



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

FOURTH SECTION

CASE OF MAKOWSKI v. POLAND

(Application no. 41012/05)

JUDGMENT

STRASBOURG

22 July 2008

FINAL

22/10/2008

This judgment may be subject to editorial revision.

In the case of Makowski v. Poland,

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

Giovanni Bonello, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 July 2008,

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

PROCEDURE

1. The case originated in an application (no. 41012/05) 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 Andrzej Makowski (“the applicant”), on 10 October 2005.

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

3. On 29 May 2007 the President of the Fourth Section of the Court decided to communicate 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 1974 and lives in Mysłowice.

A. Criminal proceedings against the applicant and his detention on remand

5. On 4 October 2002 the applicant was arrested in Blanes, Spain, under an international search and arrest warrant on suspicion of having committed several offences of fraud, forgery, perjury, uttering threats, robbery and kidnapping, while acting in an organised criminal group. On 12 February 2002 the Central Investigating Court in Madrid no. 3 (*Juzgado Central de Instrucción*) granted a request for the applicant's extradition. On 28 April 2003 the applicant was brought to Poland.

6. On 30 April 2003 the Katowice District Court (*Sąd Rejonowy*) remanded him in custody until 30 June 2003. It relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged. It further referred to the likelihood of a severe sentence of imprisonment being imposed on the applicant and to the risk that he might go into hiding. As regards the latter, the court stressed that this had happened before and had given rise to the issue of the international search and arrest warrant and to the extradition proceedings.

7. On 23 September 2003 the Katowice District Court extended the applicant's detention until 30 October 2003. It relied on the reasonable suspicion that he had committed the offences in question, the severity of the anticipated sentence, the fear that he might tamper with evidence and the complexity of the case. The applicant appealed.

8. On 29 October 2003 the Katowice Regional Court (*Sąd Okręgowy*) dismissed an appeal lodged by the applicant. It repeated the grounds previously given for his detention.

9. The applicant maintains that when he was detained between 28 April 2003 and 1 April 2004 he was forced to testify, subjected to inhuman and degrading treatment and that the conditions of his detention were poor. Moreover, he maintains that he was deprived of contact with his family.

10. On 20 December 2004 the applicant was indicted before the Katowice District Court. The bill of indictment listed several charges of fraud, forgery, perjury, robbery and kidnapping brought against thirteen accused, committed in the context of an organised criminal group.

11. On 28 December 2004 the Katowice District Court further extended the applicant's detention until 30 June 2005. The court considered that the

reasons for keeping him in detention were still valid. The applicant appealed.

12. On 9 March 2005 the Katowice Regional Court partly amended the decision of the district court and reduced the further period of his detention, fixing the deadline for 27 April 2005.

13. On 20 April 2005 the Katowice Court of Appeal (*Sąd Apelacyjny*) extended the applicant's detention until 27 August 2005.

14. At the first hearing, held on 23 May 2005, the Katowice District Court found that it had no jurisdiction to deal with the case and referred it to the Katowice Regional Court.

15. On 2 June 2005 the applicant complained to the Ministry of Justice (*Ministerstwo Sprawiedliwości*) about delays in the proceedings and his extradition from Spain. His complaint was referred to the Katowice District Court. In a letter of 30 June 2005 the President of the Katowice District Court informed the applicant that the trial court had dealt promptly with the case, which was very complex.

16. On 27 June 2005 the applicant made an application for release. He requested that his detention be replaced by another preventive measure.

17. On 8 July 2005 the Katowice District Court dismissed the application. The court found that the evidence obtained in the case sufficiently supported the charges laid against him. It referred to the likelihood of a severe sentence of imprisonment being imposed on the applicant. The court stressed that the fact that the applicant had acted in an organised criminal group posed in itself a risk of his obstructing the proper course of the proceedings.

18. On 24 August 2005 the Katowice Court of Appeal extended the applicant's detention until 30 March 2006. The court repeated the grounds given in the previous decisions.

19. On 12 December 2005 the Katowice Regional Court found that the District Court was competent to deal with the applicant's case and referred it back to the Katowice District Court.

20. On 16 January 2006 the Katowice District Court dismissed the applicant's application for release or as an alternative the replacement of detention by more lenient preventive measures. On 27 February 2006 the Katowice Regional Court upheld that decision. The court repeated the grounds given in the previous decisions.

21. The hearings scheduled for 21 April, 5 May and 19 May 2006 were adjourned.

22. On 29 March 2006 the Katowice Court of Appeal extended the applicant's detention until 30 August 2006. On 23 August 2006 that court ordered his continued detention until 30 December 2006. The applicant's appeal was dismissed on 27 September 2006 by the Katowice Court of Appeal.

23. On 2 June 2006 the court held the first hearing on the merits.

24. On 1 December 2006 the Katowice District Court released the applicant under police supervision. It also ordered that the applicant be forbidden to leave his place of residence. The proceedings are still pending.

B. Proceedings under the 2004 Act

25. On 13 January 2006 the applicant lodged a complaint with the Katowice Court of Appeal under section 5 of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) (“the 2004 Act”).

26. On 22 February 2006 the Court of Appeal dismissed his complaint. The court examined only the proceedings before the Regional Court, namely from 17 August 2005 to 12 December 2005, and held that there were no delays for which the Regional Court could be held responsible. It noted that the court, when deciding on administrative and procedural matters, acted without delay. It further considered irrelevant the fact that at the material time the trial had not yet commenced.

27. As regards the proceedings before the Katowice District Court, which began on 20 December 2004 and which are still pending before it, the Court of Appeal referred this part of the complaint to the Katowice Regional Court for consideration. On 17 May 2006 the Katowice Regional Court discontinued the proceedings, since the applicant had withdrawn his complaint on 5 May 2006 about the length of the proceedings before the District Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention on remand

28. The relevant domestic law and practice concerning the imposition of detention on remand (*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.

B. Remedies against unreasonable length of the proceedings

29. The relevant domestic law and practice concerning remedies for the excessive length of judicial proceedings are stated in the Court’s decisions in the cases of *Charzyński v. Poland* no. 15212/03 (dec.), §§ 12-23,

ECHR 2005-V; *Ratajczyk v. Poland* no. 11215/02 (dec.), ECHR 2005-VIII; and the judgment in the case of *Krasuski v. Poland*, no. 61444/00, §§ 34-46, ECHR 2005-V.

THE LAW

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

30. The applicant complained that the length of his detention 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.”

31. The Government contested that argument.

A. Admissibility

32. 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. Period to be taken into consideration

33. The Court observes that the applicant was arrested in Blanes by the Spanish authorities on 4 October 2002 under an international search and arrest warrant. He was extradited to Poland on 28 April 2003 and placed in custody. On 30 April 2003 the Katowice District Court remanded him in custody. The Government submitted that they could not be held responsible for the period of the applicant's detention between 4 October 2002 and 28 April 2003, when he had been in the custody of the Spanish authorities. The Court shares that argument and accordingly finds that the starting point for calculating the length of the applicant's detention under Article 5 § 3 is 28 April 2003. It continued until 1 December 2006 when the applicant was released.

Accordingly, the period to be taken into consideration amounts to three years, seven months and five days.

2. *The parties' submissions*

(a) **The applicant**

34. The applicant submitted that his detention had exceeded a “reasonable time”. He maintained that the domestic courts had not given relevant and sufficient grounds for his continued detention, since they repeatedly relied on the same reasons for the entire period in question, namely the persistence of a reasonable suspicion that he had committed the offences in question, the serious nature of those offences and the risk that he might go into hiding. He stressed that he had not contributed to the length of the proceedings and that the authorities had failed to exercise all due diligence in dealing with his case.

(b) **The Government**

35. The Government maintained that the applicant’s pre-trial detention had satisfied the requirements of Article 5 § 3. They stressed that the applicant’s detention had been justified by the persistence of a reasonable suspicion that he had committed the offences in question, the social danger represented by the charges against him and the complexity of the case. The Government also argued that the applicant’s detention had been justified in order to secure the proper conduct of the investigation, as there had been a risk that he would obstruct the proceedings by influencing co-defendants or go into hiding.

36. They further pointed out that the applicant’s detention had been reviewed at regular intervals and the domestic authorities had displayed adequate diligence in dealing with his case. Lastly, they maintained that all the applicant’s requests for release and his appeals against the decisions extending his detention had contributed to the protracted length of the criminal proceedings against him.

3. *The Court’s assessment*

(a) **General principles**

37. 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

38. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on four grounds, namely (1) the complexity of the case, (2) the risk that the applicant might tamper with evidence, (3) the severity of the penalty to which he was liable, and (4) the risk that the applicant might go into hiding. As regards the latter, they referred to the applicant's leaving the country and the need to issue the international search and arrest warrant (see paragraphs 5, 6, 7, 8, 11, 17 and 18 above).

39. The applicant was charged with fraud, forgery, perjury, robbery and kidnapping committed in an organised criminal group (see paragraph 10 above).

In the Court's view, the fact that the case concerned a member of such a criminal group should be taken into account in assessing compliance with Article 5 § 3 (see *Bqk v. Poland*, no. 7870/04, § 57, 16 January 2007).

40. 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 and to determine the degree of the alleged responsibility of each of the defendant, who had acted in a criminal group and against whom numerous charges of serious offences were laid, constituted valid grounds for the applicant's initial detention. Indeed, in cases such as the present one concerning organised criminal groups, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-accused or might otherwise obstruct the proceedings often is, by the nature of things, high.

41. Furthermore, 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 gravity of the charges cannot by itself justify long periods of detention (see, *Michtha v. Poland*, no. 13425/02, §§ 49, 4 May 2006).

42. As regards the risk of going into hiding, the Court observes that throughout the entire relevant period the judicial authorities based their findings in this respect on the fact that the applicant had left the country in order to avoid criminal responsibility. The Court agrees that the applicant's absconding justified keeping him in custody at the initial stages of the proceedings. However, the Court considers that that ground gradually lost its force and relevance as the proceedings progressed. In particular, given the absence of any further attempt on the part of the applicant to obstruct the proceedings, it is difficult to accept that circumstance could justify the conclusion that the risk of his interfering with the proper course of the proceedings persisted during the entire period that he spent in custody (see, *mutatis mutandis*, *Harazin v. Poland*, no. 38227/02, § 42, 10 January 2006).

Furthermore, the Court notes that after the applicant's release on bail on 1 December 2006 it appears that he did not attempt to obstruct the proper conduct of the proceedings.

43. The Court would also emphasise that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, p. 36, § 3, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000).

44. The Court observes that in the present case the authorities gave consideration to other non-custodial preventive measures with a view to ensuring the applicant's presence at trial (see paragraphs 17 and 20 above). They found nonetheless that those measures would not be sufficient to secure the proper conduct of the proceedings, relying, in particular, on the fact that the applicant had absconded previously. The Court notes that the applicant was eventually released on bail on 1 December 2006. However, it has not been explained to the Court's satisfaction why the risk previously relied on by the authorities ceased to exist on that date, namely three years and over seven months since he had first been remanded in custody.

45. Having regard to the foregoing, even taking into account the fact that the courts were faced with the particularly difficult task of trying a case involving an organised criminal group, 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

46. The applicant complained that the length of criminal proceedings had been incompatible with the "reasonable time" requirement, provided 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..."

47. 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 ..."

48. The Government noted that the applicant had failed to exhaust domestic remedies, as he had withdrawn his complaint lodged under the 2004 Act. Had he not withdrawn his complaint, the court would have been

able to decide whether the proceedings before the District Court had been excessively long.

49. The applicant, for his part, maintained that his complaint would not have been effective in his case. In his opinion it lacked any prospect of success and it could have had a potentially adverse effect on the criminal proceedings against him.

50. The Court notes that on 5 May 2006 the applicant withdrew his complaint about unreasonable length of proceedings. 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 the 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).

51. The applicant, by withdrawing his complaint, has chosen not to avail himself of this remedy. Accordingly, the complaint of unreasonable length of proceedings must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Ill treatment in detention and unlawful extradition

52. The applicant further complained that his extradition had been unlawful (the relevant decision being given on 12 February 2003), that he had been ill-treated while detained between 28 April 2003 and 1 April 2004, and that the prolonged detention had subjected him to inhuman treatment.

53. The Court notes that the complaints about the applicant's extradition and ill-treatment were lodged outside the six-month time-limit. Accordingly, these complaints have been introduced out of time and must be rejected under Article 35 §§ 1 and 4 of the Convention.

B. Ban on visits in detention

54. Lastly, the applicant complained that he had not been allowed any visits from his family. This complaint falls to be examined under Article 8 of the Convention. However, the Court, having regard to all the material in its possession, and in so far as the matters complained of are within its competence, finds that the applicant has failed to substantiate his complaints.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 46,000 euros (EUR) and 120,000 Polish zlotys (PLN) in respect of pecuniary damage and PLN 150,000 in respect of non-pecuniary damage.

57. The Government submitted that the applicant’s claims were exorbitant and should be rejected. They asked the Court to rule that a finding of a violation constituted in itself sufficient just satisfaction.

58. 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, it 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 1,000 under this head.

B. Costs and expenses

59. The applicant also claimed PLN 50,000 for the costs and expenses incurred before the domestic courts.

60. The Government contested the applicant’s claim.

61. 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 are reasonable as to quantum. The Court reiterates further that costs incurred before national courts may only be taken into account if they were incurred in seeking redress for the violations of the Convention found, which was not so in the instant case (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). The Court notes that the applicant did not substantiate his claims. In the absence of invoices, a breakdown of costs, etc., the Court rejects the claim.

C. Default interest

62. 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 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 1,000 (one 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 22 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Giovanni Bonello
President