



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

FOURTH SECTION

CASE OF SCHMALZ v. POLAND

(Application no. 19177/03)

JUDGMENT

STRASBOURG

6 September 2007

FINAL

06/12/2007

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 Schmalz 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 K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Ms L. MIJOVIĆ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 10 July 2007,

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

PROCEDURE

1. The case originated in an application (no. 19177/03) 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 Hari Schmalz ("the applicant"), on 2 June 2003.

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

3. The applicant alleged, in particular, that the length of his detention on remand had been unreasonable.

4. On 26 September 2005 the President of the Fourth Section decided to communicate to the Government the applicant's complaints concerning the length of his detention on remand and the fairness of the criminal proceedings against him. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1953 and lives in Kozubnik, Poland.

6. On 24 February 2001 the applicant was arrested by the police.

7. On 28 February 2001 the Żywiec District Court (*Sąd Rejonowy*) decided to detain the applicant on remand in view of the reasonable

suspicion that he had been involved in drug trafficking and drug production as a member of an organised gang.

8. On 21 May and 18 August 2001 the Bielsko-Biała Regional Court decided to prolong the applicant's pre-trial detention. The court relied on the reasonable suspicion against the applicant and on the severity of the penalty that might be imposed, which made it probable that he would obstruct the proceedings.

9. In 2001 the applicant on at least four occasions unsuccessfully requested the prosecutor to release him from detention.

10. On 20 December 2001 the applicant's pre-trial detention was prolonged by the Katowice Regional Court (*Sąd Okręgowy*). The court relied on the severity of the sentence that might be imposed and held that keeping the applicant in detention was justified by the need to secure the proper conduct of the investigation.

11. On 13 February and 17 April 2002 the Regional Court further prolonged the applicant's detention reiterating the grounds originally given for his detention and adding that the measure was necessary given the complexity of the case.

12. The applicant's appeals against both decisions were dismissed on 27 March and 22 May 2002 respectively.

13. Subsequently, on 24 July and 25 September 2002, the Katowice Court of Appeal prolonged the detention of the applicant and 12 co-accused. The court considered that the strong suspicion against the accused of having committed serious offences while acting in an organised gang made it probable that they would obstruct the course of the proceedings. It found that Article 258 § 2 of the Code of Criminal Procedure established a presumption to the effect that the likelihood of a severe penalty being imposed on the accused might induce them to obstruct the proceedings. With regard to the applicant, the court underlined the risk of a heavy sentence being imposed on him.

14. On 22 November 2002 the applicant and 15 co-accused were indicted before the Bielsko-Biała Regional Court.

15. On 27 November 2002 the pre-trial detention of the applicant and 14 other persons was further extended. The Katowice Regional Court considered the risk of the accused tampering with evidence high, basing itself on the fact that they had been charged with being members of an organised criminal gang.

16. The applicant appealed against this decision but on 8 January 2003 the Katowice Court of Appeal (*Sąd Apelacyjny*) dismissed his appeal.

17. As the length of the applicant's detention had reached the statutory time-limit of 2 years laid down in Article 263 § 3 of the Code of Criminal Procedure (*Kodeks postępowania karnego*) the District Court made several applications to the Katowice Court of Appeal for the applicant's detention to be prolonged beyond that term. On 8 January 2003 the Court of Appeal

granted the application. The court justified its decision with reference to the reasonable suspicion that the accused had committed the offences and the complexity of the case which concerned an organised criminal gang. The court also held that the measure was justified by the severity of the sentence to which the accused were liable and by the risk that they would interfere with the course of the proceedings.

18. On 17 March 2003 the applicant, again unsuccessfully, requested the court to lift his pre-trial detention.

19. On 6 August 2003 the Court of Appeal prolonged the applicant's detention on remand. The court noted, however, that although the bill of indictment had been lodged eight months previously, the trial court had not yet started to examine the merits of the case. As regards the need to prolong the applicant's detention, the court noted as follows:

“...The [Regional Court] rightly pointed to Articles 249 § 1 and 258 § 2 of the Code of Criminal Procedure to justify the continuation of the detention on remand in order to secure the proper conduct of the proceedings, and there is no need to discuss that further.

It should be underlined that, given the number of co-accused and the type of offences they had been charged with, the present case is particularly complex. Therefore, it is necessary to prolong further the detention in order to carry out the proceedings, in particular to take evidence from 16 accused and 11 witnesses...

It should also be noted that, as the proceedings advance, the Regional Court should consider whether it was still necessary to extend the [detention on remand] with respect to all the accused.”

20. The first hearing was held on 13 November 2003. In total, the trial court held 36 hearings.

21. On 17 December 2003 the Court of Appeal further prolonged the applicant's detention. The court pointed to the complexity of the case and the advanced stage of the proceedings before the trial court.

22. On 18 March 2004 the applicant repeated his request to lift the detention on remand.

23. On 23 June 2004 the Katowice Court of Appeal further prolonged the applicant's pre-trial detention relying in particular on the complexity of the case and the large number of co-accused.

24. On 24 August and 13 October 2004 the court dismissed subsequent requests to lift the applicant's pre-trial detention.

25. On 16 December 2004 the Bielsko-Biała Regional Court gave judgment. It convicted the applicant and sentenced him to 4 years and 6 months' imprisonment. On the same date the court decided to lift the applicant's detention.

26. The applicant lodged an appeal.

27. On 26 January 2006 the Katowice Court of Appeal upheld the judgment as regards the sentence of imprisonment imposed on the applicant.

It appears that the applicant did not lodge a cassation appeal. The judgment is final.

II. RELEVANT DOMESTIC LAW

28. The Code of Criminal Procedure of 1997, which entered into force on 1 September 1998, defines detention on remand as one of the so-called “preventive measures” (*środki zapobiegawcze*).

29. A more detailed rendition of the relevant domestic law provisions is set out in the Court's judgment in *Kudła v. Poland* [GC], no. 30210/96, § 75, ECHR 2000-XI, *Celejewski v. Poland*, no. 17584/04, §§ 22 and 23, 4 May 2006.

THE LAW

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

30. The applicant complained that the length of his detention on remand had been unreasonable. He relied on Article 5 § 3 of the Convention, which reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

31. The Government contested that argument. Firstly, they noted that the applicant had not appealed against all the decisions to prolong his detention. Secondly, they stated that the applicant's pre-trial detention satisfied the requirements of Article 5 § 3. It was justified by “relevant” and “sufficient” grounds. These grounds were, in particular, the gravity of the charges against the applicant as well as the complexity of the case which concerned an organised criminal gang. The Government further argued that the domestic authorities had shown due diligence, as required in cases against detained persons.

A. Admissibility

32. As to the Government's preliminary objection that the applicant had failed to exhaust the remedies provided for by Polish law, the Court reiterates that it is well established in its case-law that an applicant must make normal use of those domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy

which has essentially the same objective is not required (see *Yaşa v. Turkey* judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 71).

33. In the present case the applicant lodged appeals against some of the decisions prolonging his detention, including three decisions taken in 2002 (see paragraphs 12 and 16 above). He also lodged multiple requests for the detention order to be lifted or for a more lenient preventive measure to be imposed (see paragraphs 9, 18, 22 and 24 above). The Court considers that the purpose of the remedies used by the applicant was to obtain a review of his detention pending trial. In the circumstances of the case these remedies constituted adequate and effective remedies within the meaning of Article 35 of the Convention as their aim was to obtain his release.

34. The Court further notes that the non-exhaustion arguments raised by the Government are similar to those already examined and rejected in previous cases against Poland (see *Buta v. Poland*, no. 18368/02, §§ 24-28, 28 November 2006; *Duda v. Poland*, no. 67016/01, §§ 26-31, 19 December 2006) and that the Government have not submitted any new circumstances which would lead the Court to depart from its previous findings.

35. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Principles established under the Court's case-law

36. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among other authorities, *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30, and *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI)

37. The presumption is in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p.37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention

ceases to be reasonable (see *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...).

38. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention (see *McKay*, cited above, § 43).

39. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV, and *Jabłoński v. Poland*, no. 33492/96, § 80, 21 December 2000).

2. Application of the principles to the circumstances of the present case

40. The Court firstly notes that the applicant was arrested on 24 February 2001 and that on 16 December 2004 the trial court gave a judgment in his case convicting him as charged and sentencing him to a term of imprisonment. His detention thus lasted 3 years, 9 months and 22 days.

41. The Court further observes that the present case concerned a serious crime, namely drug trafficking and drug production committed together with 15 other persons. Thus it was a classic example of organised crime, by definition presenting more difficulties for the investigation authorities and, later, for the courts in determining the facts and the degree of responsibility of each member of the group. It is obvious that in cases of this kind, continuous control and limitation of the defendants' contact among themselves and with other persons may be essential to avoid their absconding, tampering with evidence and, most importantly of all, influencing, or even threatening, witnesses. Accordingly, longer periods of detention than in other cases may be reasonable (see, *Bąk v. Poland*, no. 7870/04, § 56, 16 January 2007).

42. The Court will therefore take into account in assessing the conduct of the authorities in the present case the special circumstances deriving from

the fact that it concerned a member of a criminal gang (see *Celejewski v. Poland*, no. 17584/04, 4 May 2006).

43. In their decisions to remand the applicant in custody the authorities initially relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged and the risk that he might go into hiding or interfere with the conduct of the proceedings.

In addition, the authorities relied heavily on the severity of the sentence that might be imposed, which according to them created a presumption that the applicant and other accused would obstruct the criminal proceedings. The domestic courts also considered that in view of the complexity of the case the applicant's detention was necessary to secure the proper conduct of the proceedings.

44. The judicial authorities appear also to have presumed the risk of pressure being exerted on witnesses or of obstruction of the proceedings based on the severity of the anticipated penalty, given the serious nature of the offences at issue and the fact that the applicant had been charged with being a member of an organised criminal gang. In this respect, the Court reiterates that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending (see, *Górski v Poland*, no. 28904/02, § 57, 4 October 2005). It acknowledges that in view of the seriousness of the accusations against the applicant, the authorities could justifiably have considered that such an initial risk was established. However, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001). In the circumstances of the present case, the Court finds that the severity of the anticipated penalty alone, or in conjunction with the other grounds relied on by the authorities, cannot constitute a “relevant and sufficient ground” for holding the applicant in detention for a considerably long period.

45. In these circumstances, even taking into account the particular difficulty in dealing with a case concerning an organised criminal gang, the Court concludes that the grounds given by the domestic authorities were not “relevant” and “sufficient” to justify holding the applicant in detention for 3 years and almost 10 months.

46. Although the above finding would normally absolve the Court from assessing whether the proceedings were conducted with special diligence, in the present case the Court cannot but note that even though the applicant was indicted in November 2002, it took the trial court exactly one year to hold the first hearing (see paragraphs 14 and 20 above). The Government failed to provide an explanation for the trial court's inactivity during this period. Moreover, on 6 August 2003 the Court of Appeal criticised the inactivity of the District Court (see paragraph 19 above). That delay should be considered significant and it cannot therefore be said that the authorities

displayed “special diligence” in the conduct of the criminal proceedings against the applicant.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

47. The applicant complained under Article 6 § 1 of the Convention that he had not had a “fair trial”.

48. The Court notes that it appears that the applicant did not lodge a cassation appeal with the Supreme Court. However, even assuming that the applicant had exhausted domestic remedies, the Court reiterates that it is not called upon to deal with errors of fact and law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

49. The Court observes that the applicant does not allege any particular failure to respect his right to a fair hearing. Assessing the criminal proceedings against the applicant as a whole, it finds no indication that they were unfairly conducted.

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

III. 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 137,700 Polish zlotys (PLN) in respect of pecuniary damage and 45,000 euros (EUR) under the head of non-pecuniary damage.

52. The Government considered these claims excessive.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, and bearing in mind that the applicant spent over three years in detention whereas his prison sentence amounted to four and a half years, it awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant also claimed PLN 9,700 for the costs and expenses incurred before the domestic courts.

55. The Government contested the claim.

56. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings.

C. Default interest

57. 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 complaint concerning the unreasonable length of the applicant's pre-trial detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 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 in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement, 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 6 September 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President