



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PIOTR NOWAK v. POLAND

(Application no. 7337/05)

JUDGMENT

STRASBOURG

7 December 2010

FINAL

11/04/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of Piotr Nowak v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić,

Vincent Anthony de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 November 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7337/05) against the Republic of Poland and the Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Piotr Nowak (“the applicant”), on 27 January 2005.

2. The applicant was represented by Mr M. Bogucki, a lawyer practising in Przemyśl. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wolasiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that he had been unlawfully detained.

4. On 25 March 2009 the President of the Fourth Section decided to give notice of the application to the Polish and Ukrainian Governments.

5. On 11 October 2010 the President of the Fourth Section decided to sever the applicant's complaints against Ukraine from the rest of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1979 and lives in Przemyśl.

7. In 1998 the applicant was charged with assaulting a certain A.B. On 15 April 1999 criminal proceedings against him and a co-accused were instituted. On 9 May 2000 the bill of indictment was filed with the Szczecin

District Court. On 27 June 2000 both accused were present. However the hearing was adjourned since the applicant had not been served with the bill of indictment. The trial eventually began on 13 January 2004. The applicant was present at the hearing.

8. The applicant subsequently left Poland. He submitted that before leaving, he informed the court that he could be contacted at a correspondence address in Przemyśl. He also called the court a few times, asking about progress on his case. The Government disagreed and maintained that the case file contained no proof that the applicant had attempted to contact the court. They stated that the applicant had not informed the court about his new correspondence address.

9. On 12 February 2004 the applicant failed to appear at the hearing. The Szczecin District Court ordered that the applicant be remanded in custody for a period of three months. The decision reads as follows:

“the court orders that Piotr Nowak be remanded in custody for a period of three months, since he failed to comply with a summons”.

10. In March 2004 the applicant started working in L'viv, Ukraine.

11. On 20 January 2005, at around 11 a.m., the applicant went to a police station in L'viv to report that his friend's car had been stolen. The police checked his passport, verified his personal details and locked him up in a cell. When he asked for the reasons for his arrest he was told that he was an “international thief”. He was subsequently questioned by the officers. He submits that during the questioning the officers severely beat him and extinguished cigarettes and matches on his wrist and forearm.

12. On 24 January 2005 a decision of the police concerning his voluntary expulsion was served on him.

13. The applicant was kept at the police station until the afternoon of 24 January 2005, when he was transported to the Polish border control post in Medyka, where he arrived at around 7 p.m. At around 8 p.m. he was examined by a doctor who noted that the applicant had cigarette burns on his left forearm and provided him with medical aid.

14. The applicant was arrested on the basis of the detention order of 12 February 2004 and a wanted notice issued by the Szczecin police station on 2 August 2004. He was then transferred to the Przemyśl Detention Centre.

15. On 25 January 2005 the applicant asked the court to release him from detention. He submitted that he would stay in Poland until the end of the trial. The letter reached the trial court on 1 February 2005.

16. On 31 January 2005 the applicant was examined by a prison doctor. The doctor stated that the applicant had two 0.5 cm cigarette burns on his left hand, plus two similar marks on his left wrist and one on his forearm. He also had abrasions on his lower and upper lip and a broken front tooth.

17. According to the applicant, he was served with the detention order of 12 February 2004 on 2 February 2005. The Government disagreed maintaining that the applicant received the letter from the court on 1 February 2005.

18. On 4 February 2005 the Szczecin District Court dismissed the applicant's motion of 25 January 2005. The court held that the applicant had left the country and failed to appear at hearings. For these reasons he had obstructed the proceedings.

19. On 8 February 2005 the applicant filed another application for release.

20. On 11 February 2005 the Szczecin District Court ordered the applicant's release on bail, which it set at 2,000 Polish zlotys (PLN) (approximately EUR 500). It also prohibited him from leaving the country. The decision was served on a later, unknown date.

21. On 14 February 2005 the Szczecin District Court received the applicant's appeal against his arrest on 20 January 2005 by the Ukrainian Police. On 23 February 2005 the District Court dismissed the appeal against the applicant's arrest by the Polish police on 24 January 2005. The court considered that the arrest was justified, prompt and legal.

22. On 28 February 2005 the applicant paid the bail and on the same day he was released from detention.

23. On 12 December 2005 the Szczecin District Court convicted the applicant as charged and fined him PLN 2,000.

24. Both the applicant and the prosecutor appealed. On 28 April 2006 the Szczecin Regional Court quashed the first-instance judgment and remitted the case.

25. On 11 March 2008 the Szczecin District Court gave judgment and acquitted the applicant. The judgment is final.

26. On 29 May 2008, on the applicant's complaint, the Szczecin Regional Court acknowledged the excessive length of criminal proceedings before the Szczecin District Court and granted the applicant 3,000 PLN by way of just satisfaction.

27. On 29 October 2008 the Szczecin Regional Court dismissed the applicant's request for compensation for unjustified pre-trial detention under Article 552 § 4 of the Code of Criminal Procedure. The court noted that the applicant was present at the hearing held on 13 January 2004 during which he was informed about the date of the subsequent hearing i.e. 12 February 2004. Since he failed to appear at that hearing, the trial court ordered his detention on remand. Subsequently, the trial court also issued a wanted notice for him. He was detained on 24 January 2005 and released on 28 February 2005. The court held that while indeed the applicant had been detained for 36 days and finally acquitted, the detention could not be considered "obviously unjustified". It referred to the fact that the applicant was hiding from justice and a wanted notice had been issued.

The court considered that the applicant's detention was justified in the circumstances of the case and therefore his request should be dismissed.

28. The applicant failed to appeal against this judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions concerning arrest

29. Article 244 of the Code of Criminal Procedure of 1997, which entered into force on 1 September 1998, stipulates that everyone who is arrested shall be immediately informed of the reasons for his arrest and of his rights.

30. Article 246 provides that everyone who is arrested shall be entitled to lodge an appeal with a court challenging the lawfulness of the arrest and the manner of its execution. Such an appeal must be promptly transmitted to the competent District Court which is required to examine it speedily. In cases where the District Court has established that the arrest was unlawful or unwarranted, it must order the immediate release of the person concerned.

B. Provisions concerning detention on remand

31. The Code of Criminal Procedure defines detention on remand as one of the so-called “preventive measures” (*środki zapobiegawcze*). The other measures are bail (*poręczenie majątkowe*), police supervision (*dozór policji*), a guarantee by a responsible person (*poręczenie osoby godnej zaufania*), a guarantee by a social entity (*poręczenie społeczne*), a temporary ban on engaging in a given activity (*zawieszenie oskarżonego w określonej działalności*) and a ban on leaving the country (*zakaz opuszczania kraju*).

Article 249 § 1 sets out the general grounds for the imposition of preventive measures:

“1. Preventive measures may be imposed in order to ensure the proper conduct of proceedings and, exceptionally, to prevent an accused's committing another serious offence; they may be imposed only if the evidence shows a significant probability that the accused has committed an offence.”

(...)

3. Before deciding on the application of the preventive measures, the court or the prosecutor shall hear the person charged with offence, unless it is impossible due to the accused being in hiding or residing abroad...”

Article 258 lists the grounds for detention on remand. It provides, in so far as relevant:

“1. Detention on remand may be imposed if:

(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his identity cannot be established or when he has no permanent abode [in Poland];

(2) there is a reasonable risk that an accused will attempt to induce [witnesses or co-defendants] to give false testimony or to obstruct the proper course of proceedings by any other unlawful means;

2. If an accused has been charged with a serious offence or an offence for the commission of which he may be liable to a statutory maximum sentence of at least 8 years' imprisonment, or if a court of first instance has sentenced him to at least 3 years' imprisonment, the need to continue detention to ensure the proper conduct of proceedings may be established by the likelihood that a severe penalty will be imposed.”

The Code sets out the extent of the courts' discretion to continue a specific preventive measure. Article 257 reads, in so far as relevant:

“1. Detention on remand shall not be imposed if another preventive measure is sufficient.”

Article 259 § 1 reads:

“1. If there are no special reasons to the contrary, detention on remand shall be lifted, in particular, if depriving an accused of his liberty would:

(1) seriously jeopardise his life or health; or

(2) entail excessively harsh consequences for the accused or his family.”

Article 259 § 3 provides:

“Detention on remand shall not be imposed if an offence attracts a penalty of imprisonment not exceeding one year.”

Article 259 § 4 specifies that the rule provided for in Article 259 § 3 is not applicable when the accused attempts to evade justice or persistently fails to comply with a summons or when his identity cannot be established.

C. Obligations of the accused

32. Under Article 75 of the CCP an accused who is not deprived of his liberty is required to appear whenever he receives a summons in the course of criminal proceedings. He is also required to inform the authority conducting the proceedings of any change of his abode or of any absence lasting longer than 7 days. The accused must to be informed of these obligations when first questioned.

D. Compensation for wrongful detention

33. Chapter 58 of the Code of Criminal Procedure, entitled “Compensation for wrongful conviction, detention on remand or arrest”, stipulates that the State is liable for wrongful convictions or for unjustifiably depriving an individual of his liberty in the course of criminal proceedings against him.

Article 552 provides, in so far as relevant:

“1. An accused who, as a result of the reopening of the criminal proceedings against him or of a cassation appeal, has been acquitted or resented under a more lenient substantive provision, shall be entitled to compensation from the State Treasury for the pecuniary and non-pecuniary damage he has suffered in consequence of having served all or part of the sentence initially imposed on him.

...

4. Entitlement to compensation for pecuniary and non-pecuniary damage shall also arise in the event of manifestly wrongful arrest or detention on remand.”

34. Pursuant to Article 555, an application for compensation for manifestly wrongful detention on remand has to be lodged within one year from the date on which the decision terminating the criminal proceedings in question became final.

35. Proceedings relating to an application under Article 552 are subsequent to and independent of the original criminal proceedings in which the detention was ordered. The claimant may retrospectively seek a ruling as to whether his detention was justified. He cannot, however, test the lawfulness of his continuing detention on remand and obtain release.

E. Civil remedies

36. Article 23 of the Civil Code contains a non-exhaustive list of so-called “personal rights” (*prawa osobiste*). This provision states:

“The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions.”

Article 24, paragraph 1, of the Civil Code provides:

“A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of infringement [the person concerned] may also require the party who caused the infringement to take the necessary steps to remove the consequences of the infringement ... In compliance with the principles of this Code [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest.”

Article 445 § 1 of the Civil Code, applicable in the event a person suffers a bodily injury or a health disorder as a result of an unlawful act or omission of a State agent, reads as follows:

“...[T]he court may award to the injured person an adequate sum in pecuniary compensation for the damage suffered.”

Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

“The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) suffered to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

37. The applicant complained under Article 5 of the Convention that he was unlawfully detained. Article 5 § 1 provides in so far as relevant:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

38. The Government submitted that the applicant failed to exhaust the available domestic remedies. In particular he had failed to appeal against the Szczecin District Court's decision of 12 February 2004 (served on 1 February 2005). In addition the applicant failed to appeal against the Szczecin Regional Court's judgment of 29 October 2008 dismissing his request for compensation for unjustified pre-trial detention under Article 552 of the Code of Criminal Procedure. Lastly, they were of the opinion, that the applicant could have lodged a claim for compensation under Articles 23 and 24 of the Civil Code (protection of personal goods).

39. The applicant argued that an appeal against the judgment of 29 October 2008 would have lacked any prospects of success.

40. The Court reiterates that it is well established in its case-law that an applicant must make normal use of those domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (see *Yaşa v. Turkey* judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 71).

41. In so far as the Government alleged that the applicant failed to appeal against the decision of 12 February 2004, the Court notes that the applicant lodged a motion on 25 January 2005 asking for his detention to be lifted (see paragraph 15 above). The applicant's aim in using this remedy was to obtain a review of his detention and to obtain his release. In the circumstances of the case this remedy was adequate and effective within the meaning of Article 35 of the Convention.

42. As regards the Government's objection that the applicant failed to appeal against the decision dismissing his request for compensation and also failed to lodge a claim for compensation under Articles 23 and 24 of the Civil Code the Court observes that the right to have the lawfulness of detention examined by a court and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see *Feliński v. Poland*, no. 31116/03, § 41, 42, 7 July 2009).

43. In this respect the Court observes that the applicant does not complain that he had not obtained compensation for his detention in contravention of Article 5 § 5 of the Convention.

44. Consequently, the Government's preliminary objection should be dismissed.

45. As to the substance of the case the Government maintained that the applicant's detention had been in accordance with Article 5 § 1 of the Convention. In their opinion there had been a strong probability that the applicant had committed the offences with which he had been charged. In addition his detention had been based on a court order and was therefore "lawful". There was, further, no arbitrariness on the part of the domestic authorities, since the applicant had intentionally evaded justice and moved abroad.

46. The applicant replied that after leaving Poland he had contacted the domestic court on several occasions but he had been informed that the proceedings against him were stayed. He further generally objected to the Government's submissions.

47. In the instant case, the Court will first consider whether the applicant's detention was "lawful" and effected "in accordance with a procedure prescribed by law", as required by Article 5 § 1 of the Convention. The Court notes that in May 2000 a bill of indictment against the applicant on charges of assault was filed with the Szczecin District Court. The applicant was present at the hearing held on 13 January 2004 during which he was informed about the date of the next hearing. He failed

to appear at that hearing as he had meanwhile left Poland (see paragraphs 7 - 9 above). On 12 February 2004 the District Court ordered that the applicant be remanded in custody on the ground that he had failed to comply with the summons.

48. The applicant argued that he had contacted the trial court on several occasions informing it of his new address. However, the Court notes that it was established by the Szczecin Regional Court in the compensation proceedings that the trial court had not been aware of the applicant's whereabouts. In addition the Regional Court confirmed that the applicant had been evading justice and that his failure to appear in response to the summonses had been intentional (see paragraph 27 above).

49. Against this background, the Court considers that the applicant's detention was ordered and confirmed in accordance with domestic law and fell within the ambit of Article 5 § 1(c) of the Convention, as having been effected for the purpose of bringing him before the competent legal authority on suspicion of having committed an offence.

50. In the light of all the material in its possession the Court does not find any indication that the applicant's detention was unlawful or ordered otherwise than "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1.

51. It follows that the complaint under Article 5 § 1 is inadmissible as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

52. The applicant complained that he was not brought promptly before a judge. He relied on Article 5 § 3 of the Convention which provides in so far as relevant:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power (...)"

A. Admissibility

53. The Government submitted that the applicant had failed to exhaust the required domestic remedies. They stressed that the applicant could have lodged a constitutional complaint challenging Article 249 § 3 of the Code of Criminal Procedure on the basis of which his detention decision and the arrest warrant were issued. The Government stressed that the Code's provisions did not establish a mechanism for the prompt judicial verification of a detention decision after the capture of an accused who had been evading justice. In their opinion, the applicant could have also lodged a civil

action under Articles 23 and 24 of the Civil Code (protection of personal goods) claiming that the court's verification of his detention was not automatic.

54. The applicant objected to the Government's submissions.

55. The Court notes that in their objection the Government failed to specify the provision of the Constitution to which the Code of Criminal Procedure was contrary. Nor have the Government provided any further details as to the content of such a (hypothetical) constitutional complaint. Thus, the Court considers that in the present case the effectiveness of the constitutional remedy has not been substantiated.

56. In so far as the Government alleged that the applicant should have lodged a civil action, the Court observes that under Article 448 of the Civil Code no claim for damages may arise unless the alleged infringement resulted from an unlawful act or omission. It would appear that the lack of automatic judicial control of the applicant's detention was at all times lawful (see *Ladent v. Poland*, no. 11036/03, § 75, ECHR 2008- ... (extracts)). Consequently, in the circumstances of the present case, an action under Article 23 or Article 24 of the Civil Code could not have offered the applicant reasonable prospects of success. It follows that the Government's objection must be rejected.

57. Consequently, the Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions.

58. The applicant submitted that following his arrest on 24 January 2005 he was not brought before a judge as required under Article 5 § 3 of the Convention.

59. The Government refrained from submitting observations on the merits of the complaint.

2. The Court's assessment.

60. The Court reiterates that under Article 5 § 3 there must be protection of an individual arrested or detained on suspicion of having committed a criminal offence through judicial control. The judicial control must satisfy the requirements of promptness and be automatic (see *Ladent*, cited above, § 72).

61. In the instant case, the Court observes that the Szczecin District Court issued an order for the applicant's detention on 12 February 2004. The

detention order specified that the applicant be remanded in custody for a period of three months for failing to comply with summons (see paragraph 9 above). The applicant was arrested on 24 January 2005 by the Polish border police and was subsequently detained on the basis of that order. The Court notes that following the applicant's arrest on reasonable suspicion that he had committed an offence there was no automatic judicial control of his detention. In circumstances such as those that obtained in the present case, where the applicant was arrested on the basis of a detention order issued in his absence, the domestic law does not appear to provide for such an initial automatic review and makes it dependent on an application by the detained person. The Court notes that Article 5 § 3 of the Convention does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention. To conclude otherwise would run counter to the plain meaning of this provision (see *Ladent* cited above § 75).

62. Therefore, there has been a violation of Article 5 § 3 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. The applicant complained under Article 6 of the Convention, alleging unfairness of the criminal proceedings against him. He also complained under Article 14 of the Convention that he was discriminated against on ethnic grounds.

64. The Court finds that the facts of the case do not disclose any appearance of a violation of the above-mentioned provisions. It follows that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

66. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

67. The Government contested this claim.

68. The Court awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

69. The applicant did not make any claims for costs and expenses.

C. Default interest

70. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 3 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President