



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

FOURTH SECTION

CASE OF KWIEK v. POLAND

(Application no. 51895/99)

JUDGMENT

STRASBOURG

30 May 2006

FINAL

30/08/2006

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 Kwiek v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr L. GARLICKI,

Mr J. ŠIKUTA, *judges*,

and M. O'Boyle, *Section Registrar*,

Having deliberated in private on 9 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 51895/99) 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 Bogdan Kwiek ("the applicant"), on 17 August 1998.

2. The Polish Government ("the Government") were represented by their Agents, Mr K. Drzewicki and subsequently, Ms S. Jaczewska, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the authorities had violated his right to respect for correspondence guaranteed under Article 8.

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 17 June 2003 the Court declared the application partly admissible. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1968 and lives in Chełm, Poland.

9. On 10 September 1994 the applicant began serving a sentence of 5 years' imprisonment that he had received for robbery on an unknown date.

10. On 16 December 1994 the Lublin Regional Prosecutor (*Prokurator Rejonowy*) charged him with homicide. On the same day the prosecutor also ordered that the applicant be detained on remand.

11. At the beginning of December 1995 the Regional Prosecutor lodged a bill of indictment with the Lublin Regional Court (*Sąd Wojewódzki*). The applicant was indicted on charges of homicide, aggravated robbery and possessing a firearm and ammunition without a licence.

12. On 11 August 2000 the Lublin Regional Court convicted him of armed robbery and possessing a firearm and ammunition without a licence.

13. On 26 April 2001, on the applicant's appeal, the Lublin Court of Appeal (*Sąd Apelacyjny*) partly amended the first-instance judgment.

14. The applicant did not file a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy*).

A. The monitoring of the applicant's correspondence

15. The applicant produced 6 envelopes. Some of them contain letters. All envelopes bear traces of having been opened after having been sealed; their sides were cut open and, in some instances, resealed with adhesive paper tape.

16. On an unknown date in December 1997 the applicant wrote a letter to his defence counsel. The envelope bears stamps: "Censored" ("*cenzurowano*") and "1997-12-9".

17. On 17 July 1998 the applicant's defence counsel sent a letter to him. The envelope bears a stamp that reads: "Censored. R[egional] C[ourt] Lublin". A hand written note indicates that on 21 July 1998 the letter was received at the Regional Court's registry and posted to the applicant on the same day.

18. On 28 September 1998 a letter that the applicant received from the Constitutional Court was opened and stamped "censored" by the Lublin Regional Court.

19. On 21 October and 9 November 1998 the Regional Court opened and stamped "censored" 2 letters sent to the applicant by a certain O.K., his sister-in-law ("O.K.").

20. On 15 April 1999 the Regional Court opened and censored a letter sent to the applicant by the Court's Registry on 6 April 1999. In that letter the registry informed the applicant that his defence counsel had been asked to provide more detailed information of his trial. A copy of the registry's letter to the counsel – which, in addition to the request for information, contained an explanation as to why the applicant's complaint about the length of detention lacked prospects of success – was enclosed with that letter.

II. RELEVANT DOMESTIC LAW

21. Until 1 September 1998 censorship of correspondence was effected under the provisions of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) of 19 April 1969 ("the 1969 Code"). The Code is no longer in force. On 1 September 1998 it was repealed and replaced by the "new" Code of Execution of Criminal Sentences of 6 June 1997 ("the 1997 Code").

A. Provisions in force before 1 September 1998

22. Pursuant to Article 89 § 2 of the 1969 Code, all correspondence of a detainee was, as a rule, censored, unless a prosecutor or a court decided otherwise. There was no legal means whereby a detainee could appeal against or, in any other way, contest the censorship of his correspondence or the scope of that measure (cf. *Niedbala v. Poland*, no. 27915/95, judgment of 4 July 2000, §§ 33-36).

B. Provisions in force since 1 September 1998

23. Article 102 (11) of the 1997 Code provides that the convicted persons are entitled to uncensored correspondence with the State authorities and with the Ombudsman. Article 103 of this Code, which is contained in Chapter IV entitled "Rights and duties of convicted persons", provides as follows:

"Convicted persons, their counsel, representatives and the relevant non-governmental organisations have a right to lodge complaints with institutions set up by international treaties ratified by the Republic of Poland concerning the protection of human rights. In those cases, correspondence of persons deprived of their liberty shall be sent to the addressee without delay and shall not be censored."

24. Provisions relating to the execution of detention on remand (Articles 207-223) are contained in Chapter XV entitled "Detention on remand".

Article 217 § 1, as applicable at the material time, read, in so far as relevant:

“... a detainee’s correspondence shall be censored by [the authority at whose disposal he remains], unless the authority decides otherwise.”

Pursuant to Article 214 § 1,

“Unless exceptions are provided for in the present Chapter, a detainee shall enjoy at least the same rights as are secured to a convicted person serving a sentence of imprisonment under the ordinary regime in a closed prison. No restrictions shall be applied to him except such as are necessary to secure the proper conduct of criminal proceedings, to maintain order and security in a remand centre and to prevent demoralisation of detainees.”

Article 242, as applicable at the material time, provided in § 5:

“The prohibition of censorship shall also mean the prohibition of acquainting oneself with the content of the letter.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the censorship of his correspondence was contrary to Article 8 of the Convention, which reads:

“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

26. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Monitoring of the correspondence before 1 September 1998*

(a) Arguments before the Court

27. The applicant maintained that the authorities had censored his correspondence with his defence counsel and had, therefore, violated his right to respect for his correspondence.

28. The Government acknowledged that the applicant's correspondence with his defence counsel had been censored. They further submitted that the contested measure had been applied pursuant to Article 89 of the 1969 Code. They consequently held that the censorship complained of had been carried out in compliance with Polish law.

29. The Government recalled that in the case of *Niedbala v. Poland* the Court had already dealt with the question of "automatic" censorship of detainee's correspondence. However, in the present case they reserved their opinion on the alleged breach of Article 8 of the Convention.

(b) The Court's assessment

30. The Court notes that the Government acknowledged the fact that during the applicant's detention the authorities had censored his correspondence with his defence counsel. It is, accordingly, common ground that in the present case there was an "interference by a public authority", within the meaning of Article 8 § 2 of the Convention, with the applicant's right to respect for his correspondence.

31. The Court further recalls that in the above-mentioned case of *Niedbala v. Poland* it found that Polish law concerning the control of correspondence in force before 1 September 1998 did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on public authorities (see *Niedbala v. Poland*, judgment cited above, §§ 81-84).

32. The Court sees no reason to distinguish the present case from the *Niedbala* case. Accordingly, the monitoring of the applicant's correspondence with his defence counsel was not "in accordance with the law".

There has therefore been a breach of Article 8 of the Convention in respect of the period in question.

2. Monitoring of the correspondence after 1 September 1998

(a) Arguments before the Court

33. The applicant further submitted that the censorship of the correspondence sent to him by the Constitutional Court, the Court's Registry and O.K. had been in breach of Article 8 of the Convention.

34. The Government did not dispute the fact that the censorship of the letter from the Constitutional Court, being a State authority within the meaning of Article 102 (11), and of the letter sent by the Court's Registry constituted an interference with the applicant's right to respect for his correspondence. They admitted that it had been in breach of Articles 102 (11) and 103 read in conjunction with Article 214 of the 6 June 1997 Code. In this respect, the Government pointed out that the rights of persons detained on remand should, in principle be at least equal to those of convicted persons serving a sentence of imprisonment. They submitted that under the above mentioned provisions both categories of correspondence were privileged and should not have been subjected to censorship. Accordingly, the measures imposed by the domestic authorities had been unlawful. However, the Government reserved their opinion on the alleged violation of Article 8 of the Convention in this respect.

35. They further acknowledged that the censorship of two letters sent by O.K. constituted an interference with the applicant's right to respect for his correspondence. They asserted that it had been based on the provisions of Article 217 § 1 of the 6 June 1997 Code. In the Government's view, these provisions were adequately accessible and formulated with sufficient precision.

They further considered that the censorship in question had been justified under paragraph 2 of Article 8. In this respect the Government submitted that the measure imposed had been necessary in a democratic society in the interests of public safety, for the prevention of crime. They claimed that in general the censorship of the detainee's correspondence with private persons was necessary in order to secure the proper conduct of the proceedings. They concluded that in the present case the censorship had not amounted to a violation of Article 8 of the Convention.

36. Lastly, the Government stated that the 1997 Code, as it stood at the material time, had not provided any legal means to contest the censorship of the applicant's correspondence.

(a) Principles established under the Court's case-law

37. 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*, judgment cited above, § 78).

38. As to the expression “in accordance with the law”, the court has established three fundamental principles. The first one is that the interference in question must have some basis in domestic law. The second principle is that “the law must be adequately accessible”, a person must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to his case. The third principle is that “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable a person to regulate his conduct; he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail” (see the *Silver and Others v. the United Kingdom* judgment cited above, §§ 86-88).

39. The Court recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is “necessary in a democratic society” regard may be had to the State’s margin of appreciation (see, amongst other authorities, *Campbell v. United Kingdom* judgment, cited above, § 44). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.

It has also been recognised that some measure of control over prisoners’ correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment (see *Silver and others v. the United Kingdom*, judgment cited above, § 98). In assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner’s only link with the outside world should not, however, be overlooked.

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

(i) The applicant’s correspondence with the Constitutional Court

40. It is not in dispute that the censorship of the Constitutional Court’s letter to the applicant constituted an “interference” with the applicant’s right to respect for his correspondence under Article 8 (see paragraphs 33 and 34 above). The Court sees no reason to hold otherwise.

41. The Court also notes that the Government admitted that the domestic authorities had acted contrary to the statutory prohibition laid down in Article 102 (11) of the 1997 Code. They maintained that under

Article 102 (11) read in conjunction with Article 214 of the 1997 Code the applicant's correspondence with the Constitutional Court, being a State authority, should not have been subjected to censorship (see paragraph 34 above). The Court concludes that, as acknowledged by the Government, the disputed measure was contrary to national law.

42. Since the authorities acted against the legal prohibition, the interference with the applicant's correspondence was not "in accordance with the law", as required by Article 8 of the Convention. For that reason, there has been a breach of Article 8 of the Convention in this regard and the Court does not consider it necessary to examine whether the other conditions of paragraph 2 of that provision were complied with.

(ii) The applicant's correspondence with the Court's Registry

43. The Court observes that the parties appeared to agree that the measures applied to the applicant's correspondence with the Court's Registry constituted an interference with the applicant's right to respect for his correspondence (see paragraphs 33 and 34 above).

44. The Court notes that the Government acknowledged that the authorities had acted contrary to the legal prohibition provided under the provisions of Article 103 read in conjunction with Article 214 of the 1997 Code (see paragraph 34 above). The Court sees no reason to disagree and holds that the interference was not "in accordance with the law".

Accordingly, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with. Consequently, the Court concludes that there has been a violation of Article 8 of the Convention in this respect.

(iii) The applicant's correspondence with O.K.

45. The Court notes that it is a common ground that the censorship of the applicant's correspondence with O.K. amounted to an "interference" with his right to respect for his correspondence under Article 8 (see paragraphs 33 and 35 above). The Court would underline that, in the Polish language, the word *cenzurowano* means that a competent authority, after having acquainted itself with the content of a particular communication, decides to allow its delivery or dispatch. It follows that the opening and reading of the letters amounted to an "interference" within the meaning of Article 8.

Such interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is, in addition, "necessary in a democratic society" to achieve those aims.

46. Having regard to the provisions of Articles 217 § 1 of the 6 June 1997 Code the Court accepts that was a legal basis for the opening and reading of the letters in question (see paragraphs 24 and 35 above).

The Court recalls that in a number of its previous judgments – for instance, those in the cases of *Matwiejczuk v. Poland* (no. 37641/97, judgment of 2 December 2003, § 101) and of *Mianowski v. Poland* (no. 42083/98, judgment of 16 December 2003, § 65) – it has already dealt with the question whether Polish law as it stood at the material time indicated with the reasonable clarity the scope and manner of control of prisoners' correspondence. The Court has found that the applicable provisions of Polish law were adequately accessible. Furthermore, bearing in mind the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity, it has accepted that the provisions were formulated with sufficient precision.

The Court sees no reason to come to a different conclusion in this case.

47. The Court agrees with the Government's opinion that the interference took place in "the interests of public safety" and pursued the legitimate aim of "the prevention of crime" (see paragraph 35 above).

48. The Court will further assess whether the reasons adduced to justify the control in question were relevant and sufficient and whether the principle of proportionality has been adhered to.

The Court considers that the censorship pursued a legitimate aim under Article 8 § 2 of the Convention, namely the prevention of crime. In the circumstances of the instant case, having regard to the fact that the applicant was indicted on charges of serious criminal offences and the need to secure the proper conduct of the trial, the interference could reasonably be considered as necessary in a democratic society. The relevant authorities were entitled, within the margin of appreciation left to them under Article 8 § 2, to think that the control of these particular letters was necessary "for the prevention of disorder or crime". Accordingly, the interference was justified.

49. The Court therefore considers that, in the particular circumstances of the case, the monitoring of the applicant's correspondence with O.K. can be regarded as having been necessary in a democratic society within the meaning of Article 8 § 2 of the Convention. Accordingly, the Court concludes that there has been no violation of Article 8 of the Convention in this respect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 400,000 euros (EUR) in respect of non-pecuniary damage.

52. The Government considered that amount was excessive. They asked the court to rule that the finding of a violation of Article 8 would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to assess the amount of just satisfaction on the basis of its case-law in similar cases and having regard to national economic circumstances, in particular the purchasing power of the national currency.

53. The Court considers that in the particular circumstances of the case, the finding of a violation would not constitute sufficient just satisfaction for non-pecuniary damage sustained by the applicant. Having regard to the extent of violation found, the Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

54. The applicant did not seek to be reimbursed for any costs or expenses in connection with the proceedings before the Court.

C. Default interest

55. 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention in respect of the monitoring of the applicant's correspondence with his defence counsel, the Constitutional Court and the European Court of Human Rights;
3. *Holds* that there has been no violation of Article 8 in respect of the monitoring of the applicant's correspondence with O.K.;
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 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into Polish zlotys, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President