



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

FOURTH SECTION

CASE OF M.B. v. POLAND

(Application no. 34091/96)

JUDGMENT

STRASBOURG

27 April 2004

FINAL

27/07/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.B. v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs V. STRÁŽNICKÁ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 March 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 34091/96) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr M.B. ("the applicant"), on 19 July 1995. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant died on 26 July 1998. By a decision of 8 March 2001 the Court held that in the light of its case-law there was no obstacle to the case being pursued by the applicant's father, Mr H.B. who had been granted legal aid and who was represented before the Court by Ms B. Banasik, a lawyer practising in Łódź. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołosiewicz.

3. The applicant alleged, in particular, that he was arrested by a public prosecutor who was not a "judge or an officer authorised by law to exercise judicial power", as required by Article 5 § 3 of the Convention. The applicant further complained under Article 5 § 4 that in the proceedings concerning his detention he was never brought before a judge. Therefore he did not have any possibility of effectively arguing any points relied on by the prosecution in support of his detention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 8 March 2001 the Court declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

8. By a decision of 28 January 2003 the Court declared admissible the complaint that on arrest the applicant had not been brought promptly before a “judge or an officer authorised by law to exercise judicial power”, and that the proceedings concerning his detention on remand had not been truly adversarial. It rejected the remainder of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1967.

10. In 1994 the Białystok Regional Prosecutor instituted investigations concerning suspicion of fraud. On 28 March 1995 the applicant was charged with fraud committed jointly with other persons. On 30 March 1995 the Białystok Regional Prosecutor ordered his detention on remand. The applicant was suspected of fraud committed by obtaining under false pretences a loan of USD 380,000 from a State-owned bank. The loan had not been reimbursed. It was further considered that the evidence in the case file rendered the charge against the applicant credible, while his attitude and the circumstances of the case indicated that he would jeopardise criminal proceedings, if left at liberty.

11. The applicant requested that detailed written grounds of the detention order be prepared by the prosecuting authorities. On 3 April 1995 the applicant's lawyer and on 6 April 1995 the applicant himself appealed against the detention order, arguing, *inter alia*, that his bad health was incompatible with his detention.

12. By a decision of 11 April 1995 the Białystok Regional Prosecutor preferred charges against the applicant. It was stated that the suspicion against him was rendered credible by evidence gathered in the investigations. The prosecutor referred in particular to documents concerning the circumstances in which the applicant had taken the loan, to the manner in which the funds had been transferred to the applicant's bank account, and to the links established between the suspects in the case.

13. On 10 April 1995 the Warsaw Regional Court, at a session held *in camera*, refused the applicant's lawyer's appeal against the detention order and on 27 April 1995 the applicant's own appeal was, likewise, dismissed.

14. On 25 April 1995 the applicant requested to be released.

15. On 28 April 1995 the same court refused to allow the applicant's appeal against the decision of 11 April 1995 by which the prosecution had preferred charges against the applicant. The court considered that the case was complex, that there were many suspects, and that the offences concerned were of a very serious nature.

16. On 28 April 1995 the Białystok Regional Prosecutor refused the applicant's application for release of 25 April 1995. On 18 May 1995 the Białystok Appellate Prosecutor upheld this decision, considering that a medical certificate confirmed that the applicant was suffering from Marfan syndrome which was a connective tissue disorder, so affected many structures, including the skeleton, lungs, eyes, heart and blood vessels. However, the applicant was under the medical supervision of a prison doctor. The grounds on which the applicant had been arrested still obtained, and the offence concerned was of a serious nature.

17. On 13 June 1995 the charges against the applicant were supplemented by two further counts of fraud, committed by obtaining another two bank loans by false pretences. The prosecuting authorities referred, *inter alia*, to various Polish and foreign documents, to the testimony of witnesses, interviewed during the investigations, and to other evidence. When questioned by the prosecutor on that day, the applicant requested that detailed written grounds of these charges, giving factual reasons grounding the suspicions against him, be prepared and served on him and on his lawyer. On 28 June 1995 the applicant was served with this document.

18. On 26 June 1995 the Warsaw Regional Court prolonged the applicant's detention for three months, until 29 September 1995.

19. On 13 July 1995 the applicant requested again to be released. On 17 July 1995 his request was refused by the Białystok Regional Prosecutor.

20. On 17 July 1995 the applicant requested to be released in order to undergo a specialised ophthalmologic examination, submitting that he suffered from an ailment, which seriously affected his eyesight, and that his eyesight had severely deteriorated as a result of his detention.

21. On 27 July 1995 the Warsaw Court of Appeal dismissed the applicant's appeal against the decision of the Warsaw Regional Court of 26 June 1995 prolonging his detention for a further three months.

22. On 11 August 1995 the Białystok Appellate Prosecutor upheld the decision of 17 July 1995, considering that the evidence against the applicant had rendered the charges against him sufficiently credible.

23. On 12 September 1995 the applicant's new request for release, submitted on 8 September 1995, was refused by the Białystok Regional

Prosecutor. An identical decision was given on 15 September 1995 in respect of his fresh request for release, the prosecuting authorities considering that the evidence gathered so far in the proceedings supported the charges against the applicant, and that there were genuine grounds for believing that, if released, he would exert pressure on the witnesses.

24. On 18 September 1995 the applicant's detention was prolonged until 29 November 1995, the Warsaw Regional Court considering that further measures had to be taken in order to complete the evidence gathered so far during the investigations. On 26 October 1995 the Warsaw Court of Appeal dismissed the applicant's appeal against that decision.

25. On 16, 17, 20 and 21 November 1995 the applicant had access to the case file and was informed of his right to submit, within three days, motions for further evidence to be admitted.

26. On 21 November 1995 the Białystok Regional Prosecutor again refused to release the applicant. On the same day the applicant requested the Białystok Appellate Prosecutor to set aside this decision.

27. On 23 November 1995 the Warsaw Court of Appeal prolonged the applicant's detention until 29 December 1995. On the same day the court's registry was served with the applicant's letter in which he requested the court to allow him to be present at the court session concerning the prolongation of his detention. On 27 November 1995 the court replied that his request had been included in the case file, noting that it had been served on the court after the session had been held in the applicant's and his lawyer's absence.

28. On 26 November 1995 the Warsaw Court of Appeal upheld the decision of the Warsaw Regional Court of 26 October 1995 prolonging the applicant's detention.

29. On 8, 12 and 15 December the applicant examined the case file.

30. On 14 December 1985 the Warsaw Court of Appeal dismissed the applicant's appeal against the decision of 23 November 1995 prolonging his detention until 29 December 1995.

31. On 15 December 1995 the applicant requested that certain pages that had been taken out of the case file and transferred to the file of another case, which had been severed from the applicant's case in June 1995, be re-included into his file so that he could have access to them.

32. On 21 December 1995 the Białystok Regional Prosecutor closed the investigation, considering that the case-file contained enough evidence for a bill of indictment to be lodged with a court. On the same date the prosecutor ordered that the applicant be given access to documents that he had requested on 15 December.

33. On the same day the Białystok Appellate Prosecutor refused to allow the applicant's appeal against the decision to prolong his detention, given on 23 November 1995.

34. On 8 January 1996 the applicant requested to be released and on 10 January 1996 he proposed to pay bail in the amount of PLN 5,000.

35. On 19 January 1996 the applicant requested to be granted access to the case-file, submitting that he had not been shown items Nos. 85, 86, 87.

36. On 25 January 1996 the Warsaw Regional Court dismissed the applicant's request to be released on bail.

37. By a letter of 19 January, submitted to the court on 24 January 1996, the applicant requested to be allowed to read the case file again.

38. The refusal to release the applicant, given on 25 January 1996, was upheld by the Warsaw Appellate Court on 13 February 1996, which considered that the applicant's appeal had failed to advance any arguments capable of casting doubt on the lawfulness of the decision under appeal.

39. By a letter of 21 February 1996 the applicant again requested to be given access to the case file. On 28 February 1996 the case-file was forwarded by the prosecution to the Białystok detention centre and the applicant read it again on 1 March 1996.

40. On 7 March 1996 the Warsaw Regional Court held a session, concerning the applicant's request for release on bail and the amount of bail to be paid. The applicant's lawyer attended that session. The court fixed the bail at PLN 15,000. The applicant was released on the same day after bail had been paid.

41. On 26 July 1998 the applicant died of Marfan syndrome. On 20 August 1998 the Warsaw Regional Court discontinued the criminal proceedings against him.

II. RELEVANT DOMESTIC LAW

A. Preventive measures in criminal proceedings

42. At the relevant time, the authorities competent to decide on detention on remand were provided for in Articles 210 and 212 of the Polish Code of Criminal Procedure of 1969, which read as follows:

Article 210:

“1. Preventive measures [i.e. detention on remand, bail and police supervision] shall be imposed by the court; before a bill of indictment is lodged with the court, they shall be ordered by the prosecutor (...).”

Article 212:

“1. A decision concerning preventive measures may be appealed [to a higher court]
...

2. A prosecutor's order on detention on remand may be appealed to the court competent to deal with the merits of the case...”

43. These provisions were amended on 29 June 1995 by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes, which entered into force on 4 August 1996. Pursuant to this amendment, detention on remand could be imposed only by a court order.

44. A new Code of Criminal Procedure was enacted by the Sejm (Parliament) on 6 June 1997. Its Article 250, in its relevant part, reads:

“1. Detention on remand shall be imposed by a court order.

2. In the investigative stage of proceedings, detention on remand shall be imposed, on a prosecutor's request, by a district court in the jurisdiction of which investigations are being conducted. After a bill of indictment is lodged with a court, a decision to impose detention on remand shall be given by a court competent to deal with the merits of the case.

3. The prosecutor, when submitting to a court a request referred to in § 2, shall at the same time order that the suspect be brought before a court.”

45. At the relevant time the presence of the parties at court sessions other than hearings was regulated in Articles 87 and 88 of the Code of Criminal Procedure of 1969, which, insofar as relevant, provided:

Article 87:

“The Court pronounces its decisions at a hearing if the law provides for it; and otherwise, at a court session held *in camera*. ...”

Article 88:

“A court session *in camera* may be attended by a prosecutor (...); other parties may attend if the law provides for it.”

46. Pursuant to Article 249 of the new Code of Criminal Procedure, before deciding on the application of the preventive measures, the court shall hear the person charged with offence. The lawyer of the detainee should be allowed to attend in the court session, if he or she is present. It is not mandatory to inform the lawyer of the date and time of the court session, unless the suspect so requests and if it will not hinder the proceedings.

47. The court shall inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand, or an appeal against a decision to impose or to prolong detention on remand is to be considered.

B. Position of prosecutors under Polish law

48. At the material time the relations between the organs of the Polish State were set out in interim legislation, i.e. the Constitutional Act of

17 October 1992 (Mała Konstytucja). Article 1 of the Act laid down the principle of the separation of powers in the following terms:

“The legislative power of the State shall be vested in the Sejm and the Senate of the Republic of Poland; the executive power shall be vested in the President of Poland and the Council of Ministers; and judicial power shall be vested in the independent courts.”

49. Under Article 56 of the Act, the Council of Ministers (Rada Ministrów) shall be composed of the Prime Minister, Deputy Prime Ministers and Ministers.

50. In pursuance of Article 1 of the Act of 20 June 1985 (Ustawa o sądach powszechnych), the courts are entrusted with administration of justice in the Republic of Poland. The courts are courts of appeal, regional courts and district courts. Under Article 9 of the Law, the Supreme Court exercises supervisory jurisdiction over lower courts.

51. Article 1 of the Act of 20 June 1985 on Prosecuting Authorities (Ustawa o Prokuraturze) which determines general principles concerning the structure, functions and organisation of prosecuting authorities, at the material time read as follows:

“1. The prosecuting authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.

2. The Prosecutor General shall be the highest prosecuting authority; his functions shall be carried out by the Minister of Justice.”

Article 2 of the Act reads:

“The prosecuting authorities shall ensure the observance of the rule of law and the prosecution of criminal offences.”

52. Under Article 7 of the Act, in carrying out his statutory duties, a prosecutor shall abide by the principles of impartiality and equality of citizens before the law.

53. Pursuant to Article 8 of the Act, a prosecutor is independent in carrying out his or her duties, within the limits set out in this Article. A prosecutor shall abide by the instructions, guidelines and orders of his superiors. However, if an order relates to the substance of any action to be taken in proceedings, a prosecutor may request [his superior] to issue the order concerned with reasons in writing, to alter the order, to relieve him from performing an act prescribed by that order, or to remove him from conducting the case in question. The requests to be removed from a case shall be decided by a hierarchical superior of the prosecutor who issued the order.

54. Chapter III of the Code of Criminal Procedure of 1969, applicable at the material time, entitled "Parties to proceedings, defence counsel, representatives of victims and representatives of society", described a

prosecutor as a party to criminal proceedings. According to all the relevant provisions of the Code read together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. In particular, after completing the investigation, he drew up a bill of indictment and represented the prosecuting authority before the court competent to deal with the case.

55. Under Article 3 of the Code of Criminal Procedure of 1969 "organs conducting criminal proceedings [including a prosecutor] shall examine and take into account evidence in favour of as well as against the accused."

THE LAW

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

56. The applicant complained under Article 5 § 3 of the Convention that he was deprived of his liberty by a decision of the Public Prosecutor and not of a "judge or other officer authorised by law to exercise judicial power" as required by this provision. The prosecutor, under Polish law as it stood at that time, was also investigating the case and was to represent prosecution later in the judicial proceedings. He submitted that the prosecutor was a representative of the executive.

Article 5 § 3 provides:

"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 and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

57. The Government did not comment on the complaint.

58. The applicant reiterated that the prosecutor, as his position was defined by Polish law applicable at the material time, could not be deemed to perform a judicial function and that, therefore, he should not have been vested with the power to order detention.

59. The Court recalls that in its judgment in the case of *Niedbała v. Poland* (no. 27915/95, §§ 48-57, 4 July 2000, unreported) it has already dealt with the question of whether under the Polish legislation at the material time a prosecutor could be regarded as a "judicial officer" endowed with the attributes of "independence" and "impartiality" required under Article 5 § 3. The Court found a violation of Article 5 § 3 in that case considering that a prosecutor did not offer these necessary guarantees.

60. The Court finds that the present case is similar to the *Niedbała* case. There are no reasons to come to a different conclusion in this case. Consequently, the Court concludes that the applicant's right to be brought

“before a judge or other officer authorised by law to exercise judicial power” has not been respected.

61. There has accordingly been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

62. The applicant further complained under Article 5 § 4 that in the proceedings concerning his detention he was never brought before a judge. Therefore he did not have any possibility of effectively arguing any points relied on by the prosecution in support of his detention.

Article 5 § 4 reads:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

63. As to the substance of this part of the application, the Government admit that during his detention on remand the applicant did not participate in the sessions concerning the review of his detention by the Warsaw Regional Court and Warsaw Court of Appeal. This was because the Code of Criminal Procedure, applicable at that time, did not allow for the presence of the detainee, or of his lawyer, at court sessions, where the lawfulness of his detention was examined.

64. The applicant reiterates that the requirements of Article 5 § 4 of the Convention were not met in that the proceedings concerning review of his detention were not adversarial. Neither he nor his lawyer was entitled to be present before the court or to be acquainted with the arguments advanced by the prosecution in support of the applicant's detention.

65. The Court recalls that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 154-B, p. 34, § 65). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation (see, the *De Wilde, Ooms and Versyp v. Belgium* judgment of 18 June 1971, p. 42, § 78 in fine, the *Megyeri v. Germany* judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22, the *Niedbala v. Poland* judgment cited above, §66, unreported), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded “the

fundamental guarantees of procedure applied in matters of deprivation of liberty" (see the *De Wilde, Ooms and Versyp v. Belgium* judgment, p. 41, § 76; the *Winterwerp v. The Netherlands* judgment of 24 October 1979, Series A no.33, p. 24, § 60; see the *Sanchez-Reisse v. Switzerland* judgment of 21 October 1986, Series A no. 107, p. 20, § 51).

66. In the present case, detention on remand was at that time imposed by a warrant of a prosecutor (see above). An appeal to the court lay against a detention order. The law did not entitle either the applicant himself or his lawyer to attend the court sessions held in proceedings instituted following such an appeal. Moreover, the law did not entitle either the applicant himself or his lawyer to attend court sessions held in any other kind of subsequent proceedings concerning review of the lawfulness of detention, including proceedings in which the prolongation of his detention was being considered. What is more, the applicable provisions did not require the prosecutor's submissions in support of the applicant's detention to be communicated either to the applicant or to his lawyer. Thus, it was open to the prosecution to attend relevant court sessions and to make, in the absence of the suspect, any further submissions in support of the prolongation of the detention order, while neither the applicant nor his counsel had any opportunity to be acquainted with them or to formulate any objections, or to comment thereon.

In the Court's opinion, the applicant's worsening state of health, which finally led to his death, was a factor which should have militated in favour of his appearing in person. There is a strong probability that the applicant's presence could have convinced the authorities that he should to be released.

In the light of the foregoing considerations, the Court concludes that the applicant did not receive the benefit of procedure that was really adversarial.

67. The Court finds that the proceedings concerning review of the applicant's detention did not fully comply with the guarantees afforded by Article 5 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. Under the head of non-pecuniary damage the applicant sought an award of EUR 100,000.

70. The Government considered that the sum in question was wholly exorbitant. They asked the Court to rule that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to make an award of just satisfaction on the basis of its case-law in similar cases and national economic circumstances, in particular the purchasing power of national currency and the current minimum gross salary in Poland.

71. As regards the claim for alleged damage suffered as a result of violation of Article 5 §§ 3 and 4 of the Convention, the Court recalls that in certain cases which concerned violations of Article 5 §§ 3 and 4 it has made modest awards in respect of non-pecuniary damage (see the *Sanchez-Reisse v. Switzerland* judgment cited above, § 63; the *Van Droogenbroeck v. Belgium* judgment of 25 April 1983 (*Article 50*), Series A no. 63, p. 7, § 13, and the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 29, § 65; the *Niedbała v. Poland* judgment cited above, §§ 88-89 with further references). In other cases, it has declined to make any such award (see the *Pauwels v. Belgium* judgment of 26 May 1988, p. 20, § 46; the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 154-B, (*Article 50*), pp. 44-45, § 9; the *Huber v. Switzerland* judgment of 23 October 1990, Series A no. 188, p. 19, § 46; the *Toth v. Austria* judgment of 12 December 1991, Series A no. 224, p. 24, § 91; the *Kampanis v. Greece* judgment of 13 July 1995, Series A no. 318-B, p. 49, § 66; the *Hood v. the United Kingdom* judgment of 18 February 1999, to be published in the Court's official reports, §§ 84-87; and the *Nikolova v. Bulgaria* judgment of 25 March 1999, § 76, ECHR 1999-II).

72. In this case, the Court acknowledges that the applicant suffered damage of a non-pecuniary nature as a result of the fact that in the proceedings concerning his detention he was never brought before a judge. Therefore he did not have any possibility of effectively arguing any points relied on by the prosecution in support of his detention. Having regard to the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 2,500 as compensation for non-pecuniary damage.

B. Costs and expenses

73. The applicant's father, who received legal aid from the Council of Europe in connection with his legal representation in the proceedings before the Court, did not claim further reimbursement of legal costs and expenses incurred in the preparation of the case.

C. Default interest

74. 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. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
2. *Holds* that there has been a violation of Article 5 § 4 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 according to Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement, together with any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 27 April 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President