



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

FOURTH SECTION

CASE OF ŻYWICKI v. POLAND

(Application no. 27992/06)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

20/04/2009

This judgment may be subject to editorial revision.

In the case of Żywicki v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 27992/06) 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 Krystian Żywicki (“the applicant”), on 23 June 2006.

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

3. The applicant alleged, in particular, that his pre-trial detention had exceeded a “reasonable time” within the meaning of Article 5 § 3 of the Convention; that the domestic courts had failed to examine “speedily” one of his appeals against the extension of the detention and one of his requests for release; that his detention had been unlawful; and that the length of criminal proceedings in his case had been excessive.

4. On 23 October 2007 the President of the Fourth Section of the Court decided to give notice of the complaints under Article 5 § 3 and 5 § 4 of the Convention to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Szczecin.

6. On 26 January 2004 the applicant was arrested on suspicion of having committed several offences of drug trafficking.

7. On 26 January 2004 the Szczecin District Court remanded him in custody, relying on the reasonable suspicion that he had committed the offences in question. It also considered that keeping the applicant in detention was necessary to secure the proper conduct of the proceedings, given the risk that he might tamper with evidence and go into hiding. The court also stressed the severity of the anticipated sentence.

8. In the course of the investigation, his detention was extended several times. In their decisions the courts referred to the reasons previously given and the likelihood that he had committed the offences in an organised criminal group. Further, they referred to the complexity of the case and the fact that many suspects were involved and some of them had not yet been arrested. They stressed that the detention was justified by the need to analyse the existing evidence and the scope of the applicant's criminal activity, as well as the necessity to obtain further evidence, in particular to have witnesses examined.

9. The applicant appealed against the decision extending his detention (he appealed against the Szczecin District Court's decisions of 9 April, 23 June, 31 August and 22 October 2004 and 19 January 2005) but to no avail. His applications for release were likewise unsuccessful.

10. However, on 15 July 2004 the Szczecin Regional Court (*Sąd Okręgowy*), after examination of the applicant's appeal, amended the decision extending his detention given by the Szczecin District Court on 23 June 2004 and reduced the detention period by two months. The court criticised the manner in which the investigation and the case file had been conducted, as well as pointing out shortcomings in the prosecutor's request for extension of the applicant's detention.

11. On 12 October 2004 the investigation was completed and on 20 October 2004 the applicant and other suspects were indicted before the court.

12. The detention was then subsequently extended by the Szczecin District Court on several occasions.

13. In a decision given on 20 October 2005, the Szczecin District Court extended the applicant's detention and the detention of the other nine co-accused until 25 January 2006. However, at the same time it ruled that the applicant could be released on bail on payment of a security of 30,000 Polish zlotys (PLN) (approx. 7,500 euros (EUR)). The court noted also that "in most cases the accused were charged with acting in an organised criminal group or possibly (*ewentualnie*) the offences with which they were charged had been committed together and under arrangement with other persons". The court did not however indicate which of the accused had been involved in the criminal group.

14. On 8 November 2005 the applicant's defence counsel requested the court to lower the amount of bail by PLN 10,000, but his request was rejected on 6 December 2005.

15. The applicant did not pay the security and his detention was extended beyond the statutory two-year time-limit by the Szczecin Court of Appeal (*Sąd Apelacyjny*) on 18 January 2006 and 26 April 2006.

16. In the decision of 18 January 2006, which considered the extension of the detention only in relation to the applicant, the court did not mention the charge of acting in an organised criminal group. It noted however that "the applicant was charged with two offences and in one case the anticipated penalty exceeded eight years' imprisonment. In such a situation there is *ipso iure* a presumption that the applicant would obstruct the proceedings because of the fear of a severe sentence" (*ze względu na obawę przed grożącą oskarżonemu surową karą*).

17. On 23 January 2006 the applicant lodged an appeal against the decision of 18 January 2006 and on 3 April 2006 he applied for release. According to the applicant, neither the appeal against the extension of his detention nor the application for release was examined.

In their observations the Government submitted that the applicant's appeal of 23 January 2006 had been examined by the Szczecin Court of Appeal on 2 February 2006 and dismissed. They failed however to submit the relevant documents. As regards the applicant's request for release of 3 April 2006, the Government admitted that, "by mistake" it had not been examined by the court.

18. On 26 April 2006 the Szczecin Court of Appeal extended the applicant's detention until 30 December 2006. The court relied on the same grounds as previously and reiterated the argument of the Szczecin District Court of 20 October 2005 (see paragraph 13 above) namely that "most of the co-accused" had been charged with acting in an organised criminal group.

19. On 31 October 2006 the Szczecin District Court sentenced the applicant to three years' imprisonment and ordered his release. It appears that he was released on the same day.

20. On an unspecified date the applicant appealed against the first-instance judgment. The proceedings are pending before the appellate court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant domestic law and practice concerning the imposition of detention during judicial proceedings (*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

22. The applicant complained that the length of his detention during 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.”

23. The Government contested that argument.

A. Admissibility

24. The Government submitted in the first place that the applicant had not exhausted the remedies provided for by Polish law as regards his complaint under Article 5 § 3 of the Convention, in that he had failed to appeal against the decision of 26 January 2004 remanding him in custody and against the decisions of 19 April 2005 and of 19 July 2005 extending his detention.

25. 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).

26. In the present case the applicant lodged appeals against most of the decisions extending his detention, including the decisions taken in the final stage of the proceedings, when the length of the detention had reached its most critical point. He also lodged requests for the detention measure to be lifted or for a more lenient preventive measure to be imposed, and appealed against the relevant refusals. 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.

27. The Court further notes that the arguments raised by the Government are similar to those already examined and rejected in a previous case against Poland (see *Grzeszczuk v. Poland*, no. 23029/93, Commission decision of 10 September 1997) and that the Government have not submitted any new circumstances which would lead the Court to depart from its previous findings.

28. 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. Period to be taken into consideration

29. The applicant's detention started on 26 January 2004, when he was arrested on suspicion of having committed several offences of drug trafficking. On 31 October 2006 the Szczecin District Court convicted him as charged.

Accordingly, the period to be taken into consideration amounts to two years, eight months and twenty-three days.

2. The parties' submissions

(a) The applicant

30. The applicant submitted in general terms that the applicant's application lodged with the Court was justified.

(b) The Government

31. The Government considered that the applicant's detention satisfied the requirements of Article 5 § 3. They submitted that the detention had been duly justified and that during the entire period the authorities had given relevant and sufficient reasons for extending it. The Government further submitted that the domestic courts had acted diligently and speedily, in particular taking into account the complexity of the case, the number of witnesses to be heard and the number of co-accused, most of whom "had been suspected of acting in an organised criminal group".

The Government also submitted that after one year and nine months of detention the applicant could be released on bail. However he had failed to pay the required amount and therefore the detention was continued.

3. *The Court's assessment*

(a) General principles

32. 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

33. 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 complexity of the case and (4) the risk that the applicant might obstruct the proceedings. As regards the latter, they did not, however, specify any concrete grounds justifying their opinion, relying only on presumption allegedly stemming from the severe penalty to which the applicant was liable (see paragraph 16 above).

34. The applicant was charged with several counts of drug smuggling. The courts, when extending the applicant's detention, relied on the fact that "most of the co-accused were charged with acting in an organised criminal group or the offences with which they were charged had been committed together and under arrangement with other persons (see paragraphs 13 and 18 above). However, the Government did not submit any document confirming that the charges of acting in a criminal group had concerned the applicant himself.

35. The Court accepts that the reasonable suspicion that the applicant had committed serious offences could initially warrant his detention. Also, the complexity of the case, the need to obtain voluminous evidence and to determine the degree of the alleged responsibility of each of the defendants, constituted valid grounds for the applicant's initial detention.

36. 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 *Michta v. Poland*, no. 13425/02, §§ 49, 4 May 2006).

37. While all those above factors could justify even a relatively long period of detention, they did not give the domestic courts unlimited power to continue using this measure.

38. Having regard to the foregoing, even taking into account the fact that the courts were faced with particularly difficult task of trying a case of considerable complexity and that, at a certain stage of the applicant's detention, they considered the possibility of release the applicant on bail, 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 5 § 4 OF THE CONVENTION

39. The applicant further complained that the Polish courts had failed to examine "speedily" the lawfulness of his detention in violation of Article 5 § 4 of the Convention, which states:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

40. 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

41. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see, for instance, *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II).

42. The Government submitted that the applicant's appeal of 23 January 2006, which had been submitted to the Szczecin Court of Appeal only on 30 January 2006, had been examined by that court on 2 February 2006 and dismissed. The Government has failed however to

submit the relevant documents to confirm these submissions. As regards the applicant's request for release of 3 April 2006, the Government admitted that, "by mistake" it had not been examined by the court.

43. However, in this respect the Court considers that all the issues concerning the lawfulness of the applicant's detention were, in effect, determined by the Szczecin Court of Appeal in its decision of 26 April 2006 extending the applicant's detention (see paragraph 18 above). It is therefore of the view that this decision can be seen as having addressed the arguments made by the applicant in his appeal of 23 January 2006 and in his request for release of 3 April 2006 (see *Baranowski v. Poland*, no. 28358/95, § 75, ECHR 2000-III).

44. Consequently, the Court finds that, for the purposes of Article 5 § 4, the determination of the lawfulness of the extension of the applicant's detention until 30 June 2006 lasted from 23 January to 26 April 2006, that is over three months. It considers that such a delay, which resulted in the applicant's appeal being of no legal or practical effect, amounted to a denial of the applicant's right "to take proceedings by which the lawfulness of his detention shall be decided speedily".

45. In conclusion, the Court holds that in the present case there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant also complained under Articles 5 § 1 and 6 § 2 about the alleged unlawfulness of his detention order.

47. The Court considers that the applicant's complaints fall to be examined under Article 5 § 1 (c) of the Convention.

48. The Court notes that the applicant's detention was based on Article 258 § 1 of the 1997 Code of Criminal Procedure. Furthermore, the Court observes on the basis of the material in the case file that the applicant was detained on reasonable suspicion of having committed criminal offences. The Court accordingly finds that the decision to place the applicant in custody had a legal basis and was issued by the appropriate judicial authority. There is nothing to suggest that the legal basis for his detention was not clearly defined or lacked the necessary foreseeability required under the Convention. The Court is therefore satisfied that the applicant's detention complied with the requirements of Article 5 § 1 (c). Moreover, the Court does not see any appearance of arbitrariness on the part of the relevant judicial authorities when deciding on the applicant's detention.

49. The Court therefore concludes that the applicant's detention was "lawful" within the meaning of Article 5 § 1 of the Convention.

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

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF EXCESSIVE LENGTH OF THE PROCEEDINGS.

51. 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.

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 ..."

52. The Court notes that the criminal proceedings against the applicant are still pending before the appellate court. It further observes that, pursuant to 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") 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.

53. 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 of 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).

54. The applicant did not make use of the remedy provided for under the 2004 Act. 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.

V. 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 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

57. The Government contested the claim.

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 2,500 under this head.

B. Costs and expenses

59. The applicant also claimed 12,800 Polish zlotys (PLN) for the costs and expenses incurred before the domestic courts and before the Court.

60. The Government submitted that the applicant had failed to substantiate his claim and considered that it should be rejected.

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 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 and considers it reasonable to award the applicant, who was not represented by a lawyer, the sum of EUR 100 for the proceedings before the Court.

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 complaints concerning the length of the applicant's detention and the speediness of examining the lawfulness of detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 and Article 5 § 4 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 the following amounts to be converted into Polish zlotys at the rate applicable at the date of settlement:
 - (i) EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable;
 - (ii) EUR 100 (one hundred euros) in respect of costs and expenses, 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 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 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President