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PREREQUISITES FOR EARLY CONDITIONAL RELEASE IN THE INTERPRETATIONS OF REGIONAL AND APPEALS COURTS

Conditional release, as emphasized in the Recommendation concerning conditional release,¹ is one of “the most effective and constructive ways to prevent recidivism and to promote return to a life in the society as a part of planned, supported, and supervised reintegration of prisoners with the society.”

This institution of conditional release provides an opportunity for the release, earlier than provided for in the court sentence, of a convict from a prison, which is particularly important due to the recognized negative aspects of a prison sentence. Of course early conditional release is possible on the condition that the prognoses regarding the behavior of the convict after his or her release from the penal institution are positive. According to art. 77 (1) of the Penal Code (PC), “a person penalized with a prison sentence may be conditionally released by the court from the institution where he or she is to serve the rest of his or her sentence only when the person’s attitude, characteristics, and personal conditions, the circumstances of the offense, and the behavior after its perpetration and during the sentence justify the belief that the convict will abide by the law after the release and, in particular, will not perpetrate a crime again.” The list of prerequisites on which the formulated prognosis should be based is a definite one. Thus, conclusions regarding a positive prognosis may be based solely on the circumstances enumerated in art. 77 (1) of the PC.²

¹ Recommendation Rec (2003) 22 of the Committee of Ministers for member states on conditional release, adopted by the Committee of Ministers on 24 September 2003, during the 853rd meeting of deputy ministers. *Przegląd Więziennictwa Polskiego 2011*, no. 72–73, pp. 291–301.

² J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności* [Early conditional release from prison], Warsaw 2010, p. 253.

One must also mention the formal prerequisite, namely the requirement that the convict serve the part of the prison sentence that is provided for in the relevant statute or defined in the court sentence. According to art. 77 of the PC, a convict may be conditionally released once he or she has served at least half of the sentence. Nevertheless, the legislator has provided for an exception to the abovementioned rule. In the case of repeated offenders, the formal prerequisites are more stringent; they may be granted conditional release after serving 2/3 of the sentence (convicts sentenced under art. 64 (1) of the PC) or 3/4 of the sentence (convicts sentenced under art. 64 (2) of the PC). Convicts serving a 25-year prison sentence may be conditionally released only after they have served 15 years, while convicts serving life sentences – after they have served 25 years. Of note is the fact that the legislator has not prevented any group of convicts from being granted conditional early release. Another notable fact is that the court pronouncing the sentence may, in particularly justified cases, impose more stringent limitations on the granting of conditional release, compared to those provided for in art. 78 of the PC.

The filing of a petition for early release by the entitled person, namely, according to art. 161 of the Executive Penal Code (EPC), the convict, his or her attorney, the director of the penal institution, or the probation officer, results in the duty of the penitentiary court³ – of course if the convict has served the required part of the sentence – to evaluate the prerequisites enumerated in art. 77 of the PC as to whether they justify the assumption that after the release the convict will abide by the law and, in particular, will not commit any crimes again.

An analysis of the decisions made by appeals courts considering complaints against decisions of regional courts refusing to grant conditional release raises doubts as to proper interpretation of the prerequisites for conditional release. Due to the framework of this paper, it is difficult to analyze all the available decisions of appeals courts⁴ and, consequently, only those where the court's interpretation of art. 77 of the PC raises significant reservations are discussed here.

The first item to be discussed is the interpretation of the phrase “only when” used in art. 77 (1) of the PC. Some appeals courts⁵ considering

³ Penitentiary courts are divisions of regional courts.

⁴ The decisions mentioned in the paper can be found at: <http://lex.online.wolterskluwer.pl>.

⁵ See: decision of the Appeals Court in Łódź of 23 March 1999, II AKz 114/99; decision of the Appeals Court in Kraków of 21 June 2000, II AKz 217/00; decision of the

complaints against refusals to grant conditional release assume that the rule is that the convict must serve the entire penalty, i.e. the entire sentence that has been pronounced, and in a continuous manner. As the Appeals Court in Łódź⁶ emphasized, the legislator's intent was to make early conditional release a nearly exceptional institution; most certainly, the legislator did not intend to allow for a liberal use of the aforementioned law. This conclusion can be drawn for example by comparing the contents of the previous and current law; the present law enables the court to grant the privilege in question "only when..." As to this interpretation, it must be noted that the use of conditional release cannot be judged as liberal or restrictive. The policy regarding the use of conditional release should be rational.⁷ No provision in the Penal Code or the Executive Penal Code mentions that conditional release is an exceptional institution. The two codes do not provide any substantiation for the interpretation that the convict must have served the entire sentence. As S. Lelental was right in observing,⁸ such interpretation is not possible under art. 77 (2) of the PC "which enables only imposing more stringent limitations on the granting of conditional release and only in justified cases." The phrase "only when" indicates that conditional release should depend on a positive prognosis formulated on the basis of all of the prerequisites enumerated in art. 77 (1) of the PC.⁹

As to the prerequisites for the prognosis, an analysis of the decisions of the appeals courts substantiates the conclusion that penitentiary courts, in formulating prognoses regarding the convicts' behavior after their release from the penitentiary institution, often go beyond the list of prerequisites of

Appeals Court in Gdańsk of 22 August 2000, II AKz 630/00. Also see: decision of the Appeals Court in Kraków of 27 June 2000, II Akz 214/2000 – referred to in S. Lelental, "Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2000 (II półrocze) – 2002" [Early conditional release in verdicts of the Supreme Courts and appeals courts in the years 2000 (2nd half) – 2002], *Przegląd Więziennictwa Polskiego 2003*, no. 40–41, pp. 193–194.

⁶ Decision of the Appeals Court in Łódź of 23 March 1999, I AKz 114/99.

⁷ See: G. Wiciński, "Głosa do postanowienia s. apel. z dnia 23 marca 1999 r. II AKZ 114/99" [Note to the decision of the Appeals Court of 23 March 1999, II AKZ 114/99], in: *System Informacji Prawnej Lex (Lex Omega)* 09/2012. Also see: J. Lachowski, op. cit., p. 249.

⁸ S. Lelental, op. cit., p. 194.

⁹ See: E. Bieńkowska, in: G. Rejman, ed., *Kodeks karny Część ogólna, Komentarz* [Penal Code, General Part, a commentary], Warsaw 1999, p. 1174; Z. Świda, "Charakter i stosowanie instytucji warunkowego przedterminowego zwolnienia z odbycia reszty kary pozbawienia wolności" [Nature and use of early conditional release], in: K. Krajewski, ed. *Nauki penalne wobec problemów współczesnej przestępczości Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle* [Penal sciences in response to the problem of contemporary crime. A jubilee book published on the occasion of the 70th birthday of Professor Andrzej Gaberle], Warsaw 2007, p. 376.

the prognosis provided for in art. 77 (1) of the PC. One of the prerequisites referred to by penitentiary courts¹⁰ in their decisions to refuse to grant conditional release, which was not enumerated in the aforementioned article, is the nature of the committed act.

Another prerequisite referred to by penitentiary courts¹¹ that is not enumerated by the legislator, either, is the long period until the end of the penalty or the length of the period that has been served by the convict. An example is the decision of the Regional Court in R. which, as the basis for refusing to grant early conditional release, used the facts that the convict was serving a long prison sentence among others for the offense of armed robbery and the end of the sentence was fairly distant. In the appeal proceedings, the Appeals Court in Lublin¹² was right in observing that, since the convict has served over half of his sentence and is formally entitled to apply for a conditional release, the length of the prison sentence and the type of offense he has committed should be of no importance in the consideration of his conditional release. After all, such circumstances were not enumerated in art. 77 (1) of the PC. Moreover, the Appeals Court determined that the Regional Court, in evaluating the convict's behavior, found it to be appropriate but did not take into account a number of facts that were important to the formulation of the prognosis, namely the fact that the convict had earned several dozen rewards and only one disciplinary penalty; the fact that the convict served the penalty in a system of programmed influence and that he fulfilled the obligations defined in the individual influence program; the fact that he worked outside of the penal institution, commuted without an escort, and properly performed his duties as an employee; and the fact that the convict had been granted many temporary leaves from the penal institution and returned on time. The fact that the Regional Court overlooked these facts indicates that, in its formulation of the criminological prognosis, the court did not analyze those circumstances that, in the opinion of the legislator, were important to the decision regarding conditional release. The court did so in spite of its duty to consider all the circumstances enumerated

¹⁰ See: decision of the Appeals Court in Lublin of 8 August 2007, II Akzw 527/07; decision of the Appeals Court in Lublin of 28 December 2005, II Akzw 880/05; decision of the Appeals Court in Lublin of 7 November 2001, II Akzw 563/01; decision of the Appeals Court in Lublin of 15 April 2009, II AKzw 285/09.

¹¹ See: decision of the Appeals Court in Lublin of 28 December 2005, II Akzw 880/05; decision of the Appeals Court in Lublin of 7 November 2001, II Akzw 563/01; decision of the Appeals Court in Wrocław of 21 October 2004, II AKzw 709/04; decision of the Appeals Court in Wrocław of 13 October 2004, IIA Kzw 685/04; decision of the Appeals Court in Lublin of 26 October 2005, II AKzw 622/05.

¹² decision of the Appeals Court in Lublin of 27 October 2010, II AKzw 846/10.

in art. 77 (1) of the PC and to indicate which of them prevented it from formulating a positive prognosis and why it was so. In the context of going beyond the statutory list of prerequisites for the prognosis, of note is the decision of the Regional Court in R. which refused to grant conditional release to a convict. In the substantiation of its decision the Court did indicate that the behavior of the convict in the penitentiary institution was correct and that he enjoyed good repute before his incarceration, but a positive socio-criminological prognosis could not be formulated because the convict claimed, despite his conviction, that he had not committed the offense, and the circumstances of the offense were extremely aggravating. The Appeals Court in Lublin¹³ changed the decision of the Regional Court and did grant a conditional release to the convict. The Court was right in assuming that “the convict’s subjective opinion as to whether he had committed the crime for which he was sentenced must not be used as a prerequisite that can by itself prevent granting conditional release to the convict.” The findings of the Appeals Court clearly demonstrated that the convict’s behavior prior to his incarceration and in prison allowed for a substantiated opinion that he would abide by the law and would not commit a crime after his release from the penitentiary institution.

Another example is the decision of the Regional Court in R. where the court refused to grant a conditional release to a convict. The Appeals Court in Lublin,¹⁴ which considered the complaint against this decision, found that the even though the Regional Court indicated circumstances that confirmed positive opinions about the convict, it substantiated its refusal to grant conditional release with the long period of time until the end of the sentence and the convict’s lack of concrete plans for the future. The Appeals Court in Lublin remanded the case and alleged that the Regional Court, in its formulation of the criminological prognosis, did not take into account all the statutory conditions for the prognosis. Moreover, it was right in observing that a prognosis must not be formulated based on circumstances that, even though they do pertain to the convict, are not included in the statutory list of prerequisites for the prognosis. The long period of time until the end of the penalty is certainly one of the circumstances.

Another such circumstance is the type of the crime committed. An example is the decision of the Regional Court in R.¹⁵ which substantiated its refusal to grant conditional release with the fact that the convict was serving

¹³ decision of the Appeals Court in Lublin of 1 March 2006, II AKzw 124/06.

¹⁴ Decision of the Appeals Court in Lublin of 26 October 2005, II AKzw 622/05.

¹⁵ Decision of the Appeals Court in Lublin of 27 October 2010, II Akzw 846/10. Also

a long prison sentence for an armed robbery. As the Appeals Court in Lublin found when considering the complaint against this decision, the Regional Court overlooked a number of facts that were of significant importance in the light of art. 77 (1) of the PC, such as the fact that the convict had received several rewards, served the sentence in a programmed influence system and performed the tasks defined in the individual program, was employed outside of the penitentiary institution and commuted without an escort, and was granted leave from the penitentiary institution and breaks in the sentence. As the Appeals Court found, the Regional Court did not conduct a thorough analysis of the circumstances that were important to the formulation of the prognosis. Instead, the Court focused on circumstances that are not enumerated in art. 77 (1) of the PC.

Very interesting are the arguments used by the public prosecutor in his complaint regarding the decision of the Regional Court in Zamość regarding the granting of early conditional release on the basis of a positive criminological prognosis. The public prosecutor alleged that the Court made erroneous factual findings which were used to substantiate its decision and influenced its content. In the public prosecutor's opinion, the Court was wrong to assume that the socio-criminological prognosis for the convict was positive in a situation where the length of the part of the sentence that has been served by the convict and the evaluation of its adequacy and proportionality given the circumstances of the offense committed led to a contrary conclusion. The Appeals Court in Lublin,¹⁶ in its consideration of the public prosecutor's complaint, found that the positive criminological prognosis was substantiated by the following circumstances: the convict's behavior in the penitentiary institution, the statutory rewards and the lack of disciplinary penalties, the fact that the convict served the sentence in a programmed influence system and performed tasks defined in the individual influence program, the fact that the convict was employed outside of the penitentiary institution and commuted without an escort, the fact that there were no negative observations concerning his performance of work, the fact that he was granted several leaves, his critical attitude toward the crime he committed, the lack of addictions that would hinder his adaptation to life outside of the penitentiary institution, his continued contacts with his family members

see: decision of the Appeals Court in Kraków of 8 April 2003, II Akz 125/03, discussed in S. Leleń, "Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2003–2004" [Early conditional release in verdicts of the Supreme Courts and appeals courts in the years 2003–2004], *Przegląd Więziennictwa Polskiego* 2005, no. 49, pp. 272–273.

¹⁶ Decision of the Appeals Court in Lublin of 24 April 2010, II AKz 291/10.

who were interested in his situation and were supportive, the fact that he had a permanent residence, and the fact that he continued his education by taking weekend courses. Given the above, the Appeals Court was right in finding that the prerequisites defined in art. 77 (1) of the PC had been fulfilled and upheld the decision of the Regional Court. Of note is the fact that the public prosecutor's argument regarding the length of the part of the sentence that has been served by the convict is not listed as one of the prerequisites of the prognosis.

The next important issue is consideration, in the evaluation of the premises enumerated in art. 77 (1) of the PC, of the directives regarding the length of the penalty enumerated in art. 53 of the PC. In his complaint against the decision of the Regional Court in J. G. to grant conditional release, the public prosecutor alleged that "when deciding on an early conditional release, it is necessary to take into account the prerequisites considered by the Court making the essential decision, namely the intent to prevent depreciation of its verdict and a transfer of the decision on the length of the prison sentence to the enforcement procedure stage." The Appeals Court in Wrocław¹⁷ did not share this opinion. The Appeals Court upheld the decision of the Regional Court and rightly indicated that the degree of social harm of the act, the satisfaction of the social sense of justice, and the need to form the legal awareness of the public are not elements that can be used as a basis for formulation of the prognosis regarding the convict's behavior after his release from the penitentiary institution. Moreover, the Appeals court noted that such prerequisites do influence the length of the prison sentence, but the relevant decision must not be made by the penitentiary court but by the sentencing court which, in the light of art. 77 (2) of the PC, may impose more stringent limitations on the use of conditional release.

Notably, appeals courts are not unanimous on this issue. An example is the decision of the Appeals Court in Szczecin¹⁸ which shared the opinion of the Regional Court in K., expressed in its decision to refuse to grant conditional release, that fulfilling the prerequisites enumerated in art. 77 (1) of the PC must not automatically lead to the granting of conditional release, as the directives of the measure of the penalty enumerated in art. 53 of the PC oppose it. In the opinion of the Appeals Court, the prerequisites used by the court considering the essence of the case must be taken into

¹⁷ Decision of the Appeals Court in Wrocław of 24 January 2007, II Akzw 76/07.

¹⁸ Decision of the Appeals Court in Szczecin of 24 October 2010, II AKzw 819/10.

account so that the valid sentence is not depreciated and that the decision regarding the length of the penalty is not transferred to the enforcement procedure. Evidently, the Appeals Court used the same arguments as the public prosecutor in the case discussed above.

In the context of this decision, it must be noted that art. 77 of the PC does not require determination of whether the objectives of the penalty have been achieved, as art. 90 (1) of the 1969 Penal Code did, which was universally criticized at that time.¹⁹

Another important matter that must be discussed here is the interpretation by courts of one of the prerequisites of the criminological prognosis, namely the circumstances of the offense. As the decision of the Appeals Court in Wrocław²⁰ indicates, the Regional Court in O. substantiated its refusal to grant conditional release by stating that “the circumstance of the offense under art. 148 (1) of the PC that prevents formulation of a positive diagnosis is the fact that the consequence of the offense was the death of the victim.” The Appeals Court, in considering the complaint of the convict against the decision of the Regional Court in O. pointed out that “the Regional Court failed to see, first, that if it was not for the death of the victim as a consequence of the offense, the convict would not be the perpetrator of homicide and, secondly, this interpretation of the circumstances of the offense, which leads to a negative prognosis, would automatically prevent granting conditional release to perpetrators of such offenses (...).”

Courts often are selective in choosing the prerequisites for the prognosis and in their decisions they focus on only one element of the prognosis, while disregarding the others. An example of this is the decision of the Regional Court in Kraków where the court refused to grant a conditional release to a convict. The Court, in considering an application for a conditional release, found that the behavior of the convict in the penitentiary institution was proper, but refused to grant the conditional release due to its concern about her observance of law in the future due to the circumstances of the offenses (art. 282 and art. 278 (1) of the PC) and the convict’s failure to make any effort to mend the damage done. In the Court’s opinion, this demonstrated the significant demoralization of the convict. The Appeals

¹⁹ More information can be found in: S. Lelental, “Warunkowe przedterminowe zwolnienie” [Early conditional release], in: M. Melezini, ed., *System Prawa Karnego T. 6, Kary i środki karne Poddanie sprawcy próbie* [Penal law system, vol. 6. Penalties and penal measures. Submission of offenders to tests], Warsaw 2010, p. 1079. Also see: J. Lachowski, op. cit., pp. 107–108.

²⁰ Decision of the Appeals Court in Wrocław of 12 January 2005, II Akzw 1123/04.

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Court in Kraków,²¹ which considered the complaint against that decision, was right in observing that the Regional Court unreasonably focused on the circumstances of the offense and disregarded other circumstances that were important to the formulation of the prognosis regarding the convict's behavior after release from the penitentiary institution. Those other circumstances, as the Appeals Court found, were a positive opinion of the convict in her community, 28 statutory rewards, multiple leaves and timely returns to the penitentiary institution, proper implementation of an individual influence program, performance of work and public works, a critical attitude toward the committed offense, strong bonds with the family, and efforts to pay the process costs awarded by the court to the auxiliary prosecutor. The Appeals Court was also right in observing that the circumstances of the offense are one of many elements, and not the sole element, that should be used as a basis for the formulation of the prognosis regarding the convict's behavior after her release.

Another example is the opinion of the Regional Court in L. The Court refused to grant conditional release and substantiated its decision with the unstable behavior of the convict before his incarceration in the penitentiary institution and his reprehensible behavior in the initial period of the sentence. The Appeals Court in Lublin,²² which considered the convict's complaint against the decision of the Regional Court, found that, according to the opinion provided by the penitentiary institution, the convict's behavior was initially objectionable, as demonstrated by his disciplinary penalties. However, with time, his behavior improved, as demonstrated by the statutory rewards he earned, the permits to take leave he was granted, his completion of a trade training course, his diligent performance of public works at the penitentiary institution, and his contact with the probation officer during his leave granted under art. 165 (2) of the Penal Code. Thus, the Regional Court did not conduct a comprehensive analysis of all the circumstances enumerated in art. 77 (1) of the PC. Notably, when formulating a prognosis, the court must take into account the attitude and behavior of the convict in the entire period spent in the penitentiary institution. Only then can the court determine if the changes in the convict's attitudes are permanent and will cause the convict to abide by the law in the future.

The aforementioned decisions of appeals courts demonstrate that both regional courts considering applications for early conditional release and appeals courts considering complaints against decisions regarding conditional

²¹ Decision of the Appeals Court in Kraków of 13 December 2001, II AKz 484/01.

²² Decision of the Appeals Court in Lublin of 27 December 2007, II AKZ 1015/07.

releases do not always interpret the essential prerequisites of conditional release in conformance to the legislator's intent. Their assessment of the prognostic value of the prerequisites enumerated in art. 77 of the PC also raises some objections.

The fact that decisions to grant early conditional release are facultative does not make them arbitrary. According to art. 77 (1) of the PC, the only prerequisite of a conditional release is a positive prognosis that substantiates the belief that the convict will abide by the law and, in particular, will not commit crimes again after his or her release. The prognosis should be formulated on the basis of the prerequisites enumerated in the aforementioned article. These include the convict's attitude, his or her personal characteristics and conditions, the circumstances of the offense, and the convict's behavior after the offense and during the sentence. The list of prerequisites of the prognosis includes circumstances that, under the Penal Code (art. 53 (2)) are taken into account by the sentencing court, namely the convict's personal characteristics and conditions, the circumstances of the offense, and the behavior of the convict after the offense was perpetrated. This is not accidental, as the same circumstances can play different roles in different institutions of the penal law. In the case of the institution in question, the aforementioned circumstances are considered from a different point of view. They can be important to the evaluation of changes in the convict's attitudes and characteristics, given the change of the attitude as a result of the educational influence during his or her time in the penal institution.²³ Thus, in formulating criminological prognoses, courts must consider all the circumstances enumerated in art. 77 (1) of the PC; of course, not all of them will be equally important to the formulation of the prognosis. Importantly, courts must not consider other circumstances. The courts' decisions discussed above and research on this problem²⁴ indicate that, in their substantiations of refusal to grant early conditional release, courts make references to the length of time until the end of the sentence, the inadequacy of the part of the sentence served given the total length of the sentence, the nature and type of the offense, and the fact that the convict has not admitted to committing the offense.

The differences in interpretation are due, to an extent, to the misunderstanding of the essence of early conditional release. Courts consider condi-

²³ See: A. Zoll, in: A. Zoll, ed., *Kodeks karny część ogólna komentarz T I* [Penal Code. General part. Vol. I], 3rd issue, Warsaw 2007, pp. 884–885. J. Lachowski, op. cit., p. 254.

²⁴ See: P. Wiktorska, *Czekając na wokandę Warunkowe przedterminowe zwolnienie młodocianych* [Waiting for the verdict. Early conditional release of minors], Warsaw 2010, p. 285.

tional release as a reduction of the sentence or a reward, which is not what it is. Conditional release is a test to the perpetrator which involves, if required, supervision and certain duties. When formulating the prognosis, the court must not overlook the fact that in the case of conditional release the process of rehabilitation can take place outside of penitentiary institutions. The assumption, which some courts make, that the process of rehabilitation must be completed makes conditional release pointless.

Basing refusal to grant conditional release on circumstances that are not enumerated in art. 77 (1) of the PC may have a negative impact on the effects of prison sentences. It is during their service of the sentence in penitentiary institutions, according to art. 67 (1) of the PC, that convicts must be encouraged to participate in formation of socially desirable attitudes, to include the will to abide by the law. How can convicts be persuaded to abide by the law if courts, in matters that are of such great importance to the convicts, breach substantive law? A refusal to grant conditional release solely based on arguments pertaining to general prevention is not permissible and, according to the doctrine,²⁵ violates substantive law.

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²⁵ A. Marek, *Kodeks karny Komentarz* [Penal Code. A commentary], Warsaw 2007, p. 198.

