



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

FOURTH SECTION

CASE OF MIROSLAW ZIELIŃSKI v. POLAND

(Application no. 3390/05)

JUDGMENT

STRASBOURG

20 September 2011

FINAL

20/12/2011

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

In the case of Mirosław Zieliński v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Sverre Erik Jebens,

Päivi Hirvelä,

Ledi Bianku,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 30 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 3390/05) 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 Mirosław Zieliński (“the applicant”), on 14 January 2005.

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

3. The applicant alleged, in particular, that Article 3 of the Convention had been violated in that he had been detained in overcrowded and dirty cells, he was forced to share his cell with HIV and HCV-positive inmates and he had not received adequate medical care in prison. In addition, the applicant complained under Article 8 about the monitoring of his correspondence with the Court.

4. On 4 October 2007 the President of the Fourth Section decided to give notice of the complaints under Articles 3 and 8 of the Convention to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Mirosław Zieliński, is a Polish national who was born in 1953 and is currently detained in Włocławek Prison.

A. Period of the applicant's detention subject of the instant application

6. From 18 November 2004 until 24 July 2008 the applicant was detained in Łowicz Prison. It is not clear whether on the latter date he was released or transferred to another detention facility. He is currently detained in Włocławek Prison.

B. Overall conditions of the applicant's detention

7. The applicant submitted that in Łowicz Prison he had been held in overcrowded and dirty cells. During the period of his detention in Łowicz, the applicant had occupied a total of seventeen cells, including cell no. 202 in wing II, in which he had been detained from 26 October 2007 until 24 July 2008.

8. The Government acknowledged that during almost the entire period of the applicant's detention in Łowicz Prison the space per person in his cells had been inferior to 3 square metres. They submitted that the cells had been clean and that the applicant had had one shower per week and one hour of outdoor exercise per day.

C. The applicant's detention together with HIV and HCV-positive detainees

9. The applicant also complained about the practice of mixing healthy prisoners with those who were infected with transmissible diseases, such as HIV or hepatitis C (HCV). Prisoners were not informed by the authorities about such state of affairs. On one occasion the applicant was told by his fellow cellmate that the latter was HIV-positive. To that effect the applicant submitted a statement dated 13 February 2008, in which a certain P.P., a person claiming to be an HIV-positive prisoner, certified that on 12 February 2008 he had been placed in the applicant's cell no. 202 wing II. P.P. further stated that neither the applicant nor other inmates had been aware of his illness and that he, in fact, had been instructed by the prison administration not to reveal his HIV status.

10. The applicant complained that he had been exposed to the risk of contamination because he had shared his cell with infected persons and he had not been informed about it. He also had not been advised of the dangers relating to HIV and HCV and of the means of protection against it. Moreover, he submitted that from the moment when he had found out that his fellow cellmates were either infected or could potentially be infected, he feared for his well-being.

D. The applicant's medical history

11. In 2001 the applicant suffered a fracture of the skull and underwent surgery in which a small part of his skull was removed. In addition, prior to his detention he had been hospitalised on several occasions because of his epilepsy, chronic ischemic heart disease (*choroba wieńcowa*) and thinning of the cervical cortex (*zanik kory mózgowej*). Prior to his detention in Łowicz Prison the applicant was under regular medical supervision; he received pharmacological treatment and had numerous medical check-ups. On 1 July 2004 he was tested for HIV and HCV. On 12 July 2004 he underwent coronary catheterisation (*koronografia*).

12. On 20 May 2004 the applicant was certified as “temporarily disabled” with a mild degree of disability (*umiarkowany stopień niepełnosprawności*). It was indicated that the applicant occasionally required the help of a third person in his daily life. The certificate was valid until 20 May 2007.

13. The parties did not furnish any medical reports or certificates related either to the period when the applicant was detained in Łowicz Prison or after his release.

E. The applicant's actions concerning different aspects of his detention

1. Overcrowding

14. The applicant lodged several complaints about overcrowding in Łowicz Prison. In reply the authorities acknowledged the existence of the problem and pointed to its systemic nature. On the other hand the applicant did not bring a civil action in tort to seek compensation for the alleged infringement of his personal rights on account of overcrowding and inadequate conditions of his detention.

2. Detention with HIV and HCV positive inmates

15. The applicant instituted three sets of criminal proceedings against the prison administration and filed penitentiary complaints in relation to the alleged fact that from March until October 2006 and from March 2006 until February 2008 he had been forced to share his cell with inmates infected with HIV and HCV.

16. On 8 December 2006 the Łowicz District Prosecutor (*Prokurator Rejonowy*) discontinued the criminal inquiry into the allegations described above. It was established that, as a matter of law, namely because of medical secrecy and antidiscrimination laws, the prison administration had never been informed about prisoners' health. In consequence, potentially ill prisoners were mixed with potentially healthy prisoners. The practice, however, could not be considered as criminal negligence on the part of the prison administration.

17. A similar decision was issued by the Łowicz District Prosecutor on 30 April 2007. On 26 September 2007 after the applicant's interlocutory appeal the decision was upheld by the Łowicz District Court (*Sąd Rejonowy*). In addition to the reasoning presented in the prosecutor's 2006 decision, the court relied on the submissions of the doctor in charge of the prison hospital, who had stated that mixing healthy prisoners with those who were HIV or HCV positive did not create any health risks to the prior group.

18. Lastly on 25 June 2008 the Łowicz District Prosecutor refused to open an inquiry into similar allegations related to the longer period from March 2006 until February 2008. On October 2008 the Łowicz District Court upheld that decision.

3. Medical care

19. The applicant lodged at least eleven complaints with State authorities about the quality of medical care in Łowicz Prison. It appears that he also tried to institute criminal proceedings against the medical staff and administration of Łowicz Prison and applied for a prison break on health grounds.

20. The penitentiary authorities considered the applicant's allegations groundless. It was found that the applicant had received good quality medical care and that he had been under the regular supervision of medical specialists. On the other hand, it was repeatedly stated that the applicant had been a difficult and vexatious patient who did not cooperate with prison doctors and did not follow their recommendations.

21. On 28 September 2006 the Łódź Regional Court (*Sąd Okręgowy*) rejected the applicant's application for a prison break which he claimed to need in order to undergo surgery. The applicant wished to have an implant which would fill the bone gap created in his skull as a result of his 2001 surgery. The regional court considered the procedure which was sought by the applicant unnecessary in the light of the fact that he was under regular medical supervision and received adequate medical treatment.

F. Criminal proceedings against the applicant

22. On an unspecified date the applicant was convicted by a criminal court of the first-instance. He appealed against that judgment and informed the authorities that, despite being represented by a lawyer, he wished to be brought to the appellate hearing under escort from the remand centre in order to present his case in person.

23. On 15 March 2006 the Płock Regional Court rejected the applicant's request. The court reasoned that the applicant's presence was unnecessary in the light of the fact that his legal-aid lawyer was under a duty to participate in the hearing and that the applicant had already presented his case to the appeal court in writing.

24. The applicant did not submit any further information about the course and the outcome of the proceedings in question.

G. Monitoring of the applicant's correspondence

25. The applicant's first letter to the Court, which was dated 1 January 2005, was deposited by the applicant with the administration of Łowicz Prison on 3 January 2005 and was received by the Registry of the Court on 21 January 2005. The envelope of that letter bears a stamp reading "Censored Deliver to the addressee Date ... Judge" (*Ocenzurowano Doręczyć adresatowi Data ... Sędzia*). The date of 14 January 2005 has been written by hand on the dotted line. An illegible signature is visible under the heading "Judge".

26. In his second letter to the Court, which was dated 7 February 2005, the applicant complained about the regular withholding and monitoring of his correspondence by the authorities. That letter was received by the Registry of the Court on 21 February 2005. The envelope of the letter in question bears a stamp and a signature identical to those described above. The date of 17 February 2005 has been written by hand on the dotted line.

27. The other letters which were sent by the applicant to the Court do not bear any similar stamps.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Conditions of detention

28. A detailed description of the relevant domestic law and practice concerning general rules governing the conditions of detention in Poland and domestic remedies available to detainees alleging that conditions of their detention were inadequate are set out in the Court's pilot judgments given in the cases of *Orchowski v. Poland* (no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) on 22 October 2009 (see §§ 75-85 and §§ 45-88 respectively). More recent developments are described in the Court's decision in the case of *Łatak v. Poland* (no. 52070/08) on 12 October 2010 (see §§ 25-54).

B. Monitoring of a detainee's correspondence

29. The legal provisions concerning monitoring of detainees' correspondence applicable at the material time and questions of practice are set out in paragraphs 65-66 of the judgment delivered by the Court on 4 May 2006 in *Micha v. Poland*, no. 13425/02.

C. Medical care in prison and detention of ill prisoners

30. Article 68 of the Constitution, in its relevant part, reads:

“1. Everyone shall have a right to have his health protected.

2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation...”

31. Article 115 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) (“the Code”) provides:

“1. A sentenced person shall receive medical care, medicines and sanitary articles free of charge.

...

4. Medical care is provided, above all, by health care establishments for persons serving a prison sentence.

5. Health care establishments outside the prison system shall cooperate with the prison medical services in providing medical care to sentenced persons if necessary, in particular

1) to provide immediate medical care because of a danger to the life or health of a sentenced person;

2) to carry out specialist medical examinations, treatment or rehabilitation of a sentenced person;

3) to provide medical services to a sentenced person who has been granted prison leave or a temporary break in the execution of the sentence...”

32. On the basis of Article 115, paragraph 10 of the Code, the Minister of Justice issued the Ordinance of 31 October 2003 on the detailed rules, scope and procedure relating to the provision of medical services to persons in confinement by health care establishments for persons deprived of liberty (*Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowych zasad, zakresu i trybu udzielania świadczeń zdrowotnych osobom pozbawionym wolności przez zakłady opieki zdrowotnej dla osób pozbawionych wolności* – “the October 2003 Ordinance”). This Ordinance was in force from 17 December 2003 until 11 July 2010.

33. Under paragraph 1.1 of the October 2003 Ordinance, health care establishments for persons deprived of liberty provided, *inter alia*, medical examinations, treatment, preventive medical care, rehabilitation and nursing services to persons deprived of liberty.

Under paragraph 2 of this Ordinance a person deprived of liberty was subjected to preliminary and periodical medical examinations (*badania wstępne i okresowe*) and check-ups (*badania kontrolne*).

According to paragraph 3, a person deprived of liberty was to undergo preliminary medical examinations, namely questioning about his/her medical history (*wywiad chorobowy*) and a physical examination (*badanie fizykalne*) as soon as he/she was admitted to a detention establishment. Moreover, no later than fourteen days from the admission date, a person deprived of liberty was to have a chest x-ray and a dental examination.

In practice, a person deprived of liberty who was committed to a detention facility for the first time, was to be initially placed in a transitional cell in order to undergo the above mentioned preliminary medical examinations.

A prisoner who was merely transferred from another detention facility was not to be subjected to such a procedure (see Article 79 b §§1 and 2 of the Code of Execution of Criminal Sentences). Instead, he/she was to undergo a medical check up (questioning about his/her medical history and a physical examination) before being transferred to another detention facility or released (see paragraph 5 of the October 2003 Ordinance).

34. Moreover paragraph 3.5 of the October 2003 Ordinance authorised a prison doctor (*lekarz więzienny*) to prescribe medical tests other than those mentioned above if it was justified in the light of the health of the person deprived of liberty. Those tests, however, were not mandatory and could be performed only with a prisoner’s consent.

35. In practice, upon his/her admission to a detention facility or at any other moment during his/her detention, a person deprived of liberty could request to be tested free of charge for HCV, HIV or any other transmissible disease. A decision whether or not to grant such a request lay with a prison doctor and could be appealed.

According to the internal rules of the penitentiary medical service in force at the relevant time, a request for HCV testing was only to be granted if it was accompanied by a recommendation of a prison doctor. A prison doctor could refuse to support the prisoner's request if, after questioning the prisoner about his/her medical history and risky behaviour, the test was considered unnecessary.

On the other hand, a request for HIV testing did not require an additional medical recommendation and was granted almost automatically. Such test was to be performed, at reasonable intervals, each time it was requested by a prisoner.

36. During the preliminary medical examinations a newly admitted prisoner was to receive counselling on risky behaviour and modes of HIV and HCV transmission. The prisoner was to be asked whether he/she wished to be tested for HIV and a note to that effect was to be made in his/her health record book (*książka zdrowia*).

37. The October 2003 Ordinance was replaced by a largely similar text of the Minister of Justice's Ordinance of 23 December 2010 on the provision of medical services to persons in confinement by health care establishments for persons deprived of liberty (*Rozporządzenie Ministra Sprawiedliwości z dnia 23 grudnia 2010 r. w sprawie udzielania świadczeń zdrowotnych osobom pozbawionym wolności przez zakłady opieki zdrowotnej dla osób pozbawionych wolności*), which entered into force on 3 January 2011.

Other, currently binding, rules relevant to the provision of medical services to persons deprived of liberty are to be found, among others, in the Minister of Justice's Ordinance of 2 February 2011 on types and the scope of medical documentation kept by health care establishments for persons deprived of liberty and on the manner of its processing (*Rozporządzenie Ministra Sprawiedliwości z dnia 2 lutego 2011 r. w sprawie rodzajów i zakresu dokumentacji medycznej prowadzonej w zakładach opieki zdrowotnej dla osób pozbawionych wolności oraz sposobu jej przetwarzania*), which entered into force on 10 March 2011.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

38. The applicant complained that his detention in the conditions of Łowicz Prison, in which he had been held from 18 November 2004 until 24 July 2008, had amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. In particular, the applicant complained about the prison's overcrowding and unsanitary conditions, inadequate medical care and the practice of mixing healthy prisoners with those infected with HIV and HCV. Article 3 of the Convention reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Overcrowding and living and sanitary conditions of the applicant's detention

1. Admissibility

39. The Government submitted that on 24 July 2008 the applicant had been released from Łowicz Prison. In these circumstances, the situation giving rise to the alleged breach of Article 3 of the Convention no longer existed and the applicant should bring a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code in order to seek compensation for the past violation.

40. In that regard they relied, in particular, on the *Orchowski* judgment, reiterating that the Court, having regard to the principle of subsidiarity, had held that in cases where the alleged violation of Article 3 no longer continued and could not be eliminated with retrospective effect, the only means of redress for the applicant was pecuniary compensation.

41. In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

42. The applicant in general disagreed with the above arguments and maintained that the remedy suggested by the Government could not be considered “effective” for the purposes of Article 35 § 1 of the Convention.

43. The Court has already examined a similar objection based on exhaustion of domestic remedies raised by the Government in the above-mentioned cases of *Łatak v. Poland* and *Łomiński v. Poland* and considered their arguments not only in the context of those two particular applicants but also in respect of other actual or potential applicants with similar complaints. (see *Łatak v. Poland* no. 52070/08 and *Łomiński v. Poland* no. 33502/09 (dec.), 12 October 2010, §§ 71-85 and §§ 62-76 respectively).

44. In so doing, the Court had regard to the fact that on the date of the adoption of its decisions there were 271 cases pending before it where the applicants had raised complaints similar in substance, alleging a violation of Article 3 in that at various times and for various periods they had been adversely affected by the same structural problem, having been detained in overcrowded, insanitary cells (*ibid.* § 84 and § 75 respectively).

45. Having found that a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code could be considered an “effective remedy” for the purposes of Article 35 § 1 of the Convention as from 17 March 2010 and having regard to the 3-year limitation period for lodging such an action, the Court held that essentially in all cases in which in June 2008 the alleged violation had either been remedied by placing the applicant in Convention-compliant conditions or had ended *ipso facto* because the applicant had been released, the applicants concerned should bring a civil action for the infringement of personal rights and compensation (*ibid.* § 85 and § 76 respectively).

46. In the present case the situation giving rise to the alleged violation of Article 3 ended on 24 July 2008 when the applicant was released from Łowicz Prison. The Court considers, however, that since the relevant civil action under Articles 24 and 448 of the Civil Code is barred by a three-year statute of limitation, the applicant cannot presently be required to avail himself of the civil remedy in question.

Moreover, the Court reiterates that in its pilot judgments in the cases of *Orchowski* and *Norbert Sikorski* (see *Orchowski*, cited above, § 96 and *Norbert Sikorski*, cited above, §§ 100-101) it has already held that the findings made by the Constitutional Court and by this Court that overcrowding in Polish detention facilities was of a structural nature, “undermined the effectiveness of any domestic remedy available, making them theoretical and illusory and incapable of providing redress in respect of the applicant’s complaint” at the time when he was lodging the present application with the Court (*ibid.* § 111 and § 121 respectively). This conclusion equally applies to the present case in so far as it concerns the applicant’s detention which lasted from 2004 until mid-2008, especially given that the Government and the penitentiary authorities explicitly acknowledged the existence and the systemic nature of the problem of

overcrowding in Polish detention facilities at the relevant time (ibid. § 146 and § 148 respectively and paragraph 17 above).

47. Accordingly, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies in so far as the applicant's first detention is concerned.

48. The Court also considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The applicant

49. The applicant submitted that the conditions of his detention in Łowicz Prison had fallen short of standards compatible with Article 3 of the Convention. In particular, he complained that he had been detained in overcrowded cells with less than 3 square metres of space per person and allowed to spend a very limited time outside the cell, e.g. he had only a one-hour long outdoor exercise per day and a right to take only one shower per week.

(b) The Government

50. The Government acknowledged that during almost the entire period of the applicant's detention in Łowicz Prison the space per person in his cells had been inferior to 3 square metres. They argued, however, that the applicant had not suffered inhuman or degrading treatment which attained the minimum level of severity within the meaning of Article 3 of the Convention.

(c) The Court's assessment

51. A restatement of the general principles concerning the examination of conditions of detention under Article 3 may be found in the Court's recent judgment in *Orchowski v. Poland* (cited above, §§ 119-229).

52. The Court has already found in its two pilot judgments in the cases of *Orchowski v. Poland* and *Norbert Sikorski v. Poland* that, for many years, namely from 2000 until at least mid-2008, overcrowding in Polish prisons and remand centres had revealed a structural problem consisting of "a practice that [was] incompatible with the Convention" (see *Orchowski*, cited above § 151 and *Norbert Sikorski*, cited above, §§ 155-156).

Moreover, in the instant case the penitentiary authorities and the Government did not contest the applicant's submissions and, in fact, acknowledged that during almost the entire period of his detention in Łowicz Prison the space per person in his cells had been inferior to 3 square metres (see paragraphs 14 and 50 above).

53. Having regard to the cumulative effects of the overcrowding and the overall inappropriate living conditions during the applicant's detention, which lasted three years and eight months, the Court considers that the nature, duration and severity of the ill-treatment to which the applicant was subjected are sufficient to be qualified as inhuman and degrading (see *Egmez v. Cyprus*, no. 30873/96, § 77, ECHR 2000-XII; *Labzov v. Russia*, no. 62208/00, § 45, 16 June 2005; and *Mayzit v. Russia*, no. 63378/00, § 42, 20 January 2005).

54. There has accordingly been a violation of Article 3 of the Convention.

B. Medical care in prison

55. The applicant also complained under Article 3 that in Łowicz Prison he had not received adequate medical care and treatment in view of his health condition.

He submitted that during his detention Łowicz Prison had 1,000 prisoners and employed only one doctor. Because of that ratio, the doctor could not possibly provide sufficient care and attention to prisoners who required medical assistance.

The applicant also claimed that, despite his repeated requests, he had not been authorised to undergo any specialised medical procedures and check-ups such as: reconstruction of his skull, electroencephalography (EEG) and X-ray computed tomography (CT) of his head, electrocardiography (ECG), unspecified pulmonological tests, blood tests for HCV and HIV. The applicant wished to have the above mentioned medical examinations carried out every three months.

Lastly, the applicant submitted that during his detention an unsuitable medicine, called "Metocard", had been prescribed by the prison doctors to treat his heart disease.

56. The Government submitted that no doctors or authorities had ever declared the applicant unfit for detention or recommended that he should be detained in a hospital wing. They further maintained that in prison the applicant had received adequate pharmacological treatment and had been under the regular medical supervision of a cardiologist, neurologist, psychiatrist and a surgeon.

57. The Government also argued that the applicant had not cooperated with the prison medical staff. He had read medical literature and had insisted on receiving specific medicine and undergoing particular medical

tests, while disagreeing with the decisions of the prison doctors. He had refused to undergo a number of medical exams scheduled (e.g. cardiological, surgical, ophthalmological and pulmonary check-ups and an EEG scan on 14 March 2008). He had regularly inflicted injuries on himself. The applicant, who became addicted to medicine, had faked health problems in order to receive strong psychotropic medicine.

58. On the basis of the available material, particularly in the absence of any medical reports related to the applicant's health during and after his detention in Łowicz Prison, the Court finds no indication of any shortcomings on the part of the authorities in providing adequate medical tests, treatment and care to the applicant.

59. The Court considers that the applicant's complaint does not disclose any appearance of a violation of Article 3 of the Convention. It follows that it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. The applicant's detention together with HIV and HCV-positive detainees

60. The applicant complained that for a total of eight months in 2006 and 2008 he had been kept in a cell with HIV and HCV-positive inmates and that he had not been informed by the authorities about that fact. He claimed that once he had acquired such information from fellow prisoners he had been exposed or had feared exposure to the risk of contamination because he shared his cell with infected persons and was not advised of the dangers relating to HIV and HCV and of the means of protection against it.

61. The Government submitted that it was impossible to verify the applicant's allegations that he had shared his cell with HIV and HCV-positive inmates because prisoners' medical history was confidential. Consequently, neither the prison staff nor fellow prisoners could be aware of the medical condition of their cellmates.

They also submitted that all prisoners who were newly admitted to a detention facility received counselling on risky behaviour and modes of HIV and HCV transmission. Prisoners were asked whether they wished to be tested for HIV and a note to that effect was made in their health record books.

62. The Court observes that, according to the existing international standards (see *Artyomov v. Russia*, no. 14146/02, § 96-100, 27 May 2010), segregation, isolation and restrictions on occupational and recreational activities are considered unnecessary in the case of HIV-infected persons in the community or when they are detained (see also *Enhorn v. Sweden*, no. 56529/00, § 55, ECHR 2005-I). When detained, they should not be segregated from the rest of the prison population unless this is strictly necessary on medical or other relevant grounds. Adequate health care

should be afforded to HIV-positive detainees, with due regard to the obligation of confidentiality. National authorities should provide all detainees with counselling on risky behaviour and modes of HIV transmission.

63. The Court will examine the applicant's complaint on the assumption that he did share detention facilities with HIV and HCV-positive detainees. The Court need not determine the truthfulness of each and every allegation because the complaint is in any event inadmissible for the following reasons.

64. The protection of medical data, in particular the confidentiality of information about a person's health, in particular about his HIV status, is of fundamental importance to a person's enjoyment of his or her right to respect for private life and that the domestic law must therefore afford appropriate safeguards to prevent any such disclosure which may run counter to the guarantees of Article 8 of the Convention (see *Z v. Finland*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 95).

65. On the other hand, the Court recalls that Article 3 of the Convention imposes an obligation on the State to ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Popov v. Russia*, no. 26853/04, § 208, 13 July 2006).

66. In the present case, it has not been claimed that the applicant contracted HIV or HCV or that he had been unlawfully exposed to a real risk of infection, for instance, through sexual contacts or intravenous drug use. The mere fact that HIV or HCV-positive detainees use the same medical, sanitary, catering and other facilities as those for all other prisoners does not in itself raise an issue under Article 3 of the Convention (see *Korobov and Others v. Russia* (dec.), no. 67086/01, 2 March 2006 and *Salmanov v. Russia*, no. 3522/04, 31 July 2008). Moreover, according to the domestic law and internal practices, the penitentiary authorities provided prisoners and detainees at the beginning of their detention with counselling on risky behaviour and modes of HIV and HCV transmission (see paragraph 36 above). Irrespective of that the Court considers that, because the applicant is an adult with full mental capacity, he could reasonably be expected to know about risky behaviour and modes of contracting transmissible diseases whether at liberty or in a prison environment.

In the light of all the above elements, the Court cannot find that the authorities failed in the circumstances of the case to secure the applicant's health or that they exposed him to a degree of mental suffering attaining the minimum level of severity required by Article 3 of the Convention.

67. Therefore, the Court considers that the applicant's complaint does not disclose any appearance of a violation of Article 3 of the Convention. It follows that it is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

68. The applicant complained under of Article 6 of the Convention that in the course of his criminal proceedings he had not been allowed to participate in the hearing of the appellate court. The provision in question, in its relevant part, provides the following:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

...

3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

....”

69. The Court reiterates that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, including, *inter alia*, not only his right to be present, but also to hear and follow the proceedings (see *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A). The principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, § 23, *Reports* 1997-I). The concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see *Kress v. France* [GC], no. 39594/98, § 74, ECHR 2001-VI, with further references).

70. It follows that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance hearing. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing. Indeed, even where an appellate court has full jurisdiction to review the case on questions both of fact and law, Article 6 does not always entail the right to a public hearing and to be present in person. Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the applicant (*Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II; and *Kremzow v. Austria*, 21 September 1993, §§ 58-59, Series A no. 268-B ...).

71. In the present case, it must be noted at the outset that the applicant did not inform the Court about the detailed course and the ultimate outcome of the impugned proceedings. Nevertheless, it appears that a public hearing was held at first instance, at which the applicant was heard. Moreover, the applicant was represented by a lawyer before the first and second-instance courts.

72. The Płock Regional Court which rejected the applicant's request to be brought to the appellate trial, reasoned that his presence was unnecessary in the light of the fact that his legal-aid lawyer was under a duty to participate in the hearing and that the applicant had already presented his case in the appeal which he had submitted to the court in writing (see paragraph 23 above).

73. In these circumstances, the Court finds no indication that the applicant was prevented from properly arguing his case or from submitting his arguments to the courts. The applicant had the opportunity to present his defence in the written appeal which he had submitted to the court and at the appeal trial his interests were represented by his counsel (in contrast, *Belziuk v. Poland*, *ibid*, §§ 38-40).

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF WITHHOLDING AND MONITORING OF THE APPLICANT'S CORRESPONDENCE

74. The applicant complained under Article 8 of the Convention about the censorship and the withholding of two letters sent by him to the Registry of the Court. The relevant part of this provision reads as follows:

"1. Everyone has the right to respect for ... his correspondence.

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.”

A. Admissibility

75. The Government submitted that the applicant had not exhausted all available domestic remedies in that he had failed to bring an action under Article 24 §§ 1 and 2 in conjunction with Articles 417, 448 and 23 of the Civil Code. These provisions would have allowed him to assert that by censoring his correspondence the authorities had breached his personal rights protected by the Civil Code and claim non-pecuniary damages.

76. In this connection, the Government relied on the judgment delivered by the Warsaw Regional Court on 27 November 2006 in which a prisoner had been awarded PLN 5,000 in damages from the State Treasury for a breach of secrecy of his correspondence with the Central Board of the Prison Service and the Central Electoral Office. The Regional Court held that secrecy of correspondence was one of the personal rights protected under Article 23 of the Civil Code and that in the case of its breach a claimant may be entitled to an award of non-pecuniary damages. The judgment was upheld by the Warsaw Court of Appeal on 28 June 2007.

77. The applicant did not submit observations in this respect.

78. The Court observes that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion of domestic remedies contained in that provision 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*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

79. The alleged censorship in the present case concerned two letters sent by the applicant on 1 January and 7 February 2005, therefore before the delivery of the Warsaw Regional Court’s judgment of 27 November 2006. Hence, any relevance that that judgment might possibly have in respect of the present case is reduced by the fact that it was given after the relevant time (see, among other authorities, *Lewak v. Poland*, no. 21890/03, § 25, 6 September 2007; *Kolodziński v. Poland*, no. 44521/04, § 29, 8 January 2008; and *Misiak v. Poland*, no. 43837/06, § 18, 3 June 2008).

80. Moreover, the Court notes that the examples of domestic case-law provided by the Government do not constitute evidence of a sufficiently established judicial practice to show that a claim for damages under Article 24 §§ 1 and 2 in conjunction with Articles 417, 448 and 23 of the Civil Code was an effective remedy available in theory and practice at the material time.

81. In the circumstances of the case, it cannot therefore be said that any attempt by the applicant to seek redress by lodging such an action would have provided reasonable prospects of a successful outcome (see *Pasternak v. Poland*, no. 42785/06, § 29-32, 16 July 2009).

82. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

83. The Court notes 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. Whether there was interference

84. It is noted that the envelopes, in which the applicant's letters of 1 January and 7 February 2005 were sent to the Registry of the Court, bear stamps indicating that the letters had been censored (see paragraphs 25 and 26 above).

85. The Court has held on many occasions that as long as the Polish authorities continue the practice of marking detainees' letters with the "censored" stamp, the Court has no alternative but to presume that those letters have been opened and their contents read (see *Matwiejczuk v. Poland*, no. 37641/97, § 99, 2 December 2003; *Pisk-Piskowski v. Poland*, no. 92/03, § 26, 14 June 2005, *Micha v. Poland*, no. 13425/02, § 58, 4 May 2006).

86. It follows that in respect of the applicant's letters of 1 January and 7 February 2005 there was "interference" with his right to respect for his correspondence under Article 8.

2. *Whether the interference was “in accordance with the law”*

87. The Court reiterates that any “interference by a public authority” with the right to respect for correspondence will contravene Article 8 of the Convention unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 of that Article and is “necessary in a democratic society” in order to achieve them (see, among many other authorities, *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, p. 32, § 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, § 34; and *Niedbala v. Poland* no. 27915/95, § 78).

88. It is important to respect the confidentiality of applicant prisoners’ correspondence with the Court since it may concern allegations against prison authorities or prison officials. The opening of letters both to and from the Convention organs undoubtedly gives rise to the possibility that they will be read and may conceivably, on occasion, also create the risk of reprisals by prison staff against the prisoner concerned (see *Campbell*, cited above, p. 22, § 62). No compelling reasons have been found to exist for monitoring or delaying an applicant’s correspondence with the Court (see *Campbell*, cited above, §§ 48 and 62; and *Peers v. Greece*, no. 28524/95, § 84, ECHR 2001-III; and *Drozdowski v. Poland*, no. 20841/02, §§ 27-31, 6 December 2005).

89. As regards the interference with the applicant’s right to respect for his correspondence with the Court, the Court observes that Article 103 of the 1997 Code expressly prohibits the monitoring of correspondence with the European Court of Human Rights (see *Michta*, cited above, § 61, and *Kwiek*, no. 51895/99, § 44, 30 May 2006).

90. It follows that the interference with the applicant’s correspondence with the Court was not “in accordance with the law”. Having regard to that finding, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with.

91. Consequently, the Court finds that there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed 105,000 euros (EUR) in respect of non-pecuniary damage.

94. The Government submitted that the applicant’s claim was excessive.

95. The Court awards the applicant EUR 3,200 in respect of non-pecuniary damage on account of the violation of Articles 3 and 8 of the Convention.

B. Costs and expenses

96. The applicant claimed no costs and expenses, either for the Convention proceedings or for the proceedings before the domestic courts.

C. Default interest

97. 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 complaints concerning the inadequate conditions of the applicant’s detention and the interference with his correspondence admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 8 of the Convention;

4. *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 3,200 (three thousand two 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President