



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

FOURTH SECTION

CASE OF LEWAK v. POLAND

(Application no. 21890/03)

JUDGMENT

STRASBOURG

6 September 2007

FINAL

31/03/2008

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 Lewak 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. 21890/03) 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 Jerzy Lewak (“the applicant”), on 23 May 2003.

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

3. On 14 September 2006 the President of the Fourth Section decided to give notice of the application to the Government. 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**

4. The applicant was born in 1965 and lives in Rejowiec Fabryczny.

A. The alleged ill-treatment of the applicant

5. It appears that in November 2002 the Chełm District Prosecutor charged the applicant with armed robbery. On an unspecified date in November 2002 the court ordered his detention on remand. He was detained

in the Chełm Prison. In connection with the criminal investigation against the applicant, the District Prosecutor ordered the applicant to provide a sample of his body odour.

6. According to the applicant, on 13 March 2003 he was called to the interrogation room in the Chełm Prison where he was informed that he was to provide the required samples. However, the applicant stated that he would provide them only in the presence of his lawyer. According to the applicant, he was then knocked over and kicked by two police officers and a prison guard. During that time he also lost his gold neck chain. Subsequently, the applicant agreed to provide the samples.

7. The applicant claimed that as a result of the beating he had bruises on his abdomen, his back and his waist. He also had pain in his spine.

8. On 24 March 2003 the applicant filed a criminal complaint with the Chełm District Prosecutor, alleging that he had been beaten on 13 March 2003 by two police officers and a prison guard. He further alleged that his gold chain had been stolen during the incident.

9. On 24 April 2003 the District Prosecutor opened an investigation. She heard the applicant and the two police officers and prison guard involved in the alleged incident. She also heard two other police officers who had been working in a neighbouring room at the time of the alleged incident.

10. The District Prosecutor established that the applicant had been told to provide the samples and, if he refused, that they would be taken against his will. After some persuasion, the applicant had agreed to provide the samples. All the officers confirmed that version of events and stated that force had not been used.

11. The District Prosecutor obtained other relevant evidence which did not corroborate the applicant's allegations of ill-treatment. Between 13 March and 1 April 2003 the applicant was seen by a prison doctor on five occasions. He did not report any injuries linked to his alleged ill-treatment and no such injuries were detected. On 27 March 2003 an ambulance was called for the applicant since he had complained about pain in his abdomen. On that occasion, the applicant did not mention any injuries related to his alleged ill-treatment and had received pain killers.

12. As regards the missing neck chain, the District Prosecutor found that at the time of his admission to the prison the applicant had not declared any valuables. Nor had he reported the loss of his neck chain to the prison administration.

13. Having regard to the foregoing considerations, on 30 June 2003 the District Prosecutor discontinued the investigation. She held that there was no evidence to support the view that the offences of assault and theft as alleged by the applicant had been committed.

14. The applicant appealed against that decision to the Lublin Regional Prosecutor. On an unspecified date the Regional Prosecutor upheld the decision of 30 June 2003 and transmitted the applicant's appeal to the Chełm District Court for review.

15. On 20 October 2003 the Chełm District Court upheld the decision of 30 June 2003.

16. Meanwhile, on 12 September 2003 the Chełm District Prosecutor had discontinued the investigation against the applicant concerning the charge of armed robbery. She held that the evidence obtained in the course of the investigation, including the samples of his body odour, did not confirm that the applicant had taken part in the armed robbery.

B. The alleged censorship of the applicant's correspondence with the Court

17. The envelope in which the applicant sent his first letter from the Chełm Prison to the Court dated 21 May 2003 bears the following stamps: “censored” (*ocenzurowano*) and “the Chełm District Court” (*Sąd Rejonowy w Chełmie*). It also bears a stamp confirming that the applicant's letter was received for dispatch by the prison administration on 23 May 2003. However, according to the postal stamp the letter was posted only on 3 June 2003. It also appears that the envelope had been cut open and subsequently resealed with adhesive tape.

18. The envelope in which the applicant sent his application form from the Chełm Prison to the Court dated 27 October 2003 bears the following stamps: “censored” (*ocenzurowano*) and “the Chełm District Court” (*Sąd Rejonowy w Chełmie*). It also bears a stamp confirming that the applicant's letter was received for dispatch by the prison administration on 3 November 2003. However, according to the postal stamp the letter was posted only on 13 November 2003. It also appears that the envelope had been cut open and subsequently resealed with adhesive tape.

II. RELEVANT DOMESTIC LAW

19. The relevant domestic law concerning the censorship of prisoners' correspondence is set out in the Court's judgment in the case of *Michta v. Poland*, no. 13425/02, §§ 33-39, 4 May 2006.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

20. The Court raised of its own motion a complaint under Article 8 of the Convention. This provision, in its relevant part, 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 (exhaustion of domestic remedies)

21. The Government submitted that the applicant had not exhausted all available domestic remedies. He had failed to bring an action under Article 23 in conjunction with Article 448 of the Civil Code. These provisions would have allowed him to assert that by censoring his correspondence the authorities had breached his personal rights protected by the Civil Code and claim non-pecuniary damages.

22. In this connection, the Government relied on the Warsaw Regional Court's judgment of 27 November 2006 in which a prisoner had been awarded PLN 5,000 in damages from the State Treasury for a breach of secrecy of his correspondence with the Central Board of the Prison Service and the Central Electoral Office. The Regional Court held that secrecy of one's correspondence was one of the personal rights protected under Article 23 of the Civil Code and that in the case of its breach a claimant may be entitled to an award of non-pecuniary damages.

23. The applicant did not comment.

24. The Court notes that the complaint under Article 8 of the Convention concerning the alleged censorship of the applicant's correspondence was raised *ex officio*. The two letters at issue were sent by the applicant to the Court and he could not have been aware that they had been censored by the authorities. In those circumstances, the applicant cannot be required to bring any domestic proceedings in order to obtain redress for the alleged breach of his right to respect for his correspondence.

25. Even assuming that the applicant complained about the censorship of his letters to the Court, it has to be noted that the alleged interference with the applicant's correspondence occurred in 2003, whereas the Government relied on the Warsaw Regional Court's judgment of 27 November 2006. Any relevance that the latter judgment might possibly have in respect of the

present case is therefore reduced by the fact that it was given after the relevant time (see, for example, *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX). Furthermore, the Court observes that the judgment relied on by the Government was given by a first-instance court. There is no indication that it has been reviewed by higher courts and that it has become final.

26. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. Existence of an interference

28. The Court notes that the envelope in which the applicant's first letter of 21 May 2003 was sent to the Court from the Chełm Prison bears two stamps that read: "censored" (*ocenzurowano*) and "the Chełm District Court" (*Sąd Rejonowy w Chełmie*). Similarly, the envelope in which the applicant's application form dated 27 October 2003 was sent to the Court from the Chełm Prison bears similar stamps. It appears that both envelopes had been cut open and subsequently resealed with adhesive tape.

29. The Court considers that, even if there is no separate stamp on the letters as such, there is a reasonable likelihood that the envelopes had been opened by the domestic authorities. The Court has held on many occasions that as long as the Polish authorities continue the practice of marking detainees' letters with the "censored" stamp, the Court has no alternative but to presume that those letters have been opened and their contents read (see *Matwiejczuk v. Poland*, no. 37641/97, § 99, 2 December 2003 and *Pisk-Piskowski v. Poland*, no. 92/03, § 26, 14 June 2005, *Michta v. Poland*, no. 13425/02, § 58, 4 May 2006). It follows that in respect of both of the applicant's letters there was an "interference" with his right to respect for his correspondence under Article 8.

2. Whether the interference was "in accordance with the law"

30. The Government did not indicate a concrete legal basis in the domestic law for the impugned interference. The Court notes that the interference took place on two occasions when the applicant had been detained on remand or was serving a prison sentence.

31. The Court observes that, according to Article 214 of the Code of Execution of Criminal Sentences, persons detained on remand should enjoy

the same rights as those convicted by a final judgment. Accordingly, the prohibition of censorship of correspondence with the European Court of Human Rights contained in Article 103 of the same Code, which expressly relates to convicted persons, was also applicable to detained persons (see *Michtha v. Poland*, no. 13425/02, § 61, 4 May 2006, *Kwiek v. Poland*, no. 51895/99, § 44, 30 May 2006). Thus, censorship of the applicant's two letters to the Court was contrary to the domestic law. It follows that the interference in the present case was not "in accordance with the law".

32. Having regard to that finding, 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 finds that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicant complained that he had been ill-treated by police officers and a prison guard during the taking of samples of his body odour. He also alleged that he had lost his gold chain during that incident. The applicant did not rely on any provision of the Convention. The Court considers that this complaint falls to be examined under Article 3 of the Convention.

34. The Court observes that on 24 March 2003 the applicant filed a criminal complaint against the alleged perpetrators and the District Prosecutor opened an investigation. The prosecutor heard the applicant and the officers who denied that the applicant had been beaten. The prosecutor established that between 13 March and 1 April 2003 the applicant had been seen by a prison doctor on five occasions and that he had not reported any injuries. There was no medical certificate attesting to any of the injuries allegedly sustained by the applicant. Subsequently, on 30 June 2003 the District Prosecutor discontinued the case against the police officers and the prison guard for lack of evidence. On 20 October 2003 the District Court upheld that decision.

35. Having regard to the above findings of the domestic authorities, the Court considers that the applicant has not made out his case under Article 3 of the Convention. As regards the substantive aspect of Article 3, it is not possible to establish whether the applicant was subjected to treatment prohibited by that provision. As regards the procedural aspect, the Court notes that the authorities carried out a prompt, independent and effective investigation. They took into account all available evidence and concluded that there was no proof of the applicant's ill-treatment. Having regard to the procedural requirements of Article 3 (for which, see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV and *Dzwonkowski v. Poland*, no. 46702/99, §§ 61-62, 12 April 2007), the Court finds that there were no discernible shortcomings in the investigation.

36. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 33,000 Polish zlotys (PLN) in respect of non-pecuniary damage.

39. The Government argued that the applicant's claims were exorbitant. They asked the Court to rule that a finding of a violation of Article 8 constituted 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.

40. The Court finds that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of Article 8 of the Convention. Considering the circumstances of the case, the Court awards the applicant EUR 500 under this head.

B. Costs and expenses

41. The applicant submitted no claim in respect of costs and expenses.

C. Default interest

42. 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 interference with the applicant's correspondence admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 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 500 (five hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State 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