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**PRZESŁANKI INTERWENCYJNEGO ODBIORU ZWIERZĘCIA W TRYBIE
Z ART. 7 UST. 3 USTAWY Z DNIA 21 SIERPNIĄ 1997 R. O OCHRONIE
ZWIERZĄT W ODNIESIENIU DO INSTYTUCJI KOLIZJI OBOWIĄZKÓW
Z ART. 26 § 5 K.K.**

**PREREQUISITES FOR EMERGENCY ANIMAL SEIZURE PURSUANT TO
ARTICLE 7(3) OF THE ANIMAL PROTECTION ACT OF 21 AUGUST 1997
WITH REFERENCE TO THE
INSTITUTION OF COLLISION OF DUTIES FOUND IN ARTICLE 26 § 5
OF THE CRIMINAL CODE**

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Streszczenie

Artykuł omawia przesłanki interwencyjnego odbioru zwierzęcia w trybie z art. 7 ust. 3 ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt z perspektywy wyłączenia odpowiedzialności karnej na podstawie art. 26 § 5 k.k. Głównymi problemami badawczymi opracowania są przesłanki prawidłowo przeprowadzonego odbioru zwierzęcia w trybie z art. 7 ust. 3 u.o.z., ze wskazaniem, kiedy takie zachowanie jest zachowaniem legalnym oraz zakres obowiązków przeprowadzającego odbiór względem właściciela zwierzęcia. Zgodnie z art. 217 w związku z art. 220 k.p.k. przeszukania mogą dokonywać tylko organy ścigania, w tym prokurator, funkcjonariusze Policji i innych organów, którym ustawa daje to uprawnienie. Upoważnieni przedstawiciele organizacji społecznej, której statutowym celem działania jest ochrona zwierząt, nie mają tej kompetencji, dlatego w tym zakresie są zobowiązani do współpracy z funkcjonariuszami Policji. W artykule wykazano, że w przypadku przeprowadzenia interwencyjnego odbioru zwierzęcia w trybie z art. 7 ust. 3 u.o.z., pod nieobecność funkcjonariuszy Policji i przy braku zgody właściciela posesji, nie dochodzi do naruszenia miru domowego tylko wówczas, gdy zachowane zostaną zasady subsydiarności i proporcjonalności leżące u podstaw art. 26 § 5 k.k.

Słowa kluczowe: interwencyjny odbiór zwierząt, ochrona zwierząt, wyłączenie odpowiedzialności karnej, kolizja obowiązków, zawiniona obrona konieczna

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Abstract

The article discusses the conditions for the emergency seizure of animals from their owners in accordance with Article 7(3) of the Animal Protection Act (APA) of 21 August 1997 from the viewpoint of exclusion of criminal liability under Article 26 § 5 of the Criminal Code. The main research question of the study are the prerequisites for emergency animal seizure from an owner in the meaning of Article 7(3) of the Act, together with an indication of instances in which such behaviour is lawful, and the scope of duty of person seizing the animal towards the animal's owner. Pursuant to Article 217 of the Code of Criminal Procedure in connection with Article 220 of the Code of Criminal Procedure, searches may be performed only by law enforcement agencies, including the prosecutor, police officers and other bodies authorised by statute to do so. Authorised representatives of a social organization whose statutory purpose is to protect animals do not have such competences and are therefore required to cooperate with police officers in this respect. The article shows that in case of emergency animal seizure from the owner in accordance with Article 7(3) of the Act the absence of police officers and the opposition of the owner of the premises violation of domestic peace does not occur only if the principles of subsidiarity and proportionality underlying Art. 26 § 5 of the Criminal Code are observed.

Keywords: emergency animal seizure, animal protection, exclusion of criminal liability, collision of duties, provoked self-defence

Literature still lacks a study on the legal nature of Article 7(3) of the Animal Protection Act (APA)² in light of the prerequisites by which authorised representatives of a social organisation whose statutory purpose is to protect animals should be guided when seizing an animal from its former owner³. The purpose of this study is to fill this gap. Its main

² Ustawa z dnia 21 sierpnia 1997 r. o ochronie zwierząt (Dz. U. z 2020 r. poz. 638; dalej: u.o.z.).

³ Art. 7 stanowi:

„1. Zwierzę traktowane w sposób określony w art. 6 ust. 2 może być czasowo odebrane właścicielowi lub opiekunowi na podstawie decyzji wójta (burmistrza, prezydenta miasta) właściwego ze względu na miejsce pobytu zwierzęcia i przekazane:

- 1) schronisku dla zwierząt, jeżeli jest to zwierzę domowe lub laboratoryjne, lub
- 2) gospodarstwu rolnemu wskazanemu przez wójta (burmistrza, prezydenta miasta), jeżeli jest to zwierzę gospodarskie, lub
- 3) ogrodowi zoologicznemu lub schronisku dla zwierząt, jeżeli jest to zwierzę wykorzystywane do celów rozrywkowych, widowiskowych, filmowych, sportowych lub utrzymywane w ogrodach zoologicznych.

1a. Decyzja, o której mowa w ust. 1, podejmowana jest z urzędu po uzyskaniu informacji od Policji, straży gminnej, lekarza weterynarii lub upoważnionego przedstawiciela organizacji społecznej, której statutowym celem działania jest ochrona zwierząt.

1b. Przekazanie zwierzęcia, o którym mowa w ust. 1, następuje za zgodą podmiotu, któremu zwierzę ma być przekazane.

1c. W przypadku braku zgody, o której mowa w ust. 1b, lub wystąpienia innych okoliczności uniemożliwiających przekazanie zwierzęcia podmiotom, o których mowa w ust. 1, zwierzę może zostać nieodpłatnie przekazane innej osobie prawnej lub jednostce organizacyjnej nieposiadającej osobowości prawnej albo osobie fizycznej, która zapewni mu właściwą opiekę.

2. Decyzja, o której mowa w ust. 1, podlega natychmiastowemu wykonaniu.

2a. Od decyzji, o której mowa w ust. 1, przysługuje prawo wniesienia odwołania do samorządowego kolegium odwoławczego w terminie 3 dni od daty doręczenia decyzji. Samorządowe kolegium odwoławcze rozpoznaje odwołanie w terminie 7 dni.

3. W przypadkach niecierpiących zwłoki, gdy dalsze pozostawanie zwierzęcia u dotychczasowego właściciela lub opiekuna zagraża jego życiu lub zdrowiu, policjant, strażnik gminny lub upoważniony przedstawiciel organizacji społecznej, której statutowym celem działania jest ochrona zwierząt, odbiera mu zwierzę, zawiadamiając o tym niezwłocznie wójta (burmistrza, prezydenta miasta), celem podjęcia decyzji w przedmiocie odebrania zwierzęcia.

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research question are the prerequisites for proper animal seizure in the manner provided for in Article 7(3) of the APA, including an indication when such behaviour is lawful and when it lacks legal grounds. The scope of duties of the person seizing an animal in this manner with respect to the animal's owner has been discussed respectively. This is because pursuant to Article 217 in connection with Article 220 of the Code of Criminal Procedure (CCP), searches may be performed only by law enforcement agencies, including the prosecutor, police officers and other bodies authorised by statute to do so. Authorised representatives of a social organisation whose statutory purpose is to protect animals do not have such competencies and are therefore required to cooperate with police officers in this respect. The study notes the prerequisites that justify seizing an animal in the manner provided for in Article 7(3) of the APA in the absence of police officers and without the consent of the owner. One of the detailed issues discussed is the need of the person conducting the intervention to oppose the so-called provoked self-defence.

In a commentary on the Animal Protection Act, W. Radecki notes that Article 7(3) is a reversal of the situation described in Article 7(1), because a decision about seizing an animal is executed before it is issued.⁴ In the view of the author, this provision also contains an authorisation to use means of coercion.⁵ Comparing the provisions of both items of Article 7, the author points out that item 3 imposes a duty and not only a right to seize an animal.⁶ The statements listed above therefore need to be analysed extensively from the viewpoint of the institution of collision of duties defined in Article 26 § 5 of the Criminal Code (CC).⁷

Article 7(1) of the Animal Protection Act contains an authorisation for the rural commune head (mayor, city president) competent with respect to the place in which the animal resides to issue a decision on temporary seizure of an animal from its owner if the animal is treated in the manner specified in Article 6(2) of the APA,⁸ which means that pain

4. W przypadkach, o których mowa w ust. 1 i 3, kosztami transportu, utrzymania i koniecznego leczenia zwierzęcia obciąża się jego dotychczasowego właściciela lub opiekuna.

5. Do należności z tytułu kosztów określonych w ust. 4 stosuje się przepisy o postępowaniu egzekucyjnym w administracji.

6. Odebrane zwierzę podlega zwrotowi, jeżeli sąd nie orzeknie w trybie art. 35 ust. 3 przepadku zwierzęcia, a także jeżeli postępowanie karne w tej sprawie zostanie umorzone”.

⁴ W. Radecki, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2012, s. 80.

⁵ *Ibidem*.

⁶ *Ibidem*, s. 81.

⁷ Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz. U. z 2020 r. poz. 1444, ze zm.; dalej: k.k.).

⁸ Ar. 6 ust. 2 stanowi: „Przez znęcanie się nad zwierzętami należy rozumieć zadawanie albo świadome dopuszczanie do zadawania bólu lub cierpień, a w szczególności:

1) umyślne zranienie lub okaleczenie zwierzęcia, niestanowiące dozwolonego prawem zabiegu lub procedury w rozumieniu art. 2 ust. 1 pkt 6 ustawy z dnia 15 stycznia 2015 r. o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych, w tym znakowanie zwierząt stałocieplnych przez wypalanie lub wymrażanie, a także wszelkie zabiegi mające na celu zmianę wyglądu zwierzęcia i wykonywane w celu innym niż ratowanie jego zdrowia lub życia, a w szczególności przycinanie psom uszu i ogonów (kopiowanie);

1a) znakowanie zwierząt stałocieplnych przez wypalanie lub wymrażanie;

2) (uchylony);

3) używanie do pracy albo w celach sportowych lub rozrywkowych zwierząt chorych, a także zbyt młodych lub starych oraz zmuszanie ich do czynności, których wykonywanie może spowodować ból;

4) bicie zwierząt przedmiotami twardymi i ostrymi lub zaopatrzonymi w urządzenia obliczone na sprawianie specjalnego bólu, bicie po głowie, dolnej części brzucha, dolnych częściach kończyn;

5) przeciążanie zwierząt pociągowych i jucznych ładunkami w oczywisty sposób

nieodpowiadającymi ich sile i kondycji lub stanowi dróg lub zmuszanie takich zwierząt do zbyt szybkiego biegu;

6) transport zwierząt, w tym zwierząt hodowlanych, rzeźnych i przewożonych na targowiska, przenoszenie lub

przepędzanie zwierząt w sposób powodujący ich zbędne cierpienie i stres;

7) używanie uprzęży, pęt, stelaży, więzów lub innych urządzeń zmuszających zwierzę do przebywania w nienaturalnej pozycji, powodujących zbędny ból, uszkodzenia ciała albo śmierć;

8) dokonywanie na zwierzętach zabiegów i operacji chirurgicznych przez osoby nieposiadające wymaganych uprawnień bądź niezgodnie z zasadami sztuki lekarsko-weterynaryjnej, bez zachowania koniecznej ostrożności i oględności oraz w sposób sprawiający ból, któremu można było zapobiec;

9) złośliwe straszenie lub drażnienie zwierząt;

or suffering is inflicted on it.⁹ The decision is made *ex officio* after information is obtained from the police, municipal guard, veterinarian, or authorised representative of a social organisation whose purpose is to protect animals and is subject to immediate enforcement (Article 7(1a) and (2) of the APA). The decision can be appealed from to the self-government court of appeals within 3 days from the date of serving. The self-government court of appeals is obliged to examine the appeal within 7 days.¹⁰

From the above it may be concluded that, as a rule, animals threatened by abuse should be seized according to a decision issued on the basis of Article 7(1). The subsequent stages are the existence of prerequisites referred to in Article 6(2) of the APA, a decision of the authority to seize the animal, and enforcement of the decision. There can be no doubt that in some cases this procedure may prove to be too protracted.¹¹ Everything depends on the circumstances of a particular case. Nevertheless, the legislator provided for an exception in Article 7(3) of the APA, under which it is possible to seize an animal if the prerequisites listed in Article 6(2) of the APA are fulfilled without obtaining a prior decision in this respect. It cannot be doubted that the situation described in Article 7(3) is as lawful as the situation mentioned in Article 7(1). The party acting pursuant to Article 7(3) of the APA, as rightly assumed by W. Radecki, has the duty to seize an animal in cases that admit of no delay, when further stay of the animal with its previous owner or carer poses a threat to its life or health.¹² This duty rests on a police officer, municipal guard or authorised representative of a social organisation whose statutory purpose is to protect animals (hereinafter called "an authorised representative of a social organisation" or "ARSO"). The above duty is complemented by the need to immediately notify the seizure of an animal and the circumstances thereof to the rural commune head (mayor, city president) so that a decision can be made with respect to the further fate of the animal.

10) utrzymywanie zwierząt w niewłaściwych warunkach bytowania, w tym utrzymywanie ich w stanie rażącego zaniedbania lub niechlujstwa, bądź w pomieszczeniach albo klatkach uniemożliwiających im zachowanie naturalnej pozycji;

11) porzucanie zwierzęcia, a w szczególności psa lub kota, przez właściciela bądź przez inną osobę, pod której opieką zwierzę pozostaje;

12) stosowanie okrutnych metod w chowie lub hodowli zwierząt;

13) (uchylony);

14) (uchylony);

15) organizowanie walk zwierząt;

16) obcowanie płciowe ze zwierzęciem (zoofilia);

17) wystawianie zwierzęcia domowego lub gospodarskiego na działanie warunków atmosferycznych, które zagrażają jego zdrowiu lub życiu;

18) transport żywych ryb lub ich przetrzymywanie w celu sprzedaży bez dostatecznej ilości wody umożliwiającej oddychanie;

19) utrzymywanie zwierzęcia bez odpowiedniego pokarmu lub wody przez okres wykraczający poza minimalne potrzeby właściwe dla gatunku.

⁹ W orzecznictwie podkreśla się, że zwierzę jest istotą żyjącą, zdolną do odczuwania cierpienia, a człowiek jest mu winien poszanowanie, ochronę i opiekę, co wynika także z art. 1 ust. 1 u.o.z. Każde zwierzę wymaga humanitarnego traktowania (art. 5 u.o.z.) przez co należy rozumieć traktowanie uwzględniające potrzeby zwierzęcia i zapewnienie mu opieki i ochrony w myśl art. 4 pkt 1 u.o.z. – por. wyrok NSA z 23.01.2013 r., II OSK 1743/11 i wyrok WSA w Gorzowie Wielkopolskim z 2.08.2007 r., II SA/GO 202/07, dostępne w Centralnej Bazie Orzeczeń Sądów Administracyjnych.

¹⁰ Szerzej o kwestiach proceduralnych zob.: M. Ślugocka, *Praktyczny wymiar instytucji czasowego odebrania zwierzęcia właścicielowi lub opiekunowi*, „Przegląd Prawa i Administracji” 2017, nr 108, s. 45-54; A. Rotkiewicz-Szarnowska, *Postępowanie administracyjne w sprawie czasowego odebrania zwierzęcia*, „Studia Prawnoustrojowe” 2019, nr 45, s. 253-262.

¹¹ Przykładowo zob. wyrok WSA w Gorzowie Wielkopolskim z 3.03.2021 r., II SA/Go

70/21 (Lex nr 3152943), informację w rozumieniu art. 7 ust. 1a organ otrzymał w sierpniu 2020 r.

¹² W orzecznictwie również wskazuje się, że w przypadku stwierdzenia, iż w sprawie miałby miejsce choć jeden z przypadków opisanych w podpunktach ust. 2 art. 6 u.o.z. lub inny, wyczerpujący znamię „znęcania się” (katalog zawarty w art. 6 ust. 2 ma charakter otwarty, o czym świadczy zwrot „w szczególności”), obowiązkiem organu administracyjnego było zastosowanie trybu przewidzianego w art. 7 ust. 1 (tzw. „zwykle” czasowe odebranie zwierzęcia) albo trybu z art. 7 ust. 3 (tzw. „kwalifikowane” odebranie zwierzęcia, w przypadku niecierpiącym zwłoki, gdy pozostawianie zwierzęcia u dotychczasowego właściciela lub opiekuna zagraża jego życiu lub zdrowiu) – wyrok WSA w Krakowie z 24.03.2016 r., II SA/Kr 51/16, Legalis nr 1433555.

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There can be absolutely no doubt that such seizure of an animal in circumstances listed in detail in Article 6(2) as abuse of the animal is a norm that orders the party specified in Article 7(3) of the APA to behave in the manner stipulated in that provision when the prerequisites listed there are fulfilled.¹³ The same rights are granted to parties that act on the basis of Article 217 and Article 220 § 3 of the CCP, including police officers. Article 7(3) of the APA, when applied properly with respect to an authorised representative of a social organisation, is a lawful excuse on the same basis as provisions concerning searches and seizure of things (Articles 217, 220, 224, 227 of the CCP) with respect to police officers. On the level of legal interpretation, the norm that provides the duty found in Article 7(3) of the APA remains however in collision with the norm that prohibits violating the right of ownership referenced in Article 1(2) of the APA and underlying the prohibited act listed in Article 119 § 1 of the Petty Offences Code (taking a movable thing whose value does not exceed PLN 500 for purpose of appropriating) or in Article 278 § 1 of the Criminal Code (taking a movable thing whose value exceeds PLN 500 for purpose of appropriating) In order to properly determine the scope of the duty found in Article 7(3) of the APA, it may be necessary to consider its collision with a legal interest in the form of domestic peace, which is protected by a norm underlying the prohibited act listed in Article 193 of the CC, or in the form of ownership, when for example movable things preventing access to the animal are destroyed, a behaviour which might be identical to that described in Article 124 § 1 of the Petty Offences Code (destroying, damaging or rendering a thing unsuitable for use if the value of damage does not exceed PLN 500) or in Article 288 § 1 of the CC (destroying, damaging or rendering a thing unsuitable for use if the value of damage exceeds PLN 500). One should agree with W. Radecki that Article 7(3) of the APA likewise constitutes an authorisation to use means of coercion,¹⁴ however actions in this respect, if the party acting pursuant to Article 7(3) of the APA is an authorised representative of a social organisation, should not be directed against a person. Should performing the duty that results from that provision require using coercion against a person, it is necessary for the authorised representative of a social organisation to be assisted by police officers or municipal guards. This conclusion is based on a certain value, namely protection of animals against the conditions in which they are kept, or the behaviour described in Article 6(2) of the APA. If the prerequisites listed in Article 6(2) of the APA are met, this value is certainly more important than any violations of the right of ownership committed for the purpose of seizing the animal. It cannot, however, be used to justify the violation of such legal interests as:

- a) bodily integrity, protected by a legal norm which underlies the prohibited act described in Article 217 § 1 of the CC,
- b) health, protected by a legal norm described in Article 157 § 2 of the CC (light bodily injury), Article 157 § 1 of the CC (moderate bodily injury) and Article 156 § 1 of the CC (serious bodily injury),
- c) freedom from coercion, protected by a legal norm which underlies the prohibited act described in Article 191 § 1 of the CC.

If the owner does not consent to seizure of the animal, they cannot resort to self-defence (Article 25 § 1 of the CC), because the performance of the duty listed in Article 7(3) of the

¹³ W orzecznictwie podkreśla się, że niewątpliwie intencją ustawodawcy było stworzenie w art. 7 ust. 3 u.o.z., narzędzia umożliwiającego pilne działanie w momencie stwierdzenia, iż dalsze przebywanie zwierzęcia u właściciela zagraża jego życiu lub zdrowiu. Celem u.o.z. jest niewątpliwie ochrona zwierząt, która polega m.in. na czasowym ich odebraniu właścicielowi w sytuacji rażących zaniedbań, gdy nadrzędną potrzebą jest szybkość i sprawność działania, co oczywiście nie zwalnia organu od zbadania czy wymienione wyżej przesłanki wystąpiły – por. wyroki WSA w Gdańsku z 11.01.2012 r., II SA/GD 841/11; WSA w Poznaniu z 21.03.2013 r., IV SA/PO 31/13; WSA w Łodzi z 19.02.2014 r., II SA/ŁD 1242/13, dostępne w centralnej Bazie Orzeczeń Sądów Administracyjnych).

¹⁴ *Ibidem*.

APA by an authorised representative of a social organisation is lawful behaviour. In opposition, all actions of the animal owner aimed at hindering or preventing the performance of the duty resulting from Article 7(3) of the APA are unlawful. In order to perform the duty resulting from Article 7(3) of the APA, the authorised representative of a social organisation, is authorised to counteract such behaviour, that is to undertake actions that allow the duty to be performed. The ARSO is authorised to interfere with the personal rights of the animal's owner if no other behaviour can be undertaken which does not violate these rights, which fulfils the prerequisite of "a case that admits of no delay" mentioned in Article 7(3) of the APA (the principle of necessity (subsidiarity)) and to an extent adequate to the "threat to life or health" caused by leaving the animal with its former owner or carer (the principle of relativity (proportionality)).

Should the actions of the animal's owner to hinder or prevent the obligation resulting from Article 7(3) of the APA be directed against the personal rights of the authorised representative of the social organisation, the latter has the right to self-defence described in Article 25 § 1 of the CC, with all resulting consequences. The authorised representative of the social organisation should then observe the customary principles of self-defence, namely the principle of necessity (subsidiarity) and the principle of relativity (proportionality), which means that rights of the attacker (the owner of the animal) can be interfered with to an extent much larger than allowed by Article 26 § 5 in connection with Article 26 § 1 of the CC. Resisting an attack in self-defence does not require adjusting the defender's behaviour to ensure the least severe interference with the rights of the attacker (the necessity (subsidiarity) principle) and, primarily, is not restricted by the relationship between the legal interest of the defender (the protected interest) and the legal interest of the attacker (the sacrificed interest) to such an extent as in case of Article 26 § 5 in connection with Article 26 § 1 of the CC (the principle of relativity (proportionality)). To some extent, an exception is offered by Article 2(2)(a) of the European Convention on Human Rights,¹⁵ which stipulates that "deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary." That article therefore clarifies the prerequisites listed in Article 25 § 1 of the CC with respect to methods of defence that could result in the death of a person.

In case of behaviour that fulfils the obligation resulting from Article 7(3) of the APA and simultaneously has the features of a prohibited act described in Article 193 § 1 of the CC, Article 278 § 1 of the CC or Article 119 § 1 of the Petty Offences Act (POC), the features of a prohibited act in the meaning of Article 1 § 1 of the CC do not manifest because the behaviour that performs the obligation resulting from Article 7(3) is lawful behaviour (subject to a lawful excuse) and thus cannot be considered a punishable act.

When the behaviour of the authorised representative of a social organisation exceeds the bounds of performing the duty resulting from Article 7(3) of the APA, such behaviour is not lawful and must be first and foremost examined for its causes and reasons. It is then reasonable to verify whether a prerequisite exists under Article 26 § 5 in connection with Article 26 § 2 of the Criminal Code that would allow to determine the lack of duty and, pursuant to Article 1 § 3 of the Criminal Code, the lack of fault of the representative. Of course, each case should be examined individually, especially with respect to fulfilling the prerequisite of the "case that admits of no delay," when further residence of the animal with its previous owner or carer poses a threat to its life or health, and the possibility of the authorised representative of a social organisation to be assisted by police officers or municipal guards.

It is however important to list the prerequisites which an authorised representative of a

¹⁵ Konwencja o ochronie praw człowieka i podstawowych wolności sporządzona w Rzymie dnia 4 listopada 1950 r., zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2 (Dz. U. z 1993 r. Nr 61, poz. 284, ze zm.).

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social organisation should be guided by to avoid being charged with meeting the features of a prohibited act, including primarily the acts listed in Article 119 § 1 and Article 124 § 1 of the PCO and Article 278 § 1, Article 193 or Article 288 § 1 of the CC. From the above it appears that when acting pursuant to Article 7(3) to the APA, the concept of collision of duties mentioned in Article 26 § 5 of the CC may apply. Literature notes that a collision of duties occurs when three prerequisites are fulfilled jointly.

The first is the necessary existence of an actual and direct threat to two or more legal interests simultaneously, which with respect to Article 7(3) of the APA means, on one hand, the duty to seize the animal in circumstances described in detail in Article 6(2) as animal abuse, and on the other, the prohibition of violating domestic peace and the right of ownership, including ownership of an animal, held by the owner.

The second circumstance is the necessary existence, with respect to a particular person, of a simultaneous duty to preserve all threatened interests. The source of this duty must be legal norms and not just morals or courtesy. In this respect it should be repeated that Article 7(3) of the APA obliges the authorised representative of a social obligation to seize an animal, thus violating the right of ownership held by the owner.

The third and final condition of relying on Article 26 § 5 of the CC is the objective impossibility of fulfilling all these duties at the same time.¹⁶ In terms of Article 7(3) of the APA, this condition means that seizing an animal from its owner excludes to some extent the protection of the owner's legal interests with respect to the right of ownership, including ownership of the animal, and oftentimes also the prohibition of violating domestic peace by trespassing on the premises on which the animal is located.

The obliged party mentioned in Article 7(3) is therefore faced with conflicting duties of which only one (seizing the animal) may be fulfilled. From a formal point of view, the right opinion appears to have been voiced by J. Majewski, who argues that in case of a so-called collision of duties the formal discrepancy between norms should be removed by a process of interpreting law so that only those obligations a citizen can perform (without prejudice to any of them) are indicated.¹⁷ Such an opinion may essentially be reduced to a position that a collision of duties is not a justification nor a circumstance excluding fault, but a case of colliding norms.¹⁸ Literature assumes that a collision may occur between two obligations to act, two obligations to refrain and an obligation to act and an obligation to refrain. Article 26 § 5 should be applied every time a person is burdened with more duties than they are able to perform. Provisions regulating the collision of duties therefore also apply when of three colliding obligations only two can be fulfilled etc.¹⁹ It appears reasonable to reduce collisions of duties to collisions of specific legal interests, and assessing them should occur through the lens of interests which the colliding duties are supposed to protect.²⁰ One should share the view of M. Kulik that when duties to protect interests with different value collide, priority should be given to duties protecting the more valuable interest, and that such a collision excludes the unlawfulness of a prohibited act.²¹ In this respect, it is reasonable to refer to an axiology adopted by the legislator itself which results indirectly from the statutory penalty adopted in a provision defining the type of prohibited act that violates a particular legal interest. It should be noted that pursuant to Article 35(1) and (1a) of the APA killing, depriving of life or slaughtering an animal in violation of legal provisions (Article 6(1), Article 33 or Article 34(1) to (4) of the APA) or abusing an animal is

¹⁶ M. Filar, *Komentarz do art. 26 Kodeksu karnego*, w: *Kodeks karny. Komentarz*, red. M. Filar, wyd. V, 2016, Lex teza nr 18.

¹⁷ J. Majewski, *Tak zwana kolizja obowiązków w prawie karnym*, Warszawa 2002, s. 147-148.

¹⁸ M. Kulik, *Komentarz do art. 26 Kodeksu karnego*, w: *Kodeks karny. Komentarz aktualizowany*, red. M. Mozgawa, 2018, Lex teza nr 27.

¹⁹ M. Kulik, *Komentarz do art. 26 Kodeksu karnego...*, teza nr 29.

²⁰ *Ibidem*, teza nr 30.

²¹ *Ibidem*.

publishable by a penalty of imprisonment up to 3 years. Article 35(2) of the APA stipulates that if the perpetrator of the act specified in Article 35(1) or (1a) of the APA is acting with particular cruelty, the punishment is a penalty of imprisonment from 3 months up to 5 years. Thus, the legislator has adopted a specific axiology of values of specific legal interests. It has decided that allowing the situations or acts described in detail in Article 6(2) of the APA to occur is an offence, and therefore the function of Article 7(3) of the APA is to suppress the offences specified in Article 35(1), (1a) and (2) of the APA and to protect animals against their consequences.

In this context, it should be repeated that only behaviours previously been classified as violating the legal order (unlawful) may be considered as meeting the features of a prohibited act (punishable). This means that behaviours whose description a first sight matches the description of prohibited acts in Article 119 § 1 of the POC, Article 278 § 1 of the CC, Article 193 of the CC, Article 124 § 1 of the POC or Article 288 § 1 of the CC do not meet the features of these prohibited acts if the prerequisites listed in Article 26 § 5 of the CC (collision of duties) are fulfilled in connection with Article 7(3) of the APA which provides for a duty to seize an animal. This also means that the prerequisites by which authorised representatives of a social organisation whose statutory purpose is to protect animals should be guided in seizing an animal from its former owner are as follows:

1). the manifestation and existence of a threat to the health or life of an animal listed in Article 7(3) the APA, including circumstances that fulfil the prerequisites of Article 6(2) of the APA, related to further residence of the animal with its former owner or carer – the principle of immediacy. A party acting on the basis of Article 7(3) has the duty to seize an animal only when this becomes necessary during the act and when there is still a reasonable chance of saving the animal. In other words, the party is not entitled to act when the threat to life or health of the animal, including behaviours described in Article 6(2) of the APA, has not yet arisen or has ceased because its consequences have been removed by the owner themselves or a third party or because the animal died;²²

2). it is not possible to remove the threat to the life or health of an animal, including the consequences of circumstances described in Article 6(2) of the APA, otherwise than by performing the obligation resulting from Article 7(3) the APA – the principle of subsidiarity (necessity). A party acting pursuant to Article 7(3) of the APA is entitled to seize the animal only when applying the procedure provided for in Article 7(1) cannot protect the animal against the negative consequences of the behaviour of the owner or carer described in Article 6(2) of the APA, and thus a case admitting of no delay occurs, and it is not possible to remove the threat to the life or health of the animal in a manner that does not interfere with the rights and freedoms of the owner, for example by convincing them to change the manner of dealing with the animal.²³

The conditions described above are of a constitutive nature in case of a collision of duties. The suitable application of Article 26 § 1 and 2 to Article 26 § 5 of the CC in the context of Article 7(3) of the APA also means a reference to the principle of proportionality that forces assigning values to colliding duties, taking into account the interests to which such duties relate. The list of legally protected interests is obviously found in the Constitution. Examples of such values are human life (Article 30), personal inviolability and security (Article 41(1)), right to legal protection of private and family life, honour and good reputation (Article 47), inviolability of the home (Article 50) and the right to ownership,

²² Należy zauważyć również, że dla prawidłowości wydania decyzji w trybie art. 7 ust. 3 nie wystarczy spełnienie przesłanek o których mowa w art. 6 ust. 2, ale konieczne jest spełnienie dodatkowego warunku jakim jest zaistnienie przypadku niecierpiącego zwłoki, gdy dalsze pozostawanie zwierząt u ich właściciela lub opiekuna zagraża ich życiu – por. wyrok NSA z 9.02.2011 r., II OSK 263/10, wyrok WSA w Łodzi z 19.02.2014 r., II SA/Łd 1242/13, Legalis nr 977078.

²³ Por. wyrok WSA w Krakowie z 24.03.2016 r., II SA/Kr 51/16, Legalis nr 1433555.

PREREQUISITES FOR EMERGENCY ANIMAL SEIZURE PURSUANT TO ARTICLE 7(3) OF THE ANIMAL PROTECTION ACT (...)

other property rights and the right of succession (Article 64 and Article 46).

It should be repeated that in order to determine the proportions between the value of legally protected interests one should, as an auxiliary measure, note the statutory penalty range for committing the prohibited acts listed in Article 35(1) and (1a) of the APA (fine up to 540 daily rates, penalty of restriction of liberty from 1 month up to 2 years or penalty of imprisonment from 1 month up to 3 years – Article 33 § 1, Article 34 § 1, Article 35 § 2, Article 37 and Article 37a of the CC) and in Article 35(2) of the APA (fine up to 540 daily rates, penalty of restriction of liberty from 1 month up to 2 years or penalty of imprisonment from 3 months up to 5 years – Article 33 § 1, Article 34 § 1, Article 35 § 2, Article 37 and Article 37a of the CC). In Articles 119 and 124 § 1 of the POC, the statutory penalty range is considerably lower, because both types of prohibited acts are petty offences. In Article 193 of the CC (protection of domestic peace), the legislator provided for a penalty lower than in case of Article 35(1) and (1a) of the APA, and for taking a movable thing with value exceeding PLN 500 (Article 278 § 1 of the CC) or destroying it (Article 288 § 1 of the CC), a penalty identical to the one in Article 35(2) of the APA.

The comparable statutory penalty ranges for offences against protection of animals and protection of property means that authorised representatives of a social organisation whose statutory purpose is to protect animals must, while applying Article 7(3) of the APA, be guided by two variables: first, the degree of threat to the life and health of the animal due to leaving the animal with its former owner or carer and, second, the degree of interference with the rights of the animal's owner necessary to fulfil the duty of seizing the animal resulting from Article 7(3) of the APA. The greater the threat to life and health of an animal due to leaving the animal with its former owner, the more severe the treatment to which the animal is subjected pursuant to Article 6(2) of the APA, and the more irreversible the results of such treatment appear, the more serious can the interference with the legal interests of the owner be. It should be emphasised that observing the principle of proportionality requires that the prerequisites that underlie the principle of immediacy and the principle of subsidiarity (necessity) be fulfilled beforehand. In particular, in applying Article 7(3) of the APA the authorised representative of a social organisation whose statutory purpose is to protect animals should consider whether a particular case admits of no delay, i.e. whether a threat to life or health of an animal due to leaving it with its former owner or carer exists (the principle of immediacy) and whether the threat cannot be removed otherwise than by fulfilling the duty resulting from Article 7(3) of the APA by seizing the animal (the principle of subsidiarity), while it is not possible to request assistance of a police officer or municipal guard.

Application of the principle of relativity (proportionality) to Article 7(3) of the APA due to the collision of duties mentioned in Article 26 § 5 of the CC means that maintaining a specific balance between the protected interest and the sacrificed interest is required.²⁴ Literature notes that Article 26 § 5 of the CC orders that provisions on the state of higher necessity (including the principle of proportionality) should be applied accordingly to a collision of duties, when the perpetrator has at least two duties contrary to each other, which cannot be fulfilled simultaneously.²⁵ When the degree of threat to life or health of an animal is objectively, or based on a social opinion in a particular situation, higher than or comparable to the degree of interference with the legal interest of the animal's owner, then the party fulfilling the duty resulting from Article 7(3) of the APA does not act unlawfully, and behaviours engaged into to fulfil this duty, while at first sight matching the description of prohibited acts listed in Article 119 § 1 of the PCO, Article 278 § 1 of the CC, Article 193

²⁴ Por. J. Giezek, *Komentarz do art. 26 Kodeksu karnego*, w: *Kodeks karny. Część ogólna. Komentarz*, red. J. Giezek, wyd. II, 2012, Lex teza nr 14.

²⁵ A. Zoll, *Komentarz do art. 26 Kodeksu karnego*, w: *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52*, red. W. Wróbel, A. Zoll, wyd. V, 2016, Lex teza nr 50.

of the CC, Article 124 § 1 of the PCO or Article 288 of the CC, do not meet the features of any of these acts. If, however, the degree of threat to life or health of an animal is lower, but not obviously lower than the degree of interference with the legal interest of the animal's owner, then no fault in the meaning of Article 1 § 3 of the CC can be ascribed to the party fulfilling the duty resulting from Article 7(3) of the APA, and hence such an act is not an offence.

Considering the contents of Article 7(3) of the APA in connection with the collision of duties mentioned in Article 26 § 5 of the CC, one should acknowledge two further requirements that allow the liability of an authorised representative of a social organisation to be excluded. These requirements include undertaking only such actions that lead to seizing the animal while fulfilling the duty resulting from Article 7(3) of the APA. The ARSO may therefore engage only in behaviours tied to protecting the welfare of the animal, including entering the premises on which the animal is located and taking possession of the animal.

Fulfilling the obligation resulting from Article 7(3) of the APA pursuant to Article 26 § 5, referring to Article 26 § 1 of the CC which contains an objective feature in the form of protecting a threatened legal interest, requires to undertake actions to seize an animal from its former owner or carer only when necessary to prevent a threat to the animal's life or health. Any behaviour undertaken under the pretext of fulfilling this obligation but actually motivated by causes and reasons other than the need to remove a threat to the life or health of an animal is not subject to protection under Article 7(3) of the APA in connection with Article 26(5) of the CC.

It needs to be reminded that the obligation resulting from Article 7(3) of the APA is complemented by the need to immediately notify the seizure of an animal and the circumstances thereof to the rural commune head (mayor, city president) so that a decision can be made with respect to the further fate of the animal. Judicial decisions note that a decision on seizing the animal, provided for in Article 7(3) is, unlike the decision provided for in Article 7(1), made when the animal has already been seized. The authority that conducts the proceedings and issues the decision provided for in Article 7(3) of the APA therefore rules on temporarily seizing the animal if the prerequisites listed in that provision are fulfilled, even though the animal is no longer with the owner when the decision is issued. In consequence, the proceedings of the authority are focused on a detailed, post-fact examination of the earlier seizure of the animal.²⁶ This means that the proceedings of the authority in that case may not be limited merely to approving the actual activity of the party authorised to previously physically seize the animal.²⁷

To summarise, it should be stated that excluding penal liability for behaviour that matches the description of a prohibited act while citing the fulfilment of prerequisites of emergency seizure provided for in Article 7(3) of the APA is possible only when the following prerequisites are jointly fulfilled: 1) a threat exists (*a contrario* from Article 1(1)²⁸ and Article 6(2) of the APA); 2) the threat is immediate ("when further stay of the animal with its previous owner or cases poses a threat to its life or health"), 3) a collision of duties occurs ("seizes the animal [from the owner]"), 4) the principle of subsidiarity applies, 5) the principle of proportionality ("in cases admitting of no delay") applies, 6) the threat can be removed (on one hand by limiting behaviours interfering with the owner's legal interests to a minimum required to fulfil the duty, on the other carrying out an intervention is possible

²⁶ Por. wyrok NSA z 11.06.2013 r., II OSK 2417/12; wyrok WSA w Warszawie z 18.03.2014 r., IV SA/WA 2877/13; wyrok WSA w Opolu z 24.10.2013 r., II SA/OP 348/13, dostępne w Centralnej Bazie Orzeczeń Sądów Administracyjnych.

²⁷ Wyrok WSA w Warszawie z 18.03.2014 r., IV SA/Wa 2877/13, Legalis nr 906718; wyrok NSA z 11 czerwca 2013 r., II OSK 2417/12, Legalis nr 763701.

²⁸ Art. 1 ust. 1 brzmi: „Zwierzę, jako istota żyjąca, zdolna do odczuwania cierpienia, nie jest rzeczą. Człowiek jest mu winien poszanowanie, ochronę i opiekę”.

only when the situation of the seized animal is improved as a result), 7) the actions are taken in order to remove the threat (actions motivated by reasons other than protecting the physical and mental welfare of the animal is not covered by legal protection provided by Article 7(3) of the APA).

In practice, the discussed solution raises doubts concerning the protection of rights and freedoms of citizens, both as regards protecting the rights of the owner against excessive and unjustified interference with their legally protected interests and protecting the party acting on the basis of Article 7(3) of the APA against penal liability. Citing the prerequisites found in Article 26 § 5 of the CC allows to determine when the party carrying out an intervention seizure acts lawfully and should not be exposed to potential penal liability. It was noted that, when the owner of the animal is the attacker, the seizing party is in addition entitled to self-defence provided for in Article 25 § 1 of the CC, which rules out potential penal liability for example by meeting the features of a prohibited act listed in Article 281 of the CC, provided that the prerequisites are fulfilled. In this scope, one should emphasise the conclusion that observing the principle of subsidiarity also means an obligation of the party carrying out an intervention in the manner provided for in Article 7(3) of the APA, including an authorised representative of a social organisation, to advise the other party in terms equivalent to those listed in Articles 217 § 2²⁹ and 224 § 1 of the CCP.³⁰ Failure to comply with this obligation may cause that party to become liable for the consequences of such failure, including the consequences of provoked and non-culpable self-defence on part of the owner of the animal.

The norm of Article 7(3) of the APA, when interpreted in accordance with the prerequisites of collision of duties found in Article 26 § 5 of the CC, is a proportional instrument that allows immediate action when it is discovered that further stay of an animal with its owner poses a threat to its life or health. It ensures proper protection of animals, which consists among others in seizing them from the owner in cases of flagrant neglect, when swiftness and efficiency of action are key considerations.

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²⁹ Art. 217 § 2 k.p.k. stanowi: „Osobę mającą rzecz podlegającą wydaniu wzywa się do wydania jej dobrowolnie”.

³⁰ Art. 224 § 1 k.p.k. stanowi: „Osobę, u której ma nastąpić przeszukanie, należy przed rozpoczęciem czynności zawiadomić o jej celu i wezwać do wydania poszukiwanych przedmiotów”.

Orzecznictwo

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