

Business Continuity and Pregnancy and Illness Status

Order of the Supreme Court of 19 April 2023, III USK 304/22¹

1. The basis for the emergence of the obligation of social insurance under Article 6(1)(5) of the Social Insurance System Act² is the actual performance of economic activity, i.e. the actual commencement and conduct of gainful activity, performed in an organised and continuous manner.
2. The state of pregnancy does not exclude the continuity of the economic activity undertaken, while the lack of the feature of continuity of the economic activity can be seen in the case where from the beginning the commencement and conduct of the activity will be doubtful, and this doubt can be derived from the state of health of the person reporting for social insurance and, above all, her awareness of the impossibility to perform the activity.
3. The registration of an activity and the accompanying declaration of a high social security contribution assessment base that is not covered by the expected profits, with the knowledge that there are obstacles to this activity, may indicate an intention not so much to take up and perform a gainful activity of a continuous nature, but to join the social security system in order to obtain high benefits.

Agnieszka Piwowarczyk

University of Silesia, Poland

agnieszka.piwowarczyk@us.edu.pl

ORCID: 0000-0002-4490-4330

<https://doi.org/10.26881/gsp.2026.1.13>

Commentary

1. Introductory Remarks

At the outset, it should be noted that this gloss is of an approving nature; its subject is the analysis of the Supreme Court's order of 19 April 2023, III USK 304/22.

¹ LEX No. 3575774.

² Act of 13 October 1998 on the Social Insurance System, consolidated text: *Journal of Laws* of 2025, item 350 as amended.

The case in question involved an appeal by A.K. conducting economic activity under the company E. with its seat in R. against the decision of Zakład Ubezpieczeń Społecznych, Oddział w Jaśle (Social Insurance Institution, Jasło Branch) to establish the obligation of insurance.

The decision of the Supreme Court commented on here concerns an extremely important issue not only for the pension authority, but also for entrepreneurs undertaking economic activity. The decision under review is another position in the discourse concerning the interpretation of the prerequisites of economic activity as defined in Article 3 of the Entrepreneurs' Law.³

2. Facts of the Case

The Social Insurance Institution, Oddział w Jaśle (Zakład Ubezpieczeń Społecznych Jasło Branch), by its decision of 2 January 2020, states that A.K., as a person conducting non-agricultural economic activity, had not been subject to compulsory retirement insurance, disability insurance, accident insurance, and voluntary sickness insurance since 1 March 2014.

A.K. filed an appeal against the above decision. In a judgment of 21 January 2021, the Regional Court in Krosno amended the contested decision of the Social Insurance Institution, Jasło Branch, in part by stating that the applicant, as a person conducting non-agricultural business activity, had been subject to compulsory retirement insurance, disability insurance, accident insurance, and voluntary sickness insurance from 1 January 2017.

According to the facts established by the court of first instance, A.K. had been a sole-proprietor in the area of accounting and tax consultancy since 1 March 2014. The Regional Court found that conducting non-agricultural economic activity from 1 March 2014 and reporting a high contribution assessment basis for social insurance by the insured was only aimed at obtaining sickness insurance benefits since the appellant had already been on sickness, maternity, and then care benefits since 3 March 2014. The Court of First Instance noted that the contribution assessment basis declared by the insured for the economic activity undertaken was disproportionate to the low income earned.

The Regional Court held that, in the period from 1 March 2014 to 31 December 2016, the insured should not have been subject to compulsory retirement insurance, disability insurance, accident, and voluntary sickness insurance as an entrepreneur.

The Regional Court confirmed the correctness of the contested decision for the period from 1 March 2014 to 31 December 2016, as the results of the proceedings conducted showed the correctness of the insurance institution's statement that the

³ Act of 6 March 2018 – Entrepreneurs' Law, consolidated text: *Journal of Laws* of 2025, item 1480 as amended (hereafter: PP [Prawo przedsiębiorców]).

applicant's activity did not meet the prerequisites of the legal definition of economic activity covered by social insurance.

In the Court's opinion, since 1 January 2017, the insured had been conducting economic activity that met all the prerequisites of Article 3 of the PP and had actually performed activities arising from the scope of this activity, and the allegations raised by the pension authority are not supported by the evidence of the case. In the opinion of the Regional Court, there were no grounds for excluding the insured from social insurance, starting from the beginning of 2017, for she had a legal title to be covered by this compulsory social insurance and voluntary sickness insurance from 1 January 2017.

As a result of an appeal by A.K., the Court of Appeal in Rzeszów, in a judgement of 26 April 2022, dismissed her appeal. The Court of Second Instance fully shared and adopted as its own the factual findings of the Court of First Instance and the legal considerations included in the justification of the judgment appealed against. The Court of Appeal emphasised that the basis for the obligation to provide insurance pursuant to Article 6(1)(5) and Article 13(4) of the Act on the Social Insurance System is the actual performance of non-agricultural activity, including economic activity. As a result, there is no doubt that performing economic activity constitutes the title of being subject to social insurance, provided that the insured actually performs this activity. In the opinion of the Court of Second Instance, the applicant, during the period covered by the appealed judgment, did not perform the substance of theregistered business activity, nor did she have any technical possibilities for such performance in a continuous, permanent, and professional manner.

A.K. filed a cassation appeal against the judgment of the Court of Appeal, challenging the judgment in its entirety; the applicant requested that it and the preceding judgment of the Regional Court be set aside by allowing the appeal against the decision of the pension authority in its entirety and amending the decision of the pension authority by establishing that the insured is subject to compulsory insurance, that is, retirement, disability, and accident insurance, as well as voluntary sickness insurance from 1 March 2014 until further notice, and to award the costs of the proceedings to date, including the costs of lawyers' fees for the proceedings before the Court of First and Second Instance and the costs of the cassation proceedings, to the insured party according to the prescribed norms, against the pension authority. Alternatively, the applicant requested that the judgment of the Court of First Instance be set aside and the case be referred back to the Court of Appeal for reconsideration, and that the pension authority be ordered to reimburse the insured for the costs of court proceedings and the costs of legal representation according to the prescribed norms.

In the case in question, the Supreme Court refused to accept the cassation complaint for examination, holding that the applicant had not demonstrated the need to examine its cassation complaint, which justified its refusal on the basis of

Article 398⁹ § 2 of the Code of Civil Procedure.⁴ The Supreme Court also found that the cassation appeal could not be considered as manifestly justified.

3. Analysis and Evaluation of the Position of the Supreme Court

At the outset, it is necessary to express approval of the positions of the ordinary courts' ruling in the present case, taking into account the comments that are raised later in this gloss. Turning to the analysis of the position of the Supreme Court expressed in this case, a detailed and thorough analysis of the normative definition of economic activity should be made, in particular in the context of the continuity of economic activity and its profit-making nature.

According to Article 3 of the PP, an economic activity is an activity that has a total of four characteristics: 1) it is a gainful activity; 2) it is organised; 3) it is performed on a continuous basis; and 4) it is performed in the entrepreneur's own name.⁵ The absence of any of the features listed in the Act means that the activity cannot be categorised as economic activity. These features must be factual and objective in nature.

The profit-making nature of a business activity should be linked to the intention accompanying that activity to earn an income. An activity is gainful if it is carried out with the aim of earning income. It is necessary to agree with the view expressed in the judgment of the administrative court which indicates that "the mere possibility of earning income does not indicate the profit-making nature of the applicant's activity."⁶ As is rightly noted by

Andrzej Powałowski, the profitability of an activity is determined by the purpose for which it is carried out. If it is assumed that, in connection with and as a result of the activity, there is a surplus of income over the costs incurred, then the profit-making purpose of the activity has been determined.⁷ On the other hand, a subjective conviction of the subject that he/she performs an activity for profit should be regarded as insufficient for the recognition of the profit-making character of the economic activity. Indeed, economic activity must be characterised by subordination to the rules of profitability and profit or the principle of rational management,⁸ and in order to qualify a given activity as an economic activity, it is necessary to establish whether the entity in question actually carries out an activity which objectively may generate income.⁹ Thus, only an activity that creates at least the potential possibility

⁴ Act of 17 November 1964 – Code of Civil Procedure, consolidated text: *Journal of Laws* of 2024, item 1568, 1841 as amended (hereafter: KPC [kodeks postępowania cywilnego]).

⁵ Judgment of the Supreme Court of 23 August 2022, II USKP 201/21, OSNP 2023, no. 6, item 67.

⁶ Judgment of the Provincial Administrative Court in Bydgoszcz of 13 December 2022, I SA/Bd 561/22, LEX No. 3456000.

⁷ A. Powałowski, "Działalność gospodarcza według ustawy – Prawo przedsiębiorców" [in:] *Prawo przedsiębiorcy*, eds. R. Blicharz, A. Powałowski, Warszawa 2019, p. 38.

⁸ Order of the Supreme Court of 19 October 1999, III CZ 112/99, OSNC 2000, no. 4, item 78.

⁹ Resolution of the Supreme Court of 30 November 1992, III CZP 134/92, OSNC 1993, no. 5, item 79.

of generating an income can be considered an economic activity.¹⁰ However, it is not necessary to actually earn income from the activity in question; any losses that the activity generates do not deprive it of the status of economic activity. Indeed, one has to take into account the possibility of not gaining income from the economic activity conducted, that is, incurring a loss. The profit-making character of economic activity is not determined by any actual profit, but by the intention to obtain it.¹¹ Therefore, the profit-making character of the business activity should not be directly connected with the act of charging. Indeed, as pointed out in the relevant legal doctrine, calculating and charging fees does not in every case mean that the activity is carried out in order to make a profit, and fees may be charged to cover only the costs of the activity, which does not result in an income.¹²

Another characteristic of economic activity that is of key importance for the decisions in this case is the continuity of the activity. The introduction of the premise of continuity of economic activity stems from the need to distinguish this activity from activities that are economic in nature but occur on a one-off or incidental basis.¹³ Continuity in economic activity has two aspects. The first one is the repetition of activities, so as to distinguish the economic activity carried out from a single contract for a specific piece of work or commission or a contract for the provision of a service, which in themselves do not constitute or are not yet part of an economic activity. The manifestation of economic activity does not include activities of a sporadic, ad hoc, occasional or incidental nature.¹⁴ The second aspect, which, incidentally, follows from the first one, is the intention not to engage in economic activity for a short period of time. Both aspects depend on the behaviour of the person undertaking the economic activity. In the event of doubts as to the commencement and conduct of the economic activity, the sphere of facts is decisive, as the will or intention of the party also belongs to the findings of fact in a given case.¹⁵ It is also worth mentioning the view presented by Tadeusz. Kocowski, who points to three aspects of the continuity of economic activity: temporal, intentional, and related to the basis for maintaining the business. The first aspect is based on performing economic activity continuously; the second aspect is connected with taking actions which lead to maintaining business continuity; while the third aspect is associated with the approach of an entrepreneur wishing to maintain his/her activity in order to achieve sources of income.¹⁶

¹⁰ G. Lubeńczuk, "Commentary on Article 3" [in:] M. Zdyb, G. Lubeńczuk, A. Wołoszyn-Cichocka, *Prawo przedsiębiorców. Komentarz*, Warszawa 2019.

¹¹ Judgment of the Administrative Court in Białystok of 6 March 2018, III AUa 762/17, LEX No. 2488751.

¹² Judgment of the Provincial Administrative Court in Opole of 28 June 2024, I SA/Op 400/24, LEX No. 3736347.

¹³ T. Kocowski, *Działalność gospodarcza* [in:] *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, series: System Prawa Administracyjnego, vol. 8A, 2nd ed., Warszawa 2018, p. 127.

¹⁴ Judgment of the Supreme Court of 10 April 2024, III USKP 32/23, LEX No. 3703609.

¹⁵ Order of the Supreme Court of 15 May 2020, III UK 191/19, LEX No. 3223602.

¹⁶ T. Kocowski, *Przedsiębiorcy* [in:] A. Borkowski *et al.*, *Administracyjne prawo gospodarcze*, 3rd ed., Wrocław 2009, p. 81.

Continuity of activity, as well as profitability, are concepts relevant to the intention of an entrepreneur who undertakes a business activity.¹⁷ The intention to carry out an economic activity continuously is, therefore, not undermined by the anticipation of its suspension due to pregnancy, the birth of a child, or the need to care for a child.¹⁸ Moreover, an activity of a seasonal nature, carried out periodically, will also meet the premise of continuity.¹⁹ However, repeated, prolonged periods of incapacity to work actually exclude the possibility of performing an activity as a form of gainful activity.²⁰

It should be noted that taking up and performing economic activity, even in the eighth month of pregnancy, does not constitute an obstacle to being subject to social insurance in terms of carrying out such activity continuously.²¹ However, this does not mean that the pension authority will never be able to question the title of being subject to social insurance. In its decision, the Supreme Court in a more precise way emphasises that the state of pregnancy in itself does not exclude the continuity of the activity undertaken, while the lack of the feature of continuity of economic activity may be found in the event that the commencement and conduct of the activity are highly doubtful from the beginning, and this doubt may be derived from the state of health of the person reporting for social insurance, primarily from his/her awareness of the impossibility of conducting the activity.²² This may lead to the conclusion that, by design, the financial result of the activity is irrelevant and indicates an intention to be included in the social security system in order to obtain high benefits.²³

The Supreme Court assessed that the applicant's activity was so small and short that it could not be considered as an organised, continuous, and gainful activity. She had provided only five one-off services. Declaring a high basis for insurance contributions had no economic justification and was aimed solely at obtaining high social security benefits. It has been accepted in the case law of the Supreme Court that someone who claims to be performing an activity only in order to obtain social insurance benefits is, in fact, creating the appearance of this activity, as he or she is not aiming to obtain earnings from the activity, which distorts the statutory sense of this institution.²⁴ In the author's opinion, this is exactly the situation with the present case, which, as it were,

¹⁷ H. Nowicki, K. Kucharski, "The concept of economic activity in business law," *Bulletin of the Association of Graduates and Friends of the Faculty of Law of the Catholic University of Lublin* 2021, vol. 16, no. 18(1), pp. 185–204.

¹⁸ Order of the Supreme Court of 11 October 2023, I USK 151/23, LEX No. 3614441; Judgment of the Supreme Court of 20 April 2021, II USKP 36/21, LEX No. 322950.

¹⁹ K. Stoga [in:] J. Sommer, K. Stoga, R. Potrzebny, *Prawo działalności gospodarczej. Komentarz*, Warszawa 2000, p. 17; J. Gudowski, "Commentary on Article 479¹ KPC" [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 3, ed. T. Ereciński, 5th ed, Warszawa 2016, p. 639.

²⁰ Order of the Supreme Court of 8 August 2023, I USKP 202/22, LEX No 3592134; Judgment of the Supreme Court of 9 November 2022, I USKP 148/21, LEX No. 3549446; Judgment of the Supreme Court of 25 October 2022, I USKP 24/22, LEX No. 3537843.

²¹ Order of the Supreme Court of 16 February 2022, III USK 356/21, LEX No. 3402045.

²² Judgment of the Administrative Court in Białystok of 13 June 2017, III AUa 1152/16, LEX No. 2409278.

²³ Order of the Supreme Court of 4 June 2020, III UK 445/19, LEX No. 3207825.

²⁴ Judgement of the Supreme Court of 6 April 2017, II UK 98/16, LEX No. 2307127.

was confirmed by the applicant herself. She declared that “There were many things it could have done for the clients, but the office did not do them.” This is indicative of a sham business because in the case at hand, there is a lack of active and rational client acquisition activities.

The Supreme Court is right, as it confirmed in the ruling of 19 April 2023, in the context of the cassation case under review, that one cannot be deemed to be performing economic activity when there is no actual intention to do so, and the conduct of the activity is aimed solely to obtain social security benefits. I fully endorse the conclusion expressed by the Supreme Court in the decision cited. Relevant jurisprudence²⁵ indicates that pregnancy in itself does not constitute an obstacle to being subject to social insurance in terms of exercising activity in a continuous manner; however, this is possible only if, in fact, economic activity is conducted under conditions fulfilling the statutory definition of such.²⁶

In conclusion, it should be stated that the considerations presented in the justification of this order confirm the existing body of case law in the area discussed, and my position coincides with the views expressed in the judgment under review.

In the opinion of the Supreme Court, the legal problems formulated by the applicant in the motion to accept the cassation complaint for examination do not constitute significant legal issues within the meaning of Article 398⁹ § 1(1) of the KPC. Acceptance of a cassation complaint for substantive examination must be justified by an important public interest, in particular by the need to interpret provisions that have not yet been interpreted by the courts or that raise serious doubts; in order to resolve important legal issues, especially of a precedential nature, not yet considered by the Supreme Court; and, finally, in order to eliminate judgments that are manifestly and flagrantly defective.²⁷ Moreover, the cassation appeal cannot be considered as obviously justified.

It should be noted that an important legal issue and the need to interpret the provisions do not occur if the Supreme Court has expressed a view on a certain issue in earlier case law and if there are no circumstances justifying a change of this view,²⁸ which accounts for the refusal to accept the cassation complaint for examination pursuant to Article 398⁹ § 2 of the KPC.

Declaration by a person conducting economic activity of a high basis for the assessment of social insurance contributions, with simultaneous negligible economic activity and interruptions in the performance of activity caused by the use of social insurance benefits, testifies to the ostensible nature of this activity and the lack of a title to be subject to social insurance if the only purpose of such activity is to obtain social insurance benefits. From the facts presented, it is clear that in the case in question we

²⁵ Judgment of the Supreme Court of 16 January 2014, I UK 235/13, LEX No. 1444493.

²⁶ Judgment of the Supreme Court of 10 April 2024, III USKP 32/23, LEX No. 3703609.

²⁷ Order of the Supreme Court of 12 March 2025, I CSK 2770/24, LEX No. 3841378.

²⁸ Order of the Supreme Court of 18 February 2015, II CSK 428/14, LEX No. 1652383.

are dealing with the absence of real economic activity with a fictitious declaration for social insurance in order to obtain benefits.

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Summary

Agnieszka Piwowarczyk

Business Continuity and Pregnancy and Illness Status

The subject gloss expresses approval for the theses presented in the Supreme Court's decision of 19 April 2023, III USK 304/22. In the ruling referred to, the Supreme Court unequivocally confirmed that the state of pregnancy does not constitute an obstacle to being subject to social insurance in the situation discussed; however, this is possible only if the economic activity is actually conducted in conditions fulfilling the relevant statutory definition. Economic activity cannot be deemed to be carried out in a situation where there is no actual intention to perform it and where the economic activity consists only in obtaining social insurance benefits.

Keywords: business continuity, pregnancy and sickness status, social security system.

Streszczenie

Agnieszka Piwowarczyk

Cecha ciągłości działalności a cięża i choroba

Przedmiotowa glosa wyraża aprobatę dla tez sformułowanych w postanowieniu Sądu Najwyższego z dnia 19 kwietnia 2023 r. (III USK 304/22). W głosowanym orzeczeniu SN jednoznacznie potwierdził, że stan ciąży nie stanowi przeszkody do podlegania ubezpieczeniom społecznym z omawianego tytułu, jednak jest to możliwe tylko wtedy, gdy faktycznie działalność gospodarcza jest prowadzona na warunkach wypełniających definicję ustawową. Nie można uznawać za prowadzenie działalności gospodarczej sytuacji, kiedy brak jest rzeczywistego zamiaru jej wykonywania, a prowadzenie działalności ma polegać tylko na uzyskiwaniu świadczeń z ubezpieczenia społecznego.

Słowa kluczowe: ciągłość działalności gospodarczej, stan ciąży i choroby, system ubezpieczeń społecznych.