



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

FOURTH SECTION

CASE OF STOKŁOSA v. POLAND

(Application no. 32602/08)

JUDGMENT

STRASBOURG

3 November 2011

FINAL

03/02/2012

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

In the case of Stokłosa v. Poland,

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

Ljiljana Mijović, *President*,

Lech Garlicki,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 11 October 2011,

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

PROCEDURE

1. The case originated in an application (no. 32602/08) 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 Henryk Stokłosa (“the applicant”), on 2 July 2008.

2. The applicant was represented by Mr J. Majewski, Mr A. Reichelt and Mr M. Gutowski, lawyers practising in Warsaw and Poznań respectively. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the assessor who had remanded him in custody had lacked independence, contrary to Article 5 § 3 of the Convention.

4. On 7 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

5. On 30 November 2010 the Court (Fourth Section), having regard to the declaration submitted by the Government and the applicant’s reply to that declaration, decided to strike out the application of its list of cases in so far as it related to the complaints under Article 5 § 4 of the Convention. It also decided to adjourn the examination of the applicant’s complaint under Article 5 § 3 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Śmiłowo. He was a member of the Senate (the upper chamber of the Parliament) between 1989 and 2005 and a prosperous businessman.

7. On an unspecified date the prosecution authorities instituted criminal proceedings against the applicant. It appears that he left Poland in December 2006. On 30 January 2007 the Warsaw-Praga Północ District Court ordered that the applicant be remanded in custody. That decision was upheld on appeal.

8. On 23 July 2007 the Warsaw-Praga Regional Court issued a European Arrest Warrant for the applicant. On 12 November 2007 he was arrested in Germany on the basis of that warrant. On 19 December 2007 the applicant was extradited to Poland.

9. Subsequently the Warsaw-Praga Regional Prosecutor charged the applicant with, *inter alia*, numerous counts of bribery of high-ranking officials of the Ministry of Finance and bribery of a judge of the administrative court. The applicant was represented by three defence counsel.

10. On 21 December 2007, on an application from the Warsaw-Praga Regional Prosecutor, the assessor R.Z. (junior judge) of the Warsaw-Praga Północ District Court remanded the applicant in custody until 19 March 2008.

11. Two of the applicant's counsel (Mr J. Majewski and Mr M. Boruc) lodged appeals against the detention order on 28 December 2007. Counsel J. Majewski argued, invoking Article 5 § 3 of the Convention, that the detention order had been given by an assessor who could not be considered "a judge" or "other officer authorised by law to exercise judicial power" because he lacked independence from the executive. Relying on Article 439 § 1 (1) of the Code of Criminal Procedure ("CCP") he submitted that the detention order had been given by a "non-authorised person" (*osoba nieuprawniona*). In this respect he referred to the Constitutional Court's judgment of 24 October 2007.

12. On 11 January 2008 the applicant's third counsel (Mr J. Naumann) filed an appeal against the detention order.

13. On 12 February 2008 the Warsaw-Praga Regional Court, sitting as a bench of three professional judges, dismissed the appeals against the detention order of 21 December 2007. It held that the assessor could not be considered as "a non-authorised person to give a decision" within the meaning of Article 439 § 1 (1) of the CCP. The Constitutional Court had struck down the provisions allowing the Minister of Justice to delegate

judicial powers to assessors; however the relevant decisions given by assessors had not been automatically negated. The court observed that following Poland's accession to the European Union domestic law was undergoing a continuous process of adjustment to the requirements of European law. However, the transformation of domestic law should not lead to chaos in the legal order and for that reason the Constitutional Court had allowed 18 months for the necessary legislative changes to be implemented. The court observed that at the relevant time the applicant could only challenge an alleged lack of impartiality on the part of the assessor under Article 41 § 1 of the CCP.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. The relevant domestic law and practice regarding the status of assessors (junior judges), including the landmark judgment of the Constitutional Court of 24 October 2007 (case no. SK 7/06), are set out in the Court's judgment in the case of *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 16-25, 30 November 2010.

THE LAW

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

15. The applicant complained under Article 5 § 3 of the Convention that the assessor who had remanded him in custody had not been independent from the executive. The assessor issued the order for his detention on the same day on which the prosecutor had made an application for an order. Furthermore, the assessor gave his decision against the background of intense media and political scrutiny of the applicant's case. Article 5 § 3 of the Convention provides, in so far as relevant:

“3. 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

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 applicant's submissions*

17. The applicant contested the Government's submission that there had been no need to deal with the issue of the independence of assessors following the Constitutional Court's judgment. He argued that the Convention system had to guarantee the practical and effective protection of the individual's rights. The applicant emphasised that he had no possibility to have the decision concerning his detention on remand re-opened or quashed on the basis of the Constitutional Court's judgment since that judgment had not been delivered in the proceedings initiated by the applicant. On the other hand, the applicant's own constitutional complaint would have been found inadmissible by the Constitutional Court on the ground that the contested provisions had already been found unconstitutional. Furthermore, the impugned provisions of the 2001 Act remained in force for a period of eighteen months following the promulgation of the judgment and, despite their unconstitutional character, were applied by the courts. This was confirmed by the Regional Court's decision of 12 February 2008 in his own case.

18. The applicant submitted that the Constitutional Court had authoritatively found that the relevant provisions of the 2001 Act had not ensured the real and effective independence of assessors. In the light of the relevant jurisprudence of the Court there was also no doubt that the assessor who had ordered the applicant to be detained on remand had not offered the guarantees of independence from the executive and the parties as required under Article 5 § 3. The applicant further referred to the Court's finding in the case of *Kauczor v. Poland* (no. 45219/06, § 60, 3 February 2009) that "for many years, at least as recently as in 2007, numerous cases have demonstrated that the excessive length of pre-trial detention in Poland revealed a structural problem consisting of a practice that was incompatible with the Convention". In his view, the breach of Article 5 § 3 of the Convention was exacerbated by the fact that in his and in the majority of cases the decisions imposing detention on remand had been taken by assessors who lacked adequate professional and life experience.

19. The applicant argued that the defect concerning the status of the assessor could not have been rectified on appeal. He had raised the issue of the assessor's lack of independence and invoked Article 5 § 3 in his appeal against the detention order. However, the Regional Court dismissed it. Furthermore, judicial control in respect of an individual arrested or detained on suspicion of having committed a criminal offence needed to satisfy certain requirements, including that it had to be carried out by a judicial officer within the meaning of the Court's case-law.

2. The Government's submissions

20. The Government underlined the importance of the principle of subsidiarity. They observed that the Constitutional Court in its judgment of 24 October 2007 had ruled that section 135 § 1 of the Law on the Organisation of Courts (the 2001 Act) had been incompatible with Article 45 § 1 of the Constitution. Subsequently, Parliament amended the relevant law and as of 9 May 2009 the office of assessor ceased to exist in the Polish legal system, and thus there was no need for the Court to deal with the issue of the independence of assessors.

21. The Government averred that an assessor enjoyed similar guarantees as a professional judge and therefore could be considered “a judge” or “other officer authorised by law to exercise judicial power”. First, the assessors performed their tasks on the basis of the authorisation explicitly set out in the law, namely Article 135 § 1 read in conjunction with Article 2 § 3 of the 2001 Act. Assessors who were vested with the authority to exercise judicial power were in principle governed by the provisions of the 2001 Act applicable to judges, subject to the exclusions enumerated in the same Act. Second, assessors adjudicated solely on the basis of the provisions of the law and within the framework set out by the applicable procedures. Decisions issued by them were legally binding and could not be challenged, reversed, remitted for re-examination or suspended by any organ of the executive. Furthermore, assessors had to meet the same requirements in respect of their integrity as judges and respect the principles of judicial ethics. Moreover, they took an oath before the Minister of Justice which was similar to the oath taken by judges. The Government further referred to the fact that the public at large had widely considered assessors as judges. They also pointed to the existence of institutions similar to that of the assessor in a number of European countries (Germany, Austria, the United Kingdom, the Netherlands, Luxembourg, and Estonia).

22. The Government further submitted that under the 2001 Act assessors could have been entrusted with the exercise of judicial powers only in district courts, acting as courts of first instance. The rationale behind this regulation was to enable assessors to acquire judicial experience and, secondly, to provide for the possibility of having their decisions corrected by professional judges. In consequence, every judgment as well as other appealable decision – including a decision on detention on remand – given by an assessor could have been challenged before a higher-instance court composed of professional judge(s).

23. In the present case the applicant's lawyers lodged appeals against the detention order of 21 December 2007 given by the assessor of the Warsaw-Praga Północ District Court, in which they argued that the assessor had not met the requirements of Article 5 § 3 of the Convention by reason of his lack of independence. On 12 February 2008 the Warsaw Regional Court, sitting as a bench of three professional judges, reviewed the

assessor's decision and dismissed the appeals. Thus, at the appellate stage of the proceedings the applicant enjoyed the right to have the legality of the detention order examined by a professional judge.

24. In any event, having regard to the fact that the applicant had fled Poland and that the European Arrest Warrant had been issued for him by the Warsaw-Praga Regional Court, the Government argued that it was highly probable that any court, irrespective of its composition, would have ordered the applicant's detention on remand.

25. The Government commented on the comparison between the level of protection of judicial independence in the Convention and that guaranteed under the Polish Constitution. They maintained that up until 2007 the Court and the Polish Constitutional Court had interpreted the requirements of independence and impartiality in a similar manner. However, the judgment of 24 October 2007 brought about a fundamental change in this area. It placed the constitutional guarantees on a significantly higher level. In reaction to the judgment which had introduced extremely strict standards, Parliament decided to abolish the institution of assessors. Lastly, the Government underlined that the Convention laid down a certain minimum standard, while the Constitution set out a maximum standard. In consequence, it could be possible for a measure that satisfied the Convention standard to be inconsistent with the constitutional standard.

26. In conclusion, the Government submitted that there had been no violation of Article 5 § 3 in the present case.

3. The Court's assessment

27. The Court recalls that it has already dealt with the institution of Polish assessors from the standpoint of Article 6 of the Convention. In the judgment *Henryk Urban and Ryszard Urban v. Poland* (no. 23614/08, 30 November 2010) the Court examined the question of the independence of a "tribunal" composed of an assessor in terms of conformity with the requirements of Article 6 § 1 and found as follows:

"48. The Constitutional Court considered the status of assessors in its leading judgment of 24 October 2007. It held that section 135 § 1 of the 2001 Act, providing that the Minister of Justice could confer the exercise of judicial powers on assessors, fell short of constitutional requirements because assessors did not enjoy the necessary guarantees of independence, notably vis-à-vis the Minister. The Court notes that in its analysis of the question of the independence of assessors the Constitutional Court referred to the Strasbourg case-law and observed that Article 45 of the Constitution was modelled on Article 6 § 1 of the Convention. ...

51. ... The Court notes that the Constitutional Court's findings were made in the context of an abstract review of the constitutionality of statutory provisions but, mindful of the principle of subsidiarity, considers that they may be applied to the facts of the present case, having regard to the similarity between the constitutional and the Convention requirements in so far as judicial independence is concerned and the reliance of the Constitutional Court on the relevant jurisprudence of the Court. ... The

important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 § 1 of the Constitution, guarantees which are substantively identical to those under Article 6 § 1 of the Convention.

52. The Court underlines that the Constitutional Court set aside the regulatory framework governing the institution of assessors as laid down in the 2001 Act. It further stresses that the Constitutional Court did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence The Constitutional Court, referring to international standards, pointed to the variety of possible solutions for allowing adjudication by persons other than judges. In this connection, the Court notes that its task in the present case is not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors or other similar officers which exist in certain Member States of the Council of Europe, but to examine the manner in which Poland regulated the status of assessors.

53. Having regard to the foregoing, the Court considers that the assessor B.R.-G. lacked the independence required by Article 6 § 1 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister. ...”

28. Thus, the first element of the Court’s test in the *Henryk Urban and Ryszard Urban* judgment concentrated on the institutional deficiency as regards the position of assessors *vis-à-vis* the Minister of Justice – Prosecutor General. However, in its analysis the Court also had regard to the second element, namely whether the circumstances of a particular case gave rise to legitimate concerns for believing that the Minister of Justice – Prosecutor General had or could reasonably be taken to have had an interest in the proceedings (see *Henryk Urban and Ryszard Urban*, cited above, § 56 *in fine*).

29. In the subsequent case of *Mirosław Garlicki v. Poland* (no. 36921/07, §§ 106-116, 14 June 2011) the Court examined to what extent the *Urban* holding could be relevant for the determination of a complaint under Article 5 § 3 that detention on remand had been ordered by an assessor. It recalled that the “officer authorised by law to exercise judicial power” was not identical with the “judge” but had to nevertheless have some of the latter’s attributes, that is to say he had to satisfy certain conditions each of which constituted a guarantee for the person arrested. The first such condition was independence from the executive and the parties (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34). The Court went on to observe that this interpretation corresponded to the rationale of the judicial protection of an individual arrested on suspicion of having committed a criminal offence which served to provide effective safeguards against the risk of ill-treatment and against the abuse of

powers bestowed on law enforcement officers or other authorities (see *McKay v. the United Kingdom* [GC], no. 543/03, § 32, ECHR 2006-X).

30. In consequence, the Court held that the requisite guarantees of independence applied not only to a “tribunal” within the meaning of Article 6 § 1 of the Convention, but also extended to “the judge or other officer authorised by law to exercise judicial power” referred to in Article 5 § 3 of the Convention (see *Miroslaw Garlicki*, cited above, § 113).

31. In the present case the issue of institutional deficiency of the status of assessors is the same as in the *Miroslaw Garlicki* case. Accordingly, the Court finds that the assessor R.Z. who detained the applicant on remand did not offer the guarantees of independence required of an “officer” by Article 5 § 3 of the Convention, the reason being that he could have been removed by the Minister of Justice at any time during his term of office and that there were no adequate guarantees protecting him against the arbitrary exercise of that power by the Minister (see *Miroslaw Garlicki*, cited above, § 113).

32. The applicant further alleged that the assessor R.Z. had given the decision remanding him in detention against the background of intense media and political scrutiny of the applicant’s case. He did not elaborate on this allegation in his written observations submitted to the Court. The Court notes that the applicant was a long-serving member of the Senate (the upper chamber of the Parliament) and a successful businessman and, consequently, was a well-known public figure in the country. Those elements, together with the nature of the charges brought against the applicant, appear to justify the media and political interest in the case against him (see *Craxi v. Italy (no. 2)*, no. 25337/94, §§ 63-64, 17 July 2003). However, on the facts of the case, the Court cannot discern any specific circumstances giving rise to legitimate concerns for believing that the Minister of Justice – Prosecutor General had or could reasonably be taken to have had an interest in the proceedings against the applicant which, in turn, could have influenced the decision of the assessor R.Z. in the case (compare and contrast, *Miroslaw Garlicki*, cited above, § 114).

33. The Government argued that any failing in respect of the decision given by the assessor of the Warsaw-Praga Północ District Court was rectified on appeal as his decision was reviewed and upheld by the Warsaw Regional Court sitting as a bench of three professional judges. The Court does not accept this argument. It is true that in the context of a breach of Article 6 § 1 of the Convention the possibility exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86, and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII). However, the Court finds that the doctrine of rectification of defects which occurred at the first-instance level does not apply to the judicial control of a person’s arrest or detention on

suspicion of having committed a criminal offence under Article 5 § 3 of the Convention. The logic and the rationale of the Article 5 § 3 review requires that it is the judicial officer who has to satisfy the various conditions as defined in the Court's case-law under Article 5 § 3 of the Convention, in particular he must offer the requisite guarantees of independence from the executive and the parties (see *Schiesser v. Switzerland*, §§ 31-32; *McKay*, § 35; and *Miroslaw Garlicki*, § 115, all cited above) This is supported by the fact that decisions on detention made by the "judge or other officer" under Article 5 § 3 are normally enforced instantly, for which reason deficiencies cannot be effectively rectified on appeal. In addition, the Court notes that the applicant raised the issue of the status of the assessor and invoked Article 5 § 3 in his appeal against the detention order of 21 December 2007; however the Regional Court dismissed it.

34. In the light of the foregoing, the Court finds that the assessor R.Z. of the Warsaw-Praga Północ District Court was not independent of the executive as required under Article 5 § 3 of the Convention. There has accordingly been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant sought an award in respect of non-pecuniary damage in connection with the breach of Article 5 § 3 and related suffering and distress. He left it to the Court to determine the appropriate sum in accordance with the relevant criteria.

37. The Government made no observations in this respect.

38. The Court recalls that it has found no specific circumstances in the present case which could give rise to the assumption that the Minister of Justice – Prosecutor General could have been taking an interest in the proceedings against the applicant. Accordingly, it considers that in the particular circumstances of the instant case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which may have been sustained by the applicant (see *Henryk Urban and Ryszard Urban*, § 62; compare and contrast *Miroslaw Garlicki*, §§ 114 and 154, both cited above).

B. Costs and expenses

39. The applicant made no claim for reimbursement of costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered.

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

Fatoş Aracı
Deputy Registrar

Ljiljana Mijović
President