



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

FOURTH SECTION

CASE OF GISZCZAK v. POLAND

(Application no. 40195/08)

JUDGMENT

STRASBOURG

29 November 2011

FINAL

29/02/2012

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

In the case of Giszczak v. Poland,

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

David Thór Björgvinsson, *President*,

Lech Garlicki,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 40195/08) 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 Grzegorz Giszczak (“the applicant”), on 13 August 2008.

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

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

4. On 11 May 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 (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Chmielow.

6. The applicant has been serving a thirteen years’ sentence of imprisonment. At the relevant time he was detained in the Tarnowskie Góry Prison and he had already served nearly six years of his sentence.

7. On 21 April 2008 his 11 year-old daughter was hit by a bus and, because of her serious injuries, was admitted to the intensive-care unit. The applicant was informed that she had fallen into a coma and her condition was very serious.

8. On 28 April 2008 he made an application for compassionate leave to visit his dying daughter in the hospital. On 29 April 2009 his mother made an application for compassionate leave on behalf of the applicant. On 30 April 2008 the Penitentiary Judge of the Gliwice Regional Court requested an opinion from the Tarnowskie Góry Prison on the applicant's prospects for rehabilitation.

9. On 5 May 2008 the Penitentiary Judge received a negative opinion about the applicant. It stated in particular that the applicant was active in the prison subculture, was rude towards the prison officers, had been convicted of a serious crime (incitement to murder) and had a long prison sentence to serve.

10. On 7 May 2008 the Penitentiary Judge of the Gliwice Regional Court refused the leave request because of the poor prospects of the applicant's rehabilitation. The order was delivered to the applicant on 12 May 2008.

11. The applicant lodged an appeal with the Gliwice Regional Penitentiary Court on the same day.

12. On 16 May 2008 the applicant's daughter died.

13. On 19 May 2008 the Penitentiary Judge of the Gliwice Regional Court allowed the applicant to attend his daughter's funeral on 21 May 2008, under police escort.

14. On 20 May 2008 the Director of the Detention Centre informed the applicant orally about the permission. The applicant asked to be able to wear a suit and handcuffs. He also requested that the escorting officers should wear plain clothes. He submits that his request was denied and therefore he decided not to attend the funeral, since he believed his appearance with handcuffs and chains on hands and legs and under an escort of uniformed and armed officers would create a disturbance during the ceremony. He maintains that his sister had been likewise informed by the Director of the Detention Centre that the applicant would have to wear his prison clothes and would have to have joined shackles (hand-cuffs and fetters joined together with chains).

15. The Government submitted that the applicant must have misunderstood the Director as he clearly could have attended the funeral in plain clothes and handcuffed.

16. The written decision was served on the applicant on 26 May 2008, after the funeral had already taken place. The decision only specified that the applicant was allowed to attend his daughter's funeral under escort. It did not mention whether he would have to wear joined shackles or whether he could wear plain clothes.

17. On 12 June 2008 the Gliwice Regional Penitentiary Court upheld the decision of 7 May 2008 repeating the reasoning given by the Penitentiary Judge.

18. The applicant further states that earlier in 2007 his request for compassionate leave to attend his father's funeral had been refused.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Article 141a § 1 of the Code of Execution of Criminal Sentences reads as follows:

“In cases which are especially important for a convicted person, he or she may be granted permission to leave prison for a period not exceeding five days, if necessary under the escort of prison officers or other responsible persons (osoby godnej zaufania).”

20. Section 35 of the Rules for Execution of Imprisonment (*Regulamin wykonywania kary pozbawienia wolności*) provides that when on leave from prison, the convict shall wear his own clothes.

21. Section 19 § 1 of the Law on Prison Service (*Ustawa o służbie więziennej*) of 1996 (as applicable at the material time) lists various coercive measures that can be used by prison guards including joined shackles (“*prowadnice*”).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (REFUSAL OF HOSPITAL VISIT)

22. The applicant invoking Article 3 of the Convention complained about a refusal to allow him to visit his seriously injured daughter in the hospital and the delay in examining his appeal against this decision. The complaint falls to be examined under Article 8 (see, *Lind v. Russia*, no. 25664/05, § 88, 6 December 2007), which in so far as relevant provides:

“1. Everyone has the right to respect for his private and 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.”

A. Admissibility

23. 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 parties' arguments

24. The applicant submitted that he had been refused the opportunity to bid farewell to his dying daughter in the hospital. In addition, his appeal against this decision was considered one month after his daughter's death. This delay in his opinion amounted to "mental torture".

25. The Government admitted that the refusal to allow the applicant leave to visit his seriously injured daughter in the hospital might have been incompatible with the right to respect for his private and family life.

2. The Court's assessment

26. The Court reiterates that any interference with an individual's right to respect for his private and family life will constitute a breach of Article 8, unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

27. The Court has already found that the refusal of leave to visit an ailing relative or to attend a relative's funeral constituted an interference with the right to respect for family life (see *Ploski v. Poland*, no. 26761/95, § 32, 12 November 2002). Accordingly, in the present case the refusal to release the applicant, even if only under escort, so that he could see his dying daughter in hospital interfered with his right under Article 8 of the Convention.

28. The Court is satisfied that the interference had a lawful basis, notably 141a § 1 of the Code of Execution of Criminal Sentences. The interference also pursued "a legitimate aim" within the meaning of paragraph 2 of Article 8 of the Convention, that of protecting public safety and preventing disorder or crime (see *Ploski*, cited above, § 34). It remains to be determined whether it was "necessary in a democratic society".

29. In this respect, the Court firstly observes that the applicant's 11 year old daughter was injured in a traffic accident. She was admitted to the intensive-care unit and her condition was very serious. The domestic

authorities justified the refusal to temporarily release the applicant by reference to his allegedly rude behaviour in prison and the gravity of the offence of which he had been convicted (incitement to murder). The Court considers that these reasons are not persuasive. All these concerns could easily have been addressed by an escorted leave.

30. The Court also notes that the Government admitted that the refusal of compassionate leave to the applicant might have been incompatible with the right to respect for his private and family life.

31. The Court concludes that, in the particular circumstances of the present case, the refusal of leave to visit the applicant's dying daughter in the hospital, was not "necessary in a democratic society" as it did not correspond to a pressing social need and was not proportionate to the legitimate aims pursued. There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (THE APPLICANT'S DAUGHTER'S FUNERAL)

32. The applicant contended that the refusal to allow him to attend the funeral of his daughter in plain clothes also violated Article 8 of the Convention.

A. Admissibility

33. 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 parties' arguments*

34. The applicant submitted that he had been refused permission to attend the funeral of his daughter in plain clothes and to be escorted by prison guards wearing plain clothes.

35. The Government maintained that the imposition of special conditions relating to the applicant's attendance at the funeral of his daughter did not deprive him of the effective possibility of attending the funeral. They submitted that the applicant could have attended the funeral in plain clothes. This issue was regulated by law and the Director of the Detention Centre could not have decided otherwise. The applicant and his sister must have misunderstood the Director. They further stressed that the

applicant was young and very strong and therefore he would have had to wear handcuffs without, however, having to be restrained by joined shackles (“*prowadnice*”). They agreed that there was an interference with the applicant’s rights, which was prescribed by law and pursued a legitimate aim for the prevention of disorder or crime. They were of the opinion that the applicant could have tried to escape if no precautions were taken during the funeral of his daughter.

2. The Court’s assessment

36. The Court reiterates that Article 8 of the Convention does not guarantee a detained person an unconditional right to leave prison in order to attend the funeral of a relative. It is up to the domestic authorities to assess each request on its merits. Its scrutiny is limited to consideration of the impugned measures in the context of the applicant’s Convention rights, taking into account the margin of appreciation left to the Contracting States (see *Ploski* cited above § 38).

37. Turning to the circumstances of the present case the Court firstly notes that the interference, which was based on section 19 § 1 of the Law on Prison Service and Article 141 § 4 of the 1997 Code of Execution of Criminal Sentences, was “in accordance with the law” and could be considered to be in the interests of “public safety” or “for the prevention of disorder or crime”.

38. The Court observes that the applicant has been serving a thirteen years’ sentence of imprisonment. He was convicted of incitement to murder. On 19 June 2008 the Penitentiary Judge of the Gliwice Regional Court granted the applicant compassionate leave to attend his daughter’s burial. However, this decision was served on him only on 26 June 2008, that is, 4 days after the funeral had taken place. In addition, it was not very precise (see paragraph 16 above). The Court points out that before the funeral the applicant had only been orally informed about the decision by the Director of the Detention Centre. Although the applicant was at all times very concerned about creating a disturbance during the ceremony if he appeared in prison clothes and chains, he was not given clear information as regards the particular conditions of his attendance at the funeral (see paragraphs 14, 15, 34 and 35 above).

39. The Court observes that the fact that the applicant had not been informed in time, and in a clear and unequivocal manner about the conditions of his compassionate leave to attend his daughter’s funeral eventually resulted in his refusal to attend it for fear of causing too much disturbance.

40. The Court concludes that, in the particular circumstances of the present case, the failure to provide timely and adequate reply to the applicant's request to attend the funeral of his daughter under special conditions must be seen as incompatible with his rights under Article 8 of the Convention.

41. There has, accordingly, been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (THE APPLICANT'S FATHER'S FUNERAL)

42. The applicant further complained of the fact that he was refused compassionate leave to attend his father's funeral.

43. The Court notes that the applicant failed to substantiate this complaint.

44. Consequently, the Court finds that the above complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

47. The Government submitted that the claim was excessive and irrelevant. Alternatively, they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

48. The Court considers that, in the circumstances of this particular case the applicant should be awarded the sum of EUR 2,000 for non-pecuniary damage.

B. Costs and expenses

49. The applicant did not seek to be reimbursed for costs and expenses incurred in the proceedings before the Court.

C. Default interest

50. 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* admissible the complaints concerning the refusals of the applicant's requests for compassionate leave to visit his dying daughter in hospital and the failure to provide a timely and adequate reply to the applicant's request for leave to attend her funeral and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 § 1 of the Convention in respect of the refusal of the applicant's request to visit his dying daughter in hospital;
3. *Holds* that there has been a violation of Article 8 § 1 of the Convention in respect of the failure to provide a timely and adequate reply to the applicant's request for compassionate leave to attend the funeral of his daughter;
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 2,000 (two thousand euros), 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 29 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President