



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

FOURTH SECTION

CASE OF KOWALCZYK v. POLAND

(Application no. 44131/05)

JUDGMENT

STRASBOURG

1 July 2008

FINAL

01/10/2008

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 Kowalczyk v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 10 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 44131/05) 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 Czesław Kowalczyk (“the applicant”), on 30 November 2005.

2. The applicant was represented by Mr Jacek Danisiewicz, a lawyer practising in Gdańsk. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. On 18 January 2007 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 1966 and lives in Gdynia. He is currently detained in the Gdańsk Remand Centre.

Criminal proceedings against the applicant and his detention during the judicial proceedings

5. The applicant was arrested on 12 January 1999 on suspicion of having committed homicide together with eight accomplices, and of illegal possession of arms.

6. On 14 January 1999 the Gdańsk District Court (*Sąd Rejonowy*) remanded the applicant in custody until 12 April 1999 in view of the reasonable suspicion that he had committed homicide and the risk that he would obstruct the investigation.

7. The applicant's detention was extended by several decisions of the Gdańsk Court of Appeal and the Supreme Court. The applicant's appeals and applications for release and applications to vary the preventive measure were unsuccessful. In their decisions the courts relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged, on the serious nature of the offences and the risk that the applicant would obstruct the proceedings. They basically relied on the same grounds as originally invoked each time they dismissed his applications for release or his requests to vary the preventive measures applied. In its decision of 16 June 1999 extending the applicant's detention, the Gdańsk Court of Appeal added that there was a reasonable risk that the applicant would abscond.

8. On 29 July 2003 the Gdańsk Regional Court convicted the applicant as charged and sentenced him to life imprisonment. It appears that during the proceedings the applicant served another prison sentence, because the first-instance court counted the periods of his pre-trial detention, that is to say from 12 January 1999 until 25 May 1999 and from 26 December 2002 until 29 July 2003 (eleven months and sixteen days), towards the prison sentence.

9. On 23 July 2003 the Gdańsk Court of Appeal extended the applicant's detention until 30 September 2003.

10. The applicant and other co-accused lodged appeals against the first-instance judgment.

11. The applicant remained in detention pending his appeal.

12. On 16 December 2004 the Gdańsk Court of Appeal quashed the first-instance judgment and remitted the case for re-examination. It found that the trial court had incorrectly assessed evidence and had made numerous procedural mistakes. The Court of Appeal also pointed to the fact that the reasoning of the first-instance judgment had been "grossly brief and superficial".

13. On 11 January 2005 the Gdańsk Court of Appeal extended the applicant's detention until 11 April 2005. The detention was further extended on several occasions (on 23 March, 23 June and 22 December 2005 and on 30 May and 28 September 2006). At least three of the six

above-mentioned decisions extending the detention were upheld following appeals by the applicant.

14. On 6 May 2005 the case file was sent back to the first-instance court.

15. On 25 August 2005 the Gdańsk Regional Court made a severance order and considered that the applicant's case should be dealt with separately.

16. The proceedings are still pending and the applicant remains in detention.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant domestic law and practice concerning the imposition of pre-trial detention (*aresztowanie tymczasowe*), the grounds for its extension, release from detention and rules governing other "preventive measures" (*środki zapobiegawcze*) are stated in the Court's judgments in the cases of *Golek v. Poland*, no. 31330/02, §§ 27-33, 25 April 2006 and *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 August 2006.

THE LAW

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

18. The applicant complained that the length of his detention during the judicial proceedings had been excessive. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, 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."

A. Admissibility

19. The Government submitted that the applicant had not exhausted all the remedies provided for by Polish law in that he had failed to appeal against some of the decisions extending his detention.

20. The applicant submitted that according to the Court's case-law, where an applicant abused his or her procedural rights he or she could be deemed to have contributed to prolonging the proceedings. He also asserted that he had appealed against the decisions extending his detention only in the crucial periods, in order to ascertain the approach of the courts and to minimise the possibility of prolongation of the proceedings.

21. The Court observes that the applicant did not challenge every decision extending his detention. However, he lodged several appeals against decisions extending his pre-trial detention, including the first decision, which was to remand him in custody. He also unsuccessfully requested several times that his detention be lifted. The Court has already considered that those remedies, namely an appeal against a detention order or a request for release, whether submitted to the prosecutor or to the court, depending on the stage of the proceedings, and also an appeal against a decision to extend detention, serve the same purpose under Polish law. Their objective is to secure a review of the lawfulness of detention at any given time in the proceedings, both in their pre-trial and trial stage, and to obtain release if the circumstances of the case no longer justify continued detention (see *Iwańczuk v. Poland* (dec.), no. 25196/94, 9 November 2000, and *Wolf v. Poland*, nos. 15667/03 and 2929/04, § 78, 16 January 2007). It follows from the Court's case-law that the applicant is not required to appeal against each and every decision extending his detention (see, by contrast, *Bronk v. Poland* (dec.), no. 30848/03, 11 September 2007).

22. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. The Court further notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

23. The applicant's detention started on 12 January 1999, when he was arrested on suspicion of having committed homicide. On 29 July 2003 the Gdańsk Regional Court convicted him as charged and sentenced him to life imprisonment. From that date he was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a), and consequently that period of his detention falls outside the scope of Article 5 § 3 (see *Kudła*, cited above, § 104).

24. On 16 December 2004 the Gdańsk Court of Appeal quashed the applicant's conviction. Following that date his detention was again covered by Article 5 § 3. The proceedings are still pending and the applicant remains in detention.

25. However, between 25 May 1999 and 26 December 2002 the applicant served a prison sentence which had been imposed on him in other criminal proceedings (see paragraph 8 above). This term, being covered by Article 5 § 1 (a), must therefore be subtracted from the period of the applicant's pre-trial detention for the purposes of Article 5 § 3.

26. Accordingly, the period to be taken into consideration amounts to four years and over two months.

2. The parties' submissions

(a) The Government

27. The Government submitted that the applicant's detention had been duly justified over the entire period. They emphasised that, apart from the reasonable suspicion that he had committed homicide, the applicant's detention had been justified by the severity of the likely penalty and the risk of the applicant's going into hiding and obstructing the proceedings.

28. The Government further invited the Court to assess the length of the applicant's detention in the light of the fact that he had been charged with crimes committed when acting as part of an organised criminal group and submitted, relying on the Court's case-law, that "in proceedings concerning organised crime the need to obtain voluminous evidence from many sources and to determine the facts and degree of alleged responsibility of each of the co-defendants constituted relevant and sufficient grounds for the applicant's detention during the period necessary to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused".

29. The Government asserted that the necessity for the applicant's continued detention had been thoroughly examined by the courts, which on each occasion had given sufficient reasons for their decisions. They submitted, lastly, that the authorities had displayed due diligence in the conduct of the proceedings.

(b) The applicant

30. The applicant argued that the length of his detention was clearly unreasonable. He submitted that the courts had justified his detention by repeatedly relying on the same grounds; the reasonable suspicion that he had committed the homicide with which he had been charged, the severity of the anticipated penalty, the risk of obstruction of the proceedings and of absconding. The applicant further submitted that his behaviour had never given the national authorities any grounds to presume that he might obstruct the proceedings or abscond; on the contrary, he had always been at the disposal of the domestic courts, because his main concern had been that the criminal proceedings against him and the detention, which so far had lasted over nine years, be terminated. He also pointed out that the Government had calculated the period of his detention wrongly and that, contrary to the Government's submission, he had never been charged with participation in an organised criminal group.

Lastly he submitted that there had been delays in the proceedings (for example, seventeen months of inactivity on the part of the domestic

authorities in the period between the remittal of his case for re-examination and the resumption of the proceedings by the first-instance court) and that hearings had been held infrequently.

3. *The Court's assessment*

(a) General principles

31. The Court reiterates that the general principles regarding the right to trial within a reasonable time or to release pending trial, as guaranteed by Article 5 § 3 of the Convention, were stated in a number of its previous judgements (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 et seq., ECHR 2000-XI, and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references).

(b) Application of the above principles in the present case

32. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on four grounds, namely (1) the serious nature of the offences with which he had been charged; (2) the severity of the penalty to which he was liable; (3) the risk that the applicant might tamper with evidence; and (4) the risk that the applicant might go into hiding. As regards the last of these, they did not, however, give any specific grounds for their opinion.

33. The Court accepts that the reasonable suspicion against the applicant of having committed serious offences could initially warrant his detention. Also, the need to obtain voluminous evidence to determine the degree of the alleged responsibility of each of the defendants and the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, constituted valid grounds for the applicant's initial detention.

34. However, with the passage of time, those grounds became less and less relevant. The Court must then establish whether the other grounds adduced by the courts – namely, the severity of the likely sentence, the risk of the applicant's going into hiding and the risk that the applicant would tamper with evidence – were “sufficient” and “relevant” (see *Kudła*, cited above, § 111).

35. According to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that the applicant would obstruct the proceedings. However, the Court would reiterate that, while the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the seriousness of the charges cannot by itself justify long periods of detention (see *Michta v. Poland*, no. 13425/02, §§ 49, 4 May 2006).

36. As regards the risk that the applicant might obstruct the proceedings or go into hiding, the Court notes that the authorities did not give any specific indication capable of showing that the anticipated risk went beyond a merely theoretical possibility. The Court is not, therefore, persuaded by that argument, especially as it appears that there was no indication that at any earlier stage of the proceedings the applicant tampered with evidence or made any attempt to induce witnesses to perjure themselves or created any basis to presume that he might abscond or go into hiding. Nevertheless, the courts continued to invoke that risk without giving any specific grounds justifying their view.

37. The Court further observes that the applicant was detained on a charge of homicide committed together with eight accomplices. The defendants had not been formally charged with acting as part of an organised criminal group. In these circumstances, the Court is not persuaded that the instant case presented particular difficulties for the investigation authorities or for the courts to determine the facts and mount a case against the perpetrators, as would undoubtedly have been the case had the proceedings concerned organised crime (see *Celejewski v. Poland*, cited above, § 37, *Kwiatek v. Poland*, no. 20204/02, § 46, 6 February 2007 and *Bąk v. Poland*, no. 7870/04, §§ 56-65, ECHR 2007-... (extracts)).

38. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

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

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

39. The applicant complained that the length of criminal proceedings had been incompatible with the "reasonable time" requirement provided for in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

40. However, pursuant to Article 35 § 1 of the Convention:

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

41. The Court notes that the criminal proceedings against the applicant are still pending. It further observes that, pursuant to section 5 of the 2004 Act, it is open to persons such as the applicant in the present case to lodge a complaint about the unreasonable length of the proceedings with the relevant domestic court.

42. The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it effective in respect of complaints about excessive length of judicial proceedings in Poland. In particular, it considered that it was capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Charzyński*, cited above, §§ 36-42).

43. The applicant, having been asked by the Court whether he had lodged a complaint about the length of the proceedings under the 2004 Act, has chosen not to avail himself of this remedy. Accordingly, the complaint about the unreasonable length of the proceedings must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

46. The Government submitted that the applicant's claim was exorbitant. Having regard to the circumstances of the case, they argued that a finding of a violation constituted in itself sufficient just satisfaction. Alternatively, the Government 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.

47. The Court considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

48. The applicant also claimed EUR 2,000 for the costs and expenses in respect of his lawyer's fees for representing him before the Court.

49. The Government stated that the costs and expenses sought must be necessarily incurred and reasonable as to quantum.

50. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

51. 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 excessive length of the applicant's 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
 - (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses;
 - (iii) 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 1 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President