



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

FOURTH SECTION

CASE OF NURZYŃSKI v. POLAND

(Application no. 46859/06)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

21/03/2011

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

In the case of Nurzyński v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić,

Vincent A. de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 46859/06) against the Republic of Poland 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 Krzysztof Nurzyński (“the applicant”), on 8 November 2006.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his right to respect for his family life had been infringed.

4. On 11 December 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (former Article 29 § 3 of the Convention, now Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Łódź.

6. On 11 October 2005 the applicant was arrested on charges of aggravated assault and theft.

7. On 13 October 2005 the Łódź District Court ordered his pre-trial detention, which was subsequently extended on several occasions.

8. The applicant's mother and wife were witnesses during the investigation stage of the proceedings.

9. On 30 March 2006 a bill of indictment was lodged with the Łódź District Court. The applicant was charged with aggravated assault and theft.

10. On an unknown date the applicant's wife and mother applied to be allowed to visit the applicant in prison. Their applications bear handwritten notes "refusal, the person is a witness", illegible signatures and the date of 3 April 2006.

11. On 17 July and 2 August 2006 the applicant requested to be allowed to maintain personal contact with his family. His applications were rejected. The authorities noted that the family members themselves should apply for permission to visit the applicant in prison.

12. On 14 November 2006 the applicant's mother applied for permission to visit the applicant in prison. Her application bears a note "refusal, witness in the case", an illegible signature and the date of 14 November 2006.

13. During a hearing held on 3 April 2007 the applicant's mother and wife stated that they refused to testify at the trial. On the same day, the applicant's mother was granted permission to visit the applicant in prison.

14. On 27 June 2007 the applicant and his wife were granted a divorce.

15. On 29 July 2008 the Łódź District Court convicted the applicant as charged and sentenced him to two years' imprisonment.

16. The applicant's pre-trial detention was lifted on 8 October 2008. After that date he was visited by his mother on 11 occasions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Execution of Criminal Sentences

17. Article 217 § 1 of the Code of Execution of Criminal Sentences of 1997, as applicable at the material time, provided as follows:

"A detainee is allowed to receive visitors, provided that he obtains permission from the authority at whose disposal he remains [investigating prosecutor at the investigative stage or from the trial court once the trial has begun]. If the detainee remains at the disposal of several authorities, it is necessary to obtain permission from all of them unless they decide otherwise."

B. Constitutional Court's judgment of 2 July 2009 (no. K. 1/07)

18. The judgment was given following an application, lodged by the Ombudsman on 2 January 2007, alleging that Article 217 § 1 of the Code of Execution of Criminal Sentences was incompatible with a number of constitutional provisions, including the principle of protection of private

and family life (Article 47 of the Constitution), the principle of proportionality (Article 31 § 3 of the Constitution), Article 8 of the Convention and Article 37 of the United Nations Convention on the Rights of the Child. The Constitutional Court's judgment became effective on 8 July 2009, the date of its publication in the Journal of Laws (*Dziennik Ustaw*).

19. The Constitutional Court ruled that Article 217 § 1, in so far as it did not specify the reasons for refusing family visits to those in pre-trial detention, was incompatible with the above provisions. The court held that this provision did not indicate with sufficient clarity the limitations on a detainee's constitutional right to protection of private and family life. The court also considered that Article 217 § 1 was incompatible with the Constitution in so far as it did not provide for a possibility to appeal against a prosecutor's decision to refuse a family visit to those in pre-trial detention.

C. Amendments to the Code of Execution of Criminal Sentences

20. On 5 November 2009 the parliament adopted amendments to Article 217 of the Code of Execution of Criminal Sentences. In particular, subparagraphs 1a-1f were added. These provisions provide in particular that a detainee is entitled to at least one family visit per month. In addition, they indicate clearly the conditions for refusing a family visit to a detainee and provide an appeal procedure against such a refusal. The amendments entered into force on 8 June 2010.

D. Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 11 January 2006

21. The relevant extracts from the Recommendation read as follows:

“Part II: Conditions of imprisonment

Contact with the outside world

24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

24.3 National law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted.

24.4 The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

24.5 Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant complained that during his detention he had been deprived of personal contact with his wife and mother for a significant period of time, in breach of Article 8 of the Convention which provides as relevant:

“1. Everyone has the right to respect for his ... family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

23. The Government contested that argument.

A. Admissibility

24. The Government firstly claimed that the applicant could have lodged a constitutional complaint under Article 79 § 1 of the Constitution, challenging the provisions of the Code of Execution of Criminal Sentences. Subsequently, he could have sought compensation under Article 417 § 2 of the Civil Code for damage resulting from decisions based on unconstitutional provisions.

25. The applicant contested the Government's submissions.

26. Turning to the circumstances of the present case, the Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other

authorities, *Akdivar and Others v. Turkey* 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

27. In so far as the Government alleged that the applicant should have lodged a constitutional complaint, the Court observes that on 2 January 2007 the Ombudsman had lodged an application for review of constitutionality with the Constitutional Court. The judgment in that case was delivered on 2 July 2009 (see paragraphs 17 and 18 above).

28. The Court further notes that the applicant did not object to the relevant provisions of the Code of Execution of Criminal Sentences, he merely stressed that the authorities had deprived him of personal contact with his wife and mother. Against that background, the Court concludes that the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress. The Court accordingly dismisses the Government's objection.

29. The Government further argued that the applicant had failed to exhaust the available domestic remedies envisaged by the Code of Criminal Procedure and the Code of Execution of Criminal Sentences.

30. The Court observes that the Government have failed to indicate any specific remedy that the applicant could have resorted to. Accordingly, the Court dismisses this objection.

31. The Court notes that the application 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' arguments

32. The Government submitted that the interference with the applicant's right to private and family life was justified by the requirements laid down in § 2 of Article 8. They noted that most of the applications for visits had been lodged by the applicant himself. They claimed that the applicant's wife and his mother had asked, only on one occasion and three occasions respectively, to be allowed to visit him in prison. In addition, they had both been granted witness status in the proceedings. The Government further mentioned that the applicant was a recidivist offender and the conduct of the domestic authorities was reasonably justified by the already committed and potential crimes of the applicant. They finally referred to the fact that in 1999, at the time of his marriage, the applicant had decided to change his name and take his wife's name. In their opinion, this could have explained the conduct of the domestic authorities in restricting the applicant's contact with his family in the course of the criminal proceedings. They concluded

that the restrictions imposed were justified by the need to secure the proper conduct of the proceedings.

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

2. The Court's assessment

(a) General principles

34. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on private and family life. However, it is an essential part of a detainee's right to respect for his family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see, *mutatis mutandis*, *Messina v. Italy* (no. 2) no. 25498/94, § 61, 28 September 2000, unreported).

35. Restrictions such as limitations on the number of family visits, supervision of those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special arrangements for visits constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision (*ibid.* §§ 62-63; see also *Kucera v. Slovakia*, no. 48666/99, §§ 127-128, 17 July 2007).

36. Nevertheless, any restriction of that kind must be “in accordance with the law”, must pursue one or more legitimate aim listed in paragraph 2 and, in addition, must be justified as being “necessary in a democratic society”. The expression “in accordance with the law” not only necessitates compliance with domestic law, but also relates to the quality of that law (see, *Niedbala v. Poland*, no. 27915/95, § 79, 4 July 2000). The Court notes that domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (*Domenichini v. Italy*, 15 November 1996, § 33, *Reports* 1996-V).

(b) Application of the above principles to the present case

(i) Existence of interference

37. The Court notes at the outset that the applicant had not been visited by his wife and mother for several months.

38. The Government did not dispute that the restrictions on the applicant's personal contact with his family constituted an “interference” with his right to respect for his family life. The Court sees no reason to hold otherwise.

(ii) *Whether the interference was “in accordance with the law”*

39. The Court observes that the contested measure was applied under Article 217 § 1 of the Code of Execution of Criminal Sentences. The Court further notes that this provision, as applicable at the material time, gave the relevant authority (prosecutor or court) the power to grant permission for family visits in prison. The law, however, provided no details as regards the conditions for granting such permission, no guidance as to how the authorities might decide whether the prohibition of visiting rights was merited in a particular case, and what factors might be relevant to that decision. Further, it did not provide for a possibility to appeal against the refusal of visits. The decision was left to the authorities' absolute discretion.

40. In this respect the Court notes that on 2 July 2009 the Constitutional Court declared Article 217 § 1 of the Code of Execution of Criminal Sentences unconstitutional (see paragraphs 17 and 18 above).

41. The Court further observes that it has already held that Article 217 § 1 of the Code of Execution of Criminal Sentences did not indicate with reasonable clarity the scope and manner of the exercise of any discretion conferred on the relevant authorities to restrict visiting rights (see *Wegera v. Poland*, no. 141/07, § 74-75, 19 January 2010, and *Gradek v. Poland* no 39631/06, § 47, 8 June 2010). In the present case, contrary to the case of *Grabowski* (see *Grabowski v. Poland* (dec.), no. 30447/07, 14 September 2010), where the District Court informed the applicant in detail about the reasons for refusal of visits from his common law wife, the motions of the applicant's wife and mother for permission to visit him in prison were refused with scant, blunt, handwritten notes on their motions (see paragraphs 10 and 12 above).

42. The Court concludes that, in the present case, the refusal to allow the applicant to receive family visits during his detention was not in accordance with the law. For that reason, it is not necessary to decide whether the other conditions laid down in the second paragraph of Article 8 have been complied with. There has accordingly been a violation of Article 8 of the Convention

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

45. The Government contested this claim.

46. The Court awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

48. 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 application admissible;
2. *Holds* that there has been a violation of Article 8 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 1,500 (one thousand five hundred 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 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President