The Constitutional Tribunal states that the allegation formulated this way is by no means related to the regulations included in Article 607k of the Code of Criminal Procedure, but it may be related to the guarantee contained in Article 607p of the Code of Criminal Procedure.

Consequently, as regards the allegation of the non-conformity of Article 607k of the Code of Criminal Procedure to Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution, the proceedings are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act).

Another challenged provision, Article 607l of the Code of Criminal Procedure, in the version in force at the time of adjudication in the complainant’s case, stipulated as follows:

“§ 1. With regard to surrender and provisional arrest, the court adjudicates at a sitting which may be attended by the prosecutor and the defence counsel.

§ 2. If the person who is the subject of the European warrant wishes so, the court receives his/her statement about consent to surrender or consent to the non-application of the provision of Article 607e(1), and enters it into the court minutes. The statement may not be withdrawn, which should be notified to the person who is the subject of the said warrant.

§ 3. The court’s surrender decision may be appealed against. In the case referred to in § 2, an appeal shall be lodged within a period of 3 days from the day of the decision is announced. The provisions of Article 252 shall apply accordingly”.

The above-quoted provision contains regulations on court proceedings concerning the surrender of the person who is the subject of the European arrest warrant as well as proceedings regarding the provisional arrest of that person. Moreover, it deals with the issue of appealing against the decisions made in that regard.

According to the complainant, Article 607l of the Code of Criminal Procedure is inconsistent with the indicated higher-level norms for the review, insofar as it: 1) infringes the rights and freedoms of the person who is the subject of the European arrest warrant, by not granting the right to carry out any proceedings to receive evidence to the court adjudicating on surrender; 2) infringes the rights and freedoms of the said person, making the possibility of hearing the person contingent on the request of the issuing Member State; 3) infringes the rights and freedoms of the said person, by enabling the court to issue a surrender decision, despite the fact that the suspected person has no possibility of defence which would consist in presenting his/her stance on allegations raised against him/her.

Therefore, Article 607l of the Code of Criminal Procedure has no content which would correspond to the allegation of a legislative omission as formulated above.

Consequently, as regards the allegation of the non-conformity of Article 607l of the Code of Criminal Procedure to Article 45(1) in conjunction with Article 55(4) of the Constitution, the proceedings are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act. In the light of Article 79(1) of the Constitution, it is inadmissible for the Constitutional Tribunal to adjudicate on the constitutionality of a provision which is not the legal basis of a final decision in a complainant's case.

Pursuant to Article 607m of the Code of Criminal Procedure, in the version in force at the time of adjudication in the complainant's case:

“§ 1. The court shall issue a surrender decision within a period of 60 days after the arrest of the person who is the subject of the European arrest warrant. In cases where the said person makes the statement referred to in Article 607l(2), the time limit shall be 10 days and shall run from the date on which the statement is made.

§ 2. Where in exceptional circumstances the time limits set in § 1 cannot be observed, a surrender decision may be issued within a period of another 30 days from the lapse of the said time limits. Delay should be notified to the judicial authority which has issued the European warrant, giving the reasons for the delay.

§ 3. In the case specified in Article 607k(4), the time limits referred to in § 1 and § 2 shall run from the date on which permission to surrender is obtained. If the time limits have already started running, they shall be suspended until the permission is obtained”.

The provision specifies time limits for issuing a surrender decision concerning a person who is the subject of the European arrest warrant.

When formulating the allegation concerning Article 607m of the Code of Criminal Procedure, the complainant indicated that the said provision was inconsistent with Article 55(4) in conjunction with Article 31(1), in conjunction with Article 42(2) of the Constitution, insofar as it infringed the rights and freedoms of the person who was the subject of the European arrest warrant, by imposing on the court an obligation to issue a decision within a certain time limit, thus “assuming the primacy of the pace of proceedings over the principle of thorough and reliable examination of validity of allegations raised against that person, including the examination whether it had been made probable in the European arrest warrant that the person who was the subject of that warrant had committed a given offence”.

As regards the allegation of the unconstitutionality of Article 607m of the Code of Criminal Procedure, the above conclusions drawn in the context of the allegations concerning Article 607l should be repeated here. Article 607m of the Code of Criminal

Procedure has no content which would correspond to the allegation of a legislative omission as formulated above.

As regards the allegation of the non-conformity of Article 607m of the Code of Criminal Procedure to Article 45(1) in conjunction with Article 55(4) of the Constitution, the proceedings are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act. In the light of Article 79(1) of the Constitution, it is inadmissible for the Constitutional Tribunal to adjudicate on the constitutionality of a provision which is not the legal basis of a final decision in a complainant's case.

It should be pointed out that, after the constitutional complaint under examination had been submitted, Article 607k, Article 607l and Article 607m of the Code of Criminal Procedure were amended by the Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws - Dz. U. No. 206, item 1589). The amendments introduced by the said Act have been in force since 8 June 2010. Due to the necessity to discontinue the proceedings within the scope of the allegations concerning these provisions, the amendments introduced by the above-mentioned Act will not be analysed here in detail.

Within the meaning of Article 607p of the Code of Criminal Procedure:

„§ 1. Refusal to execute the European arrest warrant shall occur in the following cases:

- 1) if the offence on which the European warrant is based is covered by amnesty under the jurisdiction of Polish criminal courts,
- 2) if a legally effective ruling has been issued against the person who is the subject of the European arrest warrant by another Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State,
- 3) if a legally effective decision has already been issued to surrender the said person to another EU Member State,
- 4) if the said person may not, owing to his/her age, be held criminally liable for the acts on which the arrest warrant is based under the Polish law,
- 5) if the execution of the European warrant violates the rights and freedoms of persons and citizens,
- 6) if the European warrant has been issued in relation to an offence committed without the use of violence for political reasons.

§ 2. If the European warrant has been issued against a Polish citizen, it may be executed provided that the act on which the said warrant is based was not committed in the territory of the Republic of Poland, or on a Polish vessel or aircraft, and constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of the commission of the offence and at the time of the receipt of the European warrant”.

The above-quoted provision indicates grounds for mandatory refusal to execute the European arrest warrant.

It has aptly been stated in the letter of the Public Prosecutor-General that it follows from the substantiation of the constitutional complaint under examination that – in the complainant's view – grounds for mandatory refusal to execute the European arrest warrant should include the case where it has not been made probable that the person who is the subject of the said warrant has committed alleged offences. Due to the use of the wording “insofar as it allows for”, it should be assumed that, according to the complainant, the unconstitutionality of the challenged provisions consists in the lack of a norm which would unconditionally prohibit the surrender of the person who is the subject of the said warrant,

and such a premiss may only be included in Article 607p(1) of the Code of Criminal Procedure.

As regards the allegation of the unconstitutionality of Article 607p(2) of the Code of Criminal Procedure, the proceedings are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act.

In the light of the above, the Constitutional Tribunal states that, in the present case, only Article 607p(1) of the Code of Criminal Procedure is subject to substantive assessment.

1.5. The inadmissibility of review of the conformity of the challenged provision to international agreements, in the course of review proceeding commenced by way of constitutional complaint.

The analysis of formal issues should also take into account the higher-level norms indicated by the complainant in the present case.

In the original wording of the constitutional complaint, the complainant indicated, as the basis of the review, Article 45(1) of the Constitution, Article 42(2) of the Constitution, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention) and Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977 No. 38, item 167; hereinafter: the ICCPR) as well as Article 55(4) of the Constitution. It should be underlined that in the substantiation for the constitutional complaint, Article 6 of the Convention is mentioned only in the context of a guarantee contained in its paragraph 3 point (a), and Article 14 of the ICCPR – only in the context of a guarantee arising from its paragraph 3 point (a). In the substantiation for the complaint, in the context of the allegation that Article 45(1) of the Constitution has been infringed, the complainant has made reference to “the principle expressed in Article 1 of the Constitution, which states that Poland is a state ruled by law”, and Article 56(1) of the Constitution, which stipulates that “the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts”.

With the allegation formulated this way, it should be pointed out that, in the course of review proceeding commenced by way of constitutional complaint, it is not possible to challenge the conformity of a provision of a statute to an international agreement. Indeed, Article 79(1) of the Constitution indicates that a constitutional complaint is a measure aimed at protecting constitutional rights and freedoms (cf. the judgment of the Constitutional Tribunal of 17 May 2004, Ref. No. SK 32/03, OTK ZU No. 5/A/2004, item 44).

Therefore, the proceedings concerning the conformity of the challenged provisions to Article 6 of the Convention and Article 14 of the ICCPR are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

1.6. The possibility of extending the scope of the allegations presented in the original wording of the constitutional complaint.

In the procedural letter of 17 October 2007, the complainant modified the original indication of the higher-level norms for the review. In the said letter, he indicated that Article 607k of the Code of Criminal Procedure was inconsistent with Article 45(1) in conjunction with Article 31(1), in conjunction with Article 41(3), in conjunction with Article 42(2) of the Constitution and, moreover, was inconsistent with Article 55(4) in

conjunction with Article 31(1) and in conjunction with Article 41(3), in conjunction with Article 42(2) of the Constitution. With regard to challenged Article 607l of the Code of Criminal Procedure, he indicated, as higher-level norms for the review, Article 45(1) in conjunction with Article 31(1), in conjunction with Article 42(2) of the Constitution. He mentioned the same higher-level norms for the review in the context of the allegation of the unconstitutionality of Article 607m and Article 607p of the Code of Criminal Procedure.

The Constitutional Tribunal states that Article 46 of the Constitutional Tribunal Act provides for a period of 3 months for submitting a constitutional complaint. The period is counted from the service of a legally effective judgment, a final decision or a different final ruling. In the substantiation for the constitutional complaint, it was stated that the decision of the Court of Appeal in Poznań issued in the complainant's case had not been served on the complainant. However, he knew its content, as on 6 April 2007 he had been served with the decision of the Circuit Court of 5 April 2007, Ref. No. III Kop 42/07, ordering the extension of the period of provisional arrest. The substantiation for the decision made reference to the substantiation for the decision of 3 April 2007 of the Court of Appeal in Poznań, Ref. No. II Akz 85/07.

In the light of the above, it should be stated that the complainant's procedural letter of 17 October 2007 could not effectively extend the range of the higher-level norms for the review, indicated in the constitutional complaint, by which the proceedings have been commenced in the case under examination.

Therefore, the substantive assessment of the constitutionality of the challenged provisions will be carried out only in the light of Article 42(2), Article 45(1) and Article 55(4) of the Constitution.

1.7. The possibility of review of the challenged provisions in the light of Article 55(4) of the Constitution.

It has been aptly pointed out in the letter of the Public Prosecutor-General that, in the course of review proceeding commenced by way of constitutional complaint, the allegation of the infringement of Article 55(4) of the Constitution may not be examined separately. The indicated provision makes general reference to constitutional rights and freedoms, without specifying which of them may be infringed during extradition. Thus, the higher-level norm for review arising from Article 55(4) of the Constitution must, in the present case, be considered not separately, but in conjunction with the other provisions indicated as higher-level norms for the review, i.e. in conjunction with Article 45(1) and Article 42(2) of the Constitution.

This means that the higher-level norms for review, in the light of which the constitutional review will be carried out in the present case, will be considered not separately but as Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution.

To sum up the above conclusions concerning formal issues, the Constitutional Tribunal states that the substantive assessment in the present case amounts to determining the conformity of Article 607p(1) of the Code of Criminal Procedure to Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution.

2. Substantive issues.

2.1. The characteristics of the challenged provisions.

The provisions challenged by the complainant are contained in Chapter 65b of the Code of Criminal Procedure. The provisions contained in that chapter have been added to

the Code of Criminal Procedure by the Act of 18 March 2004 amending the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanours (Journal of Laws - Dz. U. No. 69, item 626). The Act entered into force on 1 May 2004, i.e. on the day of Poland's accession to the EU.

The special character of the constitutional issue presented to the Constitutional Tribunal for examination is related to the fact that the provisions indicated as the subject of the allegation have been added to the Code of Criminal Procedure due to the obligation to implement the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, OJ L 190, 18.7.2002, p. 1; hereinafter: the Framework Decision). The legal framework of the European arrest warrant has been specified in the Treaty of Amsterdam of 1997, which introduced a new source of EU law – a framework decision which binds all EU Member States and obliges them to implement its regulations into their national legal systems (cf. P. Kruszyński, “Europejski nakaz aresztowania jako forma realizacji idei wzajemnej współpracy w zakresie wymiaru sprawiedliwości pomiędzy państwami Unii Europejskiej”, [in:] *Współczesne problemy procesu karnego i jego efektywności. Księga pamiątkowa prof. Andrzeja Bulsiewicza*, Marek (ed.), Toruń 2004, p. 191).

The Constitutional Tribunal has already presented its view on the issue of constitutionality of a provision of the Code of Criminal Procedure implementing the Framework Decision. In the judgment of 27 April 2005, Ref. No. P 1/05 (OTK ZU No. 4/A/2005, item 42), the Tribunal reviewed the constitutionality of Article 607t(1) of the Code of Criminal Procedure, insofar as it allows for the surrender of a Polish citizen to another EU Member State on the basis of the European arrest warrant.

Carrying out the substantive analysis of the provision challenged in the proceedings which ended with the above-mentioned judgment, the Constitutional Tribunal determined that it had jurisdiction to conduct a constitutional review of provisions implementing framework decisions.

In the Polish literature on the subject, some of the representatives of the doctrine have argued that, although the subject of the review conducted by the Tribunal was a provision of the Code of Criminal Procedure, the resulting assessment had an indirect impact on the assessment of the provisions of the Framework Decision. Some authors have stated that the Tribunal has no jurisdiction to conduct the review of provisions which result from the implementation of a framework decision (cf. P. Hofmański, “Glosa do wyroku TK z 27 kwietnia 2005 r., sygn. P 1/05”, *Państwo i Prawo* Vol. 9/2005, p. 116; S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2007, p. 598; A. Górski, A. Sakowicz, *Bariery prawne integracji europejskiej w sprawach karnych*, Warszawa 2005, p. 18).

The Constitutional Tribunal does not share those views. The aforementioned judgment affects the assessment of the Framework Decision within the scope of the ruling. However, what constitutes the subject of the adjudication is constitutional doubts referring to the provisions of national law.

It should be emphasised that the organs of the state established to carry out the constitutional review of law in other EU Member States have been in favour of the admissibility of constitutional review of national provisions implementing framework decisions, also in the context of the Council Framework Decision on the European arrest warrant. The following should be mentioned here: the opinion of the French State Council of 26 September 2002 (Ref. No. 368/282), the judgment of the Supreme Court of Cyprus of 7 November 2005 (Ref. No. 294/2005), the judgment of the Federal Constitutional Court of Germany of 18 July 2005 (Ref. No. 2 BvR 2236/04) as well as the judgment of the Constitutional Court of the Czech Republic of 3 May 2006 (Ref. No. Pl. US 66/04) – for more information see B. Nita, “Europeizacja prawa karnego a standardy konstytucyjne państw

członkowskich UE / The Europeanisation of Criminal Law and the Constitutional Standards in the Member States of the European Union”, *Zeszyty natolińskie* Issue No. 34/2009, Centrum Europejskie Natolin, Warszawa 2009. In the recent years, with regard to the constitutionality of provisions implementing the European arrest warrant, views on the substance of the issue have again been presented by the Federal Constitutional Court of Germany in the following judgments: of 3 September 2009, Ref. No.2 BvR 1826/09 and of 9 October 2009, Ref. No. 2 BvR2115/09; as well as by the Constitutional Court of Spain in its judgment of 28 September 2009, Ref. No. STC 199/2009.

In the light of the above, the Constitutional Tribunal states that it has jurisdiction to review the constitutionality of the provisions challenged by the constitutional complaint under examination.

2.2. The essence of the European arrest warrant.

In accordance with Article 1(1) of the Framework Decision, the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

In its judgment of 27 April 2005, Ref. No. P 1/05, the Constitutional Tribunal already indicated that the concept underlying the Council Framework Decision on the European arrest warrant was set in the specific realities of the current stage of development of social, political and legal relations within the EU. The concept of the European arrest warrant remains related to the principle of free movement of persons within the EU, adopted in the Convention implementing the Schengen Agreement and concerning the gradual abolition of checks at the common borders, signed at Schengen on 19 June 1990, (OJ L 239, 22.9.2000, p. 19: special edition – Polish version – OJ, ch. 19, t. 2, p. 9). A negative consequence of free movement of persons and of the absence of checks at the common internal borders is the difficulty in prosecuting and trying the perpetrators of offences. This has made it necessary to develop new and more effective ways of combating crime.

The Tampere European Council of 1999 indicated a priority task to develop a common area of cooperation among the judicial authorities of the EU Member States (cf. M. Płachta, “Europejski nakaz aresztowania (wydania): kłopotliwa rewolucja w ekstradycji”, *Studia Europejskie* Issue No. 3/2002, p. 54), intending to create a situation where judicial cooperation in criminal matters would be based on the principle of mutual recognition of judicial decisions (for more, see M. Kula, “Ewolucja III filaru Unii Europejskiej”, [in:] *Zwalczanie przestępczości w Unii Europejskiej. Współpraca sądowa i policyjna w sprawach karnych*, A. Górski, A. Sakowicz (eds.), Warszawa 2006, p. 23 and the subsequent pages, as well as A. Górski, A. Sakowicz, “Europejski nakaz aresztowania i jego implementacja do prawa krajowego”, *ibidem*, p. 359 and the subsequent pages; M. Wasmeier, “The ‘Battle of the Pillars’: Does the European Community have the Power to Approximate National Criminal Law?”, *European Law Review*, Issue No. 5/2004, pp. 613-635; I. Bantekas, “The Principle of Mutual Recognition in the EU Criminal Law”, *European Law Review*, Issue No. 3/2007, pp. 365-385; L. Yli-Vakkuri, “Building upon the Schengen Acquis”, *ERA-Forum* Issue No. 2/2001, p. 53 and the subsequent pages).

Framework decisions bind only with regard to a set goal, leaving the choice of the form and measures to be applied at the discretion of particular Member States of the European Union.

The European arrest warrant is based on the principle of mutual recognition of judicial decisions issued by foreign judicial authorities. This is clearly indicated in point 6 of the Preamble to the Framework Decision. The principle of mutual recognition implies

the acceptance of differences among particular legal systems and mutual trust in the administration of justice by foreign judicial authorities.

The principle of mutual recognition, enshrined in Article 28 of the Treaty establishing the European Community (hereinafter: the EC Treaty), is intrinsically linked with private law (for more information see D.C. Horng, *The Principle of Mutual Recognition, the European Union's Practice and Development, World Competition* 1999, p. 135 and the subsequent pages). The principle has been implemented in criminal law, with the indication of the "basis" shared by all EU Member States, which is constituted by the standards for the protection of human rights, set by the Convention for the Protection of Human Rights and Fundamental Freedoms, which binds all the States; this is to eliminate striking discrepancies in the level of the protection of those rights in particular Member States (see B. Nita, "Europejski nakaz aresztowania – europeizacja prawa karnego a standardy konstytucyjne państw członkowskich Unii Europejskiej", *Państwo i Prawo* Vol. 5/2007, pp. 57-58 and the literature on the subject cited therein).

The European arrest warrant is extradition within the meaning of Article 55 of the Constitution (cf. the judgment of the Constitutional Tribunal of 27 April 2005, Ref. No. P 1/05). Therefore, with regard to that legal institution, guarantees are applied which the Constitution links with extradition.

2.3. The content of the provisions indicated as higher-level norms for the review in the present case.

Article 45(1) of the Constitution, which expresses the principle of a fair trial, reads as follows: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court".

In its interpretation of the principle of a fair trial, the Constitutional Tribunal has indicated on a number of occasions that the content of the said principle comprises, in particular, the following: the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state with particular characteristics (impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court. In the more recent jurisprudence, what has been considered as an element of the right to a fair trial is also the right to have cases examined by the organs of the state with an adequate organisational structure and position (cf. e.g. the judgments of the Constitutional Tribunal of: 16 March 1999, Ref. No. SK 19/98, OTK ZU No. 3/1999, item 36; 2 April 2001, Ref. No. SK 10/00, OTK ZU No. 3/2001, item 52; 12 March 2002, Ref. No. P 9/01, OTK ZU No. 2/A/2002, item 14; 20 September 2006, Ref. No. SK 63/05, OTK ZU No. 8/A/2006, item 108; 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108).

In the substantiation for the constitutional complaint under examination, the complainant argues that the challenged provisions infringes his constitutional right to a fair trial, as regards the obligation to devise a proper court procedure which complies with the requirements of a fair and public hearing.

The right to defence, as specified in Article 42(2) of the Constitution, guarantees that anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. Such a person may, in particular, choose counsel or avail himself/herself - in accordance with principles specified by statute - of counsel appointed by the court. The complainant makes reference to the first sentence of that provision, indicating that, due to the shortcomings of the challenged provisions, there is no possibility of undertaking effective defence before the court adjudicating on surrender on the basis of the European arrest warrant.

Article 55(4) of the Constitution, indicated as a higher-level norm for the review in the present case, has been added by the Act of 8 September 2006 amending the Constitution of the Republic of Poland (Journal of Laws - Dz. U. No. 200, item 1471; hereinafter: the Act of 8 September 2006). It reads as follows: “The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizen”.

The provision under analysis refers to two different situations. In the part where the provision forbids the extradition of a person suspected of the commission of a crime for political reasons but without the use of force, it is not related to the situation of the complainant.

What is significant here is the part of the said provision from which it follows that extradition is forbidden if it were to violate “rights and freedoms of persons and citizens” (Article 55(4) *in fine*). As it has been indicated above, the higher-level norm for the review arising from Article 55(4) of the Constitution will be considered in conjunction with the other provisions cited as a higher-level norm in the present case, i.e. in conjunction with Article 45(1) and Article 42(2) of the Constitution.

2.4. The assessment of conformity of the challenged provision to the indicated higher-level norms for the review.

As it has been mentioned above, with regard to the challenged provision, the complainant has formulated two kinds of allegations.

Firstly, he has indicated that the Code of Criminal Procedure does not specify formal requirements which should be met by the European arrest warrant, on the basis of which the person who is the subject of the European arrest warrant is to be surrendered from the territory of the Republic of Poland. It does not specify requirements concerning the proper way of translating the European arrest warrant. The allegations raised in that context by the complainant with regard to the translations of the European arrest warrant which were used by the court in his case, are not subject to substantive review. Indeed, the Constitutional Tribunal, as a court of law, and not a court of facts, has no jurisdiction to assess the correctness of the application of law (cf. e.g. the judgment of the Constitutional Tribunal of 8 December 2009, Ref. No. SK 34/08, OTK ZU No. 11/A/2009, item 165).

Secondly, the complainant alleged that adjudicating on the surrender of a Polish citizen without the court’s examination whether it was probable that alleged acts had been committed by the suspect was inconsistent with the Constitution. The European arrest warrant contains only information about evidence gathered in a given case and mentions a ruling which has been delivered, and on the basis of which the said warrant has been issued. The Code of Criminal Procedure does not include a requirement to enclose a decision on which the European arrest warrant is based and, moreover, it does not specify a requirement to present evidence indicating that it is probable that an offence has been committed by the person who is the subject of the said warrant.

Consequently, it is possible to surrender the person who is the subject of the European arrest warrant, despite that fact that the commission of alleged acts has not been made probable.

Pursuant to Article 1(1) of the Framework Decision, the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The above provision of the Framework Decision has been implemented into the Polish legal system by Article 607k of the Code of Criminal Procedure, which indicates the

purpose of surrender on the basis of the European arrest warrant. Article 607k(1) concerns the surrender of the person who is the subject of the said warrant from the territory of the Republic of Poland. Such surrender is carried out for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order in the territory of another EU Member State.

It should be emphasised that the allegations raised by the complainant solely refer to a situation where surrender on the basis of the European arrest warrant serves the purpose of conducting a criminal prosecution. This clearly follows from the substantiation of the complaint. Due to the abstract and specific character of a constitutional complaint as a measure to commence review proceedings before the Constitutional Tribunal, the effective commencement of proceedings concerning the constitutionality of the challenged provision, also with regard to a situation where surrender on the basis of the European arrest warrant occurs for the purpose of executing a penalty, would not actually be possible. The constitutional doubts raised by the complainant are linked to the actual circumstances in which surrender occurred for the purpose of conducting a criminal prosecution.

Moreover, attention should be drawn to the fact that the allegations raised in the constitutional complaint under examination are related to a situation where surrender concerns a Polish citizen. This circumstance is not without significance, when considering the fact that Article 55 of the Constitution renders a guarantee protecting against extradition differently in the context of Polish citizens than with regard to persons who do not have Polish citizenship.

Article 55(1) of the Constitution, as a rule, guarantees protection against extradition to Polish citizens. It provides for exceptions which are stipulated in the two subsequent paragraphs of that Article.

Pursuant to paragraph two: “Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request”.

Allowing for an exception from the hitherto absolute protection of Polish citizens against extradition, the new wording of Article 55(2) of the Constitution has restricted it in two ways.

It follows from Article 55(3) of the Constitution that the said restrictions do not apply to extradition granted upon a request made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body. The said provision refers to the surrender of a Polish citizen to International Criminal Courts and is not related to the European arrest warrant. Indeed, the Framework Decision solely concerns relations among the EU Member States.

Further obstacles to extradition are set out in Article 55(4) of the Constitution. It reads as follows: “The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens”. This prohibition is not restricted by the premiss of citizenship.

Challenged Article 607p(1) of the Code of Criminal Procedure is therefore subject to constitutional assessment in the present case only insofar as it specifies grounds for mandatory refusal to execute the European arrest warrant issued for the purpose of conducting a criminal prosecution against a Polish citizen.

Taking a stance on the allegations formulated in this way, it should be stated as follows.

In the jurisprudence of the Supreme Court and in the literature on the subject, it is unanimously assumed that the phrase “a criminal prosecution” which is used in Article 607k(1) of the Code of Criminal Procedure should be interpreted in the light of the provisions in force in the Member State issuing the European arrest warrant. The provisions of the executing Member State are not relevant here (cf. the resolution of the Supreme Court of 20 July 2006, Ref. No. I KZP 21/06, OSNKW No. 9/2006, item 77, and also approving commentary to that resolution by A. Lacha, OSP No. 6/2007, item 70 as well as R. A. Stefański, “Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2006 r.”, *Wojskowy Przegląd Prawniczy* No. 2/2007, p. 92).

In its decision of 8 December 2008, Ref. No. V KK 332/08 (*Biuletyn Prawa Karnego* No. 1/2009, item 84), the Supreme Court has presented the view that the Polish court which executes the European arrest warrant does not examine the admissibility of the issue thereof in the light of Article 607c(1) included in Chapter 65a of the Code of Criminal Procedure, which regulates a procedure for requesting another EU Member State to surrender the person who is the subject of the European arrest warrant, and not in Chapter 65b of the Code of Criminal Procedure, which contains the provision under discussion. According to the indicated decision of the Supreme Court, the assessment of the admissibility of surrendering the person who is the subject of the European arrest warrant should only be conducted in the light of Article 607p and Article 607r of the Code of Criminal Procedure, and only with reference to the premisses enumerated in those provisions, the Polish court may refuse to execute the said warrant. By contrast, the examination of the European arrest warrant in the light of premisses concerning the issue of the warrant is possible only within a very narrow scope, and only as regards meeting formal requirements by the warrant. In accordance with the stance of the Supreme Court, the court of the executing Member State, may consider whether the European arrest warrant has been issued by a competent judicial authority and whether it contains elements which are essential for declaring it compliant with formal requirements. A review may not, however, lead to substantive adjudication on the lack of grounds for the execution of the warrant.

A similar stance has been taken by the Court of Appeal in Kraków (the decision of 15 July 2004, Ref. No. II AKz 257/04, *Krakowskie Zeszyty Sądowe* No. 9/2004, item 41). In accordance with that decision, the European arrest warrant is subject to review (Article 607k of the Code of Criminal Procedure), but there may be no refusal to execute it, as long as it meets formal requirements (Article 607c of the Code of Criminal Procedure), and there are no negative premisses arising from Article 607p and Article 607r of the Code of Criminal Procedure. The difference here amounts to the application of Article 607c of the Code of Criminal Procedure in proceedings to execute the European arrest warrant issued by another Member State.

The above-cited view of the Supreme Court should be considered in conjunction with its previous stance, expressed in the resolution of 20 July 2006, Ref. No. I KZP 21/06. In the indicated resolution, in the context of Article 607k(1) and, to put it more precisely, in the context of the purpose of surrender on the basis of the European arrest warrant, specified therein, the Supreme Court has stated that the executing judicial authority may

refuse to surrender the person who is the subject of the European arrest warrant, if it determines that the warrant has been issued contrary to the premisses of admissibility of the issue thereof. Also, it has stated that what determines whether the person who is the subject of the European arrest warrant is surrendered for the purpose of conducting a criminal prosecution is not the provisions of the executing State, but the provisions of the issuing Member State, interpreted in the light of the content of the Framework Decision on the European arrest warrant.

The opinions of the representatives of the doctrine on this issue are divergent. A view in favour of the admissibility of examining that issue, in the Polish literature on the subject, has been expressed by T. Grzegorzczak (cf. T. Grzegorzczak, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz*, Warszawa 2008, p. 1290). Such a view is also shared by M. Hudzik, who indicates that the European arrest warrant, similarly to extradition, does not allow for surrendering requested persons for the purpose of conducting a prosecution other than criminal prosecution. Consequently, a request for surrender for the purpose of conducting a different prosecution must be regarded as a circumstance determining refusal to execute the warrant (cf. M. Hudzik, "Dobre narzędzie, niedobra sprawa", *Rzeczpospolita* Issue No. 132/2006, p. 7; see also: "Europejski nakaz aresztowania a nieletni sprawcy czynów zabronionych", *Europejski Przegląd Sądowy* No. 8/2006, p. 22). A similar view is also shared by P. Hofmański, E. Sadzik and K. Zgryzek, who state that the court adjudicating on the execution of the European arrest warrant is obliged to examine whether the issuing judiciary authority which has fulfilled the premisses of the issue of the said warrant (cf. P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*, Vol. III. Commentary to Articles 468-682, P. Hofmański (ed.), Warszawa 2007, p. 632).

Such a possibility is rejected by A. Górski and A. Sakowicz, in the light of the principle of mutual trust, which - in the view of those authors - excludes the admissibility of examination whether the European arrest warrant has been issued in accordance with the law of the issuing Member State (cf. A. Górski, A. Sakowicz, [in:] K. T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 1289). The possibility of examining the purpose for the issue of the European arrest warrant is also rejected by K. Malinowska-Krutul, in "Ekstradycja a przekazanie w ramach europejskiego nakazu aresztowania" (*Prokuratura i Prawo* Issue No. 6/2007, p. 100), who states that there could be no other reasons for refusal to execute the European arrest warrant than the circumstances indicated in Article 607p and Article 607r of the Code of Criminal Procedure, e.g. recognising by a Polish court that there have been no circumstances set out in Article 607k, i.e. the lack of an appropriate "purpose" for the European arrest warrant, which is conducting a criminal prosecution.

The Constitutional Tribunal has no jurisdiction to review the constitutionality of the application of law. At the same time, in accordance with the interpretation of the principle of protection of citizens' trust in the state and its laws in the jurisprudence of the Constitutional Tribunal, what must be subject to constitutional protection is not only citizens' trust in the law, but - above all - trust in the interpretation of law assumed in the practice of applying the law by the organs of the state, in particular where the practice is consistent and well-established at a given point in time, and the provisions - on the basis of which this practice has been established - do not allow to accept it as manifestly unfounded. It follows from the principle of protection of citizens' trust in the state and its laws that the addressees of legal norms may assume that the content of the binding law is exactly the same as it has been specified by courts, especially when specified by the Supreme Court (cf. the judgment of the Constitutional Tribunal of 9 October 2001, Ref. No. SK 8/00, OTK ZU No. 7/2001, item 211).

Referring the above statement to the allegations formulated by the complainant in the context of Article 607p(1) of the Code of Criminal Procedure, it should be noted that, in the light of Article 55(1) of the Constitution, which – as a rule – provides for a prohibition against extradition of Polish citizens, as well as in the light of Article 55(2) of the Constitution, which introduces an exception to the prohibition against surrendering Polish citizens, provided that other restrictions indicated in that provision are adhered to, the verification of the purpose of issuing the European arrest warrant is necessary. As it has been indicated above, such verification is admissible in the jurisprudence of courts.

In the context of the above jurisprudence, there is a different situation as regards the admissibility of the examination of the European arrest warrant in the light of the premisses for its issue. In accordance with the stance presented in jurisprudence, it is possible only within a very narrow scope, and only as regards meeting formal requirements by the warrant. The Constitutional Tribunal states that the court of the executing Member State may consider whether the European arrest warrant has been issued by a competent judicial authority and whether it contains elements which are essential for declaring it compliant with formal requirements. The said review may not, however, include substantive adjudication on the existence or lack of grounds for executing the warrant.

What should be distinguished from the review of the purpose for issuing the European arrest warrant, and formal premisses which it should fulfil, is the verification of grounds for prosecuting the person who is the subject of the European arrest warrant. In particular, this concerns the possibility of examining an evidential basis.

As it has been indicated above, the potential source of the legislator's positive obligation should be looked for in provisions stipulating the grounds for refusal to execute the European arrest warrant. What is relevant for the allegation of a legislative- omission is Article 607p(1) of the Code of Criminal Procedure, specifies grounds for refusal to execute the European arrest warrant.

With regard to the possibility of verifying grounds for the prosecution of the person who is the subject of the European arrest warrant, the Court of Appeal in Kraków has expressed its stance in its decision of 17 November 2004, Ref.No. AKz 403/04 (*Krakowskie Zeszyty Sądowe* No. 11/2004, item 19). With reference to Article 10 of the Framework Decision on the European arrest warrant, the court indicated that the mechanism of the European arrest warrant was based on a high level of confidence between Member States which execute the warrant in accordance with the principle of mutual recognition of judicial decisions. In addition, it also drew attention to the fact that still before the amendment introducing the European arrest warrant, in the context of regulations concerning extradition, in the jurisprudence there was a view that the purpose of extradition proceedings was merely the adjudication on the legal admissibility of surrender. It was regarded sufficient to make the allegation about the commission of the offence probable, by means of filing an extradition request by a an authority of a given state (cf. also the decision of 25 August 1999 of the Court of Appeal in Katowice, Ref. No. II AKz 251/99 *Krakowskie Zeszyty Sądowe* No. 10/1999, item 63. Also, in P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...*, p. 633; a different view in R. Kmiecik, "Kilka uwag o prawnodowodowych i konstytucyjnych aspektach sprawy Jakuba T.", *Palestra* Issue No. 11-12/2008, p. 177; cf. also M. Wąsek-Wiaderek, "Dopuszczalność badania przesłanek wystąpienia z europejskim nakazem aresztowania przez sąd orzekający o jego wykonaniu", [in:] *Studia i Analizy Sądu Najwyższego*, Vol. II, K. Ślęzak, W. Wróbel (eds.), Warszawa 2008, pp. 127-150).

Considering that issue from the constitutional perspective, attention should be drawn to the wording of Article 55(1) and Article 55(4) of the Constitution. As it has already been indicated, Article 55(1) of the Constitution, in principle, guarantees

prohibition against the extradition of Polish citizens, and the indicated guarantee refers not only to surrender on the basis of “classic” extradition, executed in accordance with the provisions contained in Chapter 65 of the Code of Criminal Procedure, but also to surrender carried out on the basis of the European arrest warrant, regulated in Chapter 65a and Chapter 65b of the Code of Criminal Procedure (cf. the judgment of the Constitutional Tribunal of 27 April 2005, Ref. No. P 1/05).

The prohibition against extradition arising from Article 55(4) of the Constitution, in the situation if the execution of extradition violates “rights and freedoms of persons and citizens”, constitutes – apart from premisses indicated in Article 55(2) of the Constitution – an additional restriction on the admissibility of extradition.

The use of the expression “violate rights and freedoms of persons and citizens” may raise doubts as to whether the provision under analysis refers to the rights and freedoms specified in the Constitution alone, or whether also to the freedoms and rights guaranteed by the provisions of international law, including the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is indicated in the literature on the subject that the interpretation of that expression should be broad and ought to comprise the rights which are guaranteed by the provisions of the acts of international law that bind Poland, as well as the rights and freedoms protected by the Constitution (cf. B. Nita, “*Ograniczenia ekstradycji po zmianie art. 55 Konstytucji RP a europejski nakaz aresztowania*”, *Przegląd Sejmowy* No. 2/2008, p. 93 and the subsequent pages).

Article 607p of the Code of Criminal Procedure, partially constitutes the implementation of Article 3 of the Framework Decision on the European arrest warrant.

In accordance with the indicated provision of the Framework Decision on the European arrest warrant, grounds for mandatory refusal to execute the European arrest warrant, as well as the grounds for optional refusal to execute the warrant which are specified in Article 607r of the Code of Criminal Procedure, are not exhaustive in character (cf. also A. Lach, “*Problemy funkcjonowania europejskiego nakazu aresztowania*”, *Europejski Przegląd Sądowy* No. 11/2006, p. 24 and the subsequent pages). In particular, point 13 to the Preamble of the indicated Framework Decision rules out the admissibility of surrender, if there was a serious risk related thereto that in the Member State to which the accused person is to be surrendered, “he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. Due to the fact that the members of the Council of Europe are bound by the European Convention on Human Rights, such a danger is considered to be unlikely (cf. B. Nita, *Europejski nakaz aresztowania ...*, p. 58)

In accordance with Article 607p(1)(5), a ground for mandatory refusal to execute the European arrest warrant is respect for the protection of the rights and freedoms of persons and citizens. The execution of the European arrest warrant shall be refused if it infringed on the indicated rights and freedoms.

The analysed grounds for refusal to execute the European arrest warrant have been added to the Code of Criminal Procedure by the Act of 27 October 2006 amending the Code of Criminal Procedure (Journal of Laws - Dz. U. No. 226, item 1647). The indicated amendment is related to the amendment to Article 55 of the Constitution, introduced by the Act of 8 September 2006.

It should be noted that Article 55(4) of the Constitution *in fine* and also Article 607p(1)(5) of the Code of Criminal Procedure introduce a new obstacle which is absent in the Framework Decision, as regards refusal to execute the European arrest warrant. This concerns both Polish citizens as well as any other persons who have no Polish citizenship, regardless of the type of offence committed.

The Framework Decision on the European arrest warrant contains no regulations which would concern proceedings to receive evidence before the court adjudicating on surrender.

As it has been indicated above, according to the decision of 8 December 2008 of the Supreme Court, Ref. No. V KK 332/08, the assessment of the admissibility of surrendering the person who is the subject of the European arrest warrant should only be conducted in the light of Article 607p and Article 607r of the Code of Criminal Procedure; only by relying on the premisses mentioned in those provisions, a Polish court may refuse to execute the warrant. In the above-mentioned decision, the Supreme Court at the same time ruled out the admissibility of substantive adjudication on the lack of grounds for the execution of the European arrest warrant, when such adjudication was to follow verification of the fulfilment of formal requirements by the warrant.

In the case of “classic” extradition, i.e. surrender carried out on the basis of provisions contained in Chapter 65 of the Code of Criminal Procedure, the scope of proceedings to receive evidence before the court adjudicating on the legal admissibility of extradition is also limited. In principle, evidence may be examined here solely in the context of the legal admissibility of surrender.

In the context of “classic” extradition, in the literature on the subject, it is stated that during proceedings concerning the legal admissibility of extradition, it is inadmissible to determine the liability of a person who is the subject of an extradition request for the commission of an offence (see L. Gardocki, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S. M. Przyjemski, R. A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz*, Vol. III, Warszawa 2004, p. 884; T. Grzegorzczak, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz*, Warszawa 2008, p. 1266; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...*, p. 584).

Explanations provided by the person who is the subject of an extradition request constitute a means of evidence in proceedings before the court adjudicating on the legal admissibility of extradition. By contrast, in the case of a well-founded motion of a said person, who is to be surrendered for the purpose of conducting a criminal prosecution against him/her, the court should undertake the examination of evidence that is available in the territory of the state. The evidence may be examined not only upon the motion of the said person, but also upon the motion of the prosecutor or by the court *ex officio* (Article 167 of the Code of Criminal Procedure shall apply here). It is indicated that the basis for dismissal of a motion concerning evidence may, in this context, be Article 170(1) of the Code of Criminal Procedure (see S. Steinborn, [in:] J. Grajewski, L. K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz, tom 2 (art. 425-673)*, Kraków 2006, p. 703).

It is assumed in jurisprudence that Article 604 of the Code of Criminal Procedure, which refers to “classic” extradition, may separately constitute the basis for dismissing a motion concerning evidence in a situation where, by means of the motion, a party makes a request for the examination of evidence which is not available in the territory of the state (cf. the decision of 18 January 2006 issued by the Court of Appeal in Lublin, Ref. No. II AKz 2/06, *Prokuratura i Prawo* (supplement) No. 6/2006, item 29).

As it has been indicated by the Court of Appeal in Lublin (the decision of 5 May 2005, Ref. No. II AKz 114/05 (OSA No. 9/2007, item 44), there is a need for examining indispensable evidence, in the course of proceedings regulated by Chapter 65 of the Code of Criminal Procedure, when this is required by the substantive law premisses of substantive adjudication, which are referred to in Article 604(1) of the Code of Criminal Procedure, i.e. the premisses of admissibility of surrendering the requested person. They

require the court to *ex officio* consider relevant evidence (available within the State), as part of the obligation provided for in Article 167 of the Code of Criminal Procedure.

The Constitutional Tribunal states that the view presented in the above ruling is additionally justified by the current wording of Article 55 of the Constitution. What is meant here is the guarantee contained in Article 55(4) *in fine*, in accordance with which extradition shall be forbidden if it violates the rights and freedoms of persons and citizens.

It has been aptly stated by the Public Prosecutor-General that the provisions implementing the Framework Decision into the Polish legal system do not provide for the examination of grounds for issuing the European arrest warrant by the courts of particular EU Member States. When considering issues which, to a large extent, concern that circumstance, one should take into account the wording of point 12 of the Preamble to the Framework Decision, which indicates that: “This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media”.

The Constitutional Tribunal, just as other organs of public authority which apply the law in the EU Member States, is obliged to assume an interpretation of national provisions which will be consistent with the EU law, i.e. such an interpretation which will allow to achieve the aim indicated in a framework decision (cf. the judgment of the Court of 16 June 2005, in the case *Maria Pupino*, Ref. No. C-105/03). However, interpretation consistent with the EU law has its limits. Delineating the boundaries of the obligation, the Court of Justice noted that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national criminal law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.

In the light of the above, the Constitutional Tribunal states that the assessment of the constitutionality of the challenged provision, in the context of the higher-level norms for review indicated in the present case, requires taking into account the wording of point 12 of the Preamble to the Framework Decision.

The Constitutional Tribunal shares the view of the Public Prosecutor-General that the principle of mutual trust should prevail when interpreting the provisions on the European arrest warrant. However, this statement does not solve the problem of possible unconstitutionality of provisions constituting the implementation of regulations based on the principle of mutual recognition.

It is worth making reference here to the views presented by the European Court of Human Rights, as regards guarantees enshrined in the European Convention on Human Rights in relation to extradition. In the statement of reasons for its judgment of 19 February 2008, Ref. No. P 48/06 (OTK ZU No. 1/A/2008, item 4), the Constitutional Tribunal stated that lowering the constitutional standard, due to the necessity to take into account the provisions of the Convention when interpreting constitutional guarantees, would be tantamount to the non-conformity of a statutory regulation to the Constitution.

In the judgements delivered in the case of *Bozano v. France* (of 2 December 1987, Application No. 9990/82) and the case of *Mohamoud Askar against the United Kingdom* (of 16 October 1995, Application No. 26373/95), the European Court of Human Rights stated that the right which might be infringed during extradition proceedings was the right to a fair trial, guaranteed in Article 6 of the Convention. The case concerned the infringement of the said right in the country to which the person was extradited. Such a stand was taken by the Supreme Court in its decision of 29 July 1997, Ref. No. II KKN 313/97, OSNKW No. 9-10/1997, item 85).

However, in the case under examination, there is a different situation. Article 55(4) of the Constitution in conjunction with Article 45(1) and Article 42(2) of the Constitution are to constitute the context for the assessment of constitutionality of provisions which concern court proceedings in the executing Member State, and not proceedings in the issuing Member State.

It is obvious that the guarantee arising from Article 6 of the European Convention on Human Rights binds proceedings carried out in the Member State which adjudicates on the execution of an extradition request/the European arrest warrant.

What should be stressed here once again is the fact that also point 12 of the Preamble to the Framework Decision declares the inviolability of the constitutional principles of the EU Member States, as regards respect for the right to a fair trial.

Undoubtedly, assuming the role of the accused in a general sense (a passive party to criminal proceedings) implies discomfort of the necessity to submit to the stringent rules of proceedings.

The Constitutional Tribunal has on a number of occasions stated in its jurisprudence that guaranteeing the right to defence is necessary in any repressive incidental proceedings, even if it does not cause acute interference with constitutional rights and freedoms (cf. e.g. the judgment of the Constitutional Tribunal of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129).

From the point of view of the guarantee of a fair trial (Article 45(1) of the Constitution), it is necessary to ensure the exercise of the right to defence. This is required, due to Article 2 of the Constitution, by any reliable procedure. A person against whom proceedings related to negative consequences are instituted must be provided with possibilities to defend himself/herself in a way which is adequate to the aim of the proceedings (Article 42(2) of the Constitution).

The execution of the European arrest warrant entails surrendering the person who is the subject of the said warrant from the territory of the Republic of Poland to another EU Member State. In the case of adjudicating on surrender based on the European arrest warrant, the degree of interference with the rights and freedoms of the person who is the subject of the said warrant is considerable. Moreover, proceedings aimed at the execution of the European arrest warrant may also have another negative aspect; namely they may entail applying a preventive measure in the form of provisional arrest (Article 607k(3) of the Code of Criminal Procedure).

In the view of the Public Prosecutor-General, the aim of proceedings concerning surrender is to surrender or refuse to surrender the requested person, and not to adjudicate

on the guilt of the person and the penalty for the act mentioned in the European arrest warrant. Therefore, the right to a hearing does not have to be guaranteed within the scope of verifying evidence confirming the commission of acts mentioned in the European arrest warrant.

The scope of jurisprudence of the court adjudicating on the execution of the European arrest warrant is primarily delineated by the Constitution, and above all by relevant guarantees set out in Article 55(4) in conjunction with Article 45(1) and Article 42(2) of the Constitution. Since, pursuant to Article 30 of the Constitution, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens, and the indicated provision of the Constitution specifies a subjective right (cf. K. Działocha, “Konstytucyjna koncepcja prawa i jego źródeł w orzecznictwie Trybunału Konstytucyjnego” [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, M. Zubik (ed.), Warszawa 2006, p. 303 and the subsequent pages), then – on the basis of Article 607p(1)(5) of the Code of Criminal Procedure – it should be possible to refuse to execute the European arrest warrant, in the case where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on which the warrant is based. Such a conviction may arise from findings made due to the initiative of the person who is the subject of the European arrest warrant, his/her defence counsel, the prosecutor as a party to the proceedings, as well as from findings made due to the initiative of the court adjudicating on the execution of the warrant, or from findings arising from the facts which are known to the court.

The ground for the mandatory execution of the European arrest warrant, specified in Article 607p(1)(5) of the Code of Criminal Procedure, also comprises a situation where the description of the act is imprecise to the extent which makes it impossible to adjudicate on the admissibility of surrender, i.e. to the extent which makes it impossible to determine whether there are grounds for mandatory or optional refusal to execute the European arrest warrant (Article 607p and Article 607r of the Code of Criminal Procedure).

The Constitutional Tribunal states that the European arrest warrant must clearly indicate in relation to which act it has been issued. Otherwise, the court adjudicating on the execution of the warrant could not believe that it is obvious that the person who is the subject of the European arrest warrant has committed the act on which the said warrant is based. An imprecise description of the act would make it impossible to apply, within the scope specified above, the premiss of mandatory refusal to execute the European arrest warrant set out in Article 607p(1)(5) of the Code of Criminal Procedure. Indeed, as it has been indicated, this provision provides for refusal to execute the European arrest warrant when it is obvious for the court adjudicating on the execution of the said warrant that the prosecuted person has not committed the act on which the arrest warrant is based. Therefore, without a sufficiently precise description of a given act, the premiss of refusal to execute the said warrant understood this way would be illusory.

As it has been indicated above, proceedings aimed at the execution of the European arrest warrant may also have another negative aspect; namely they may entail applying a preventive measure in the form of provisional arrest, which follows from Article 607k(3) of the Code of Criminal Procedure. The said provision, in the version in force at the time of adjudication in the complainant's case, read as follows: “A European warrant may be accompanied by a request for provisional arrest or another preventive measure”. In the context of that regulation, there is no unanimity in the jurisprudence of courts as to the admissibility of verifying the evidential basis of the request for surrender on the basis of the European arrest warrant. Against such a possibility was the Court of Appeal in Katowice (the decision of 25 October 2006, Ref. No. II AKz 685/06 (*Krakowskie Zeszyty*

Sądowe No. 1/2007, item 101). A different stance was presented by the Court of Appeal in Katowice in its decision of 23 August 2006, Ref. No. II AKz 518/06, *Krakowskie Zeszyty Sądowe* No. 1/2007, item 99). The view ruling out the admissibility of examination of evidential basis would, at the same time, rule out the admissibility of examination of a general premiss, the fulfilment of which, in accordance with Article 249(1) of the Code of Criminal Procedure, determines the admissibility of provisional arrest (cf. the decision of the Court of Appeal in Katowice dated 25 October 2006, Ref. No. II AKz 685/06). Article 607k(3), in the version which is currently in force, stipulates that: “upon the motion of the prosecutor, the circuit court may order provisional arrest, setting the period thereof for the time indispensable for the surrender of the requested person”. The said regulation refers to a situation where surrender is carried out for the purpose of conducting a criminal prosecution. In the case where surrender is carried out for the purpose of executing a penalty, the sufficient basis for provisional arrest is a legally valid sentence decision or other ruling constituting the basis for the deprivation of liberty of the requested person (Article 607k(3) of the Code of Criminal Procedure *in fine*).

Taking the above into consideration, the Constitutional Tribunal states that, from the point of view of the Constitution, it would be impossible to accept a situation where the court adjudicating on provisional arrest for the person who is the subject of a request for surrender for the purpose of conducting a prosecution - after having determined that the application of that preventive measure is ruled out, as it does not fulfil the general premiss of provisional arrest by the fact that the person to be surrendered has not committed the alleged act – would still be obliged to surrender that person.

The Constitutional Tribunal states that taking into account the above-mentioned circumstances – i.e. 1) a situation where it is obvious for the court adjudicating on the execution of the European arrest warrant that the person who is the subject of the said warrant has not committed the act on the basis of which the European arrest warrant has been issued, and 2) in the case where the description of the act on the basis of which the European arrest warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant – is possible within the scope of the ground for non-execution specified in Article 607p(1)(5) of the Code of Criminal Procedure, rendered in the Constitution in its Article 55(4). It is of secondary importance how the above obstacle to surrender will be considered in a specific case, and in particular whether refusal to surrender will be preceded by requesting the issuing Member State, in accordance with Article 607z of the Code of Criminal Procedure, to complete the missing information and, at the same time, indicate new circumstances revealed in the case, in the hope that relying on that circumstance will result in the withdrawal of the European arrest warrant by the issuing Member State.

The Constitutional Tribunal emphasises that the above statement should not be regarded as tantamount to allowing the court adjudicating on the execution of the European arrest warrant to carry out detailed proceedings to receive evidence with regard to the guilt of the person who is the subject of the said warrant.

It is right to state that in the case of surrender to another EU Member State on the basis of the European arrest warrant the level of confidence in the validity of the request for surrender should be higher than in the case of surrender on the basis of a “classic” extradition request to another State which is not necessarily bound by at least the minimum level of guarantees set by the European Convention on Human Rights. On the other hand, in the light of the higher-level norms for the constitutional review in the present case, it would be impossible to accept the unconditional surrender of the person who is the subject of the European arrest warrant in the above-mentioned situations.

Bearing in mind that Article 607p(1)(5) of the Code of Criminal Procedure, which repeats – at the statutory level – the content of Article 55(4) of the Constitution, has capacious content, and in the case where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on the basis of which the European arrest warrant has been issued, as well as when the description of the act on the basis of which the said warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant, it should be assumed that – within the above-mentioned scope – the said provision is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.