



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

FOURTH SECTION

CASE OF CZARNOWSKI v. POLAND

(Application no. 28586/03)

JUDGMENT

*This version was rectified on 4 June 2009
under Rule 81 of the Rules of Court*

STRASBOURG

20 January 2009

FINAL

20/04/2009

This judgment may be subject to editorial revision.

In the case of Czarnowski 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,

Päivi Hirvelä,

Ledi Bianku,

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. 28586/03) 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 Edward Czarnowski (“the applicant”), on 18 August 2003.

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

3. In addition, third-party comments were received from the Helsinki Foundation for Human Rights (Warsaw, Poland), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

4. The applicant alleged that the refusal to allow him to attend the funeral of his father was in breach of Article 8 of the Convention.

5. On 6 July 2007 the President of the Fourth Section decided to give notice of the application 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

6. The applicant was born in 1963 and lives in Siemirowice.

7. On 7 April 2000 the Wejherowo District Court (*Sąd Rejonowy*) convicted the applicant of domestic violence and sentenced him to a one-year period of imprisonment suspended on probation for 4 years. The court found that between June 1998 and October 1999 the applicant had ill-treated his girlfriend in that he had beaten her and abused her verbally.

8. It appears that the applicant breached the terms of his probation and on 20 September 2002 the Wejherowo District Court ordered that his sentence be enforced. On 2 April 2003 he started to serve it in the Wejherowo Detention Centre.

9. On 18 July 2003 the applicant's father died. The applicant submits that he immediately asked the prison authorities for leave to attend his father's funeral. On 20 July the applicant's girlfriend delivered him his father's death certificate.

10. On 21 July 2003, a Monday, the applicant made a formal application for leave to attend the funeral, which was to be held on 22 July 2003.

11. On 21 July 2003 the Penitentiary Judge of the Gdańsk Regional Court (*Sędzia Sądu Okręgowego Wydziału Penitencjarnego*) refused the leave request. The reasons given for the judge's decision were as follows:

"The convicted person's application cannot be allowed. The grounds relied on [by the applicant] to justify allowing him to leave the prison cannot be considered especially important.

Consequently, since the conditions specified in Article 141 § 4 of [the Code of Execution of Criminal Sentences] had not been fulfilled, it has been decided as above."

12. The decision also included an instruction on the possibility to lodge an appeal against the decision with the Gdańsk Penitentiary Court within 7 days of the date of notification of the decision.

13. The decision was notified to the applicant on 22 July 2003. The applicant did not appeal against it as the funeral had already taken place and he considered that his request to leave prison had become without purpose.

II. RELEVANT DOMESTIC LAW

14. Article 141 § 4 of the 1997 Code of Execution of Criminal Sentences, as in force at the material time, read as follows:

“In cases which are especially important for a convicted person, he or she may be granted permission to leave prison for a period not exceeding 5 days, if necessary under the escort of prison officers or other responsible persons (*osoby godnej zaufania*). As regards convicted persons detained in closed prison facilities such leave may be granted by a Penitentiary Judge and in urgent cases by the Director of the Prison.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

15. The applicant complained that the refusal to grant him compassionate leave from prison for the purpose of attending the funeral of his father amounted to a breach of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and 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.”

16. The Government contested that argument.

A. Admissibility

17. The Government raised a preliminary objection submitting that the applicant had failed to exhaust domestic remedies. They maintained, firstly, that it had been open to the applicant to appeal against the decision of 21 July 2003. Secondly, the Government argued that the applicant should have brought an action under Article 24 in conjunction with Article 448 of the Civil Code. These provisions would have allowed him to assert that by failing to grant him leave from prison the authorities had breached his personal rights protected by the Civil Code and claim non-pecuniary damages.

18. The applicant did not comment on this matter.

19. The Court observes that Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

20. The Court notes that the Government's objection that the applicant should have lodged civil proceedings for compensation for breach of his personal rights is confined to a mere assertion and there are no further arguments or domestic court decisions indicating that, at the relevant time, recourse to such an action in the circumstances of the applicant's case would have offered any reasonable prospects of success.

Secondly, the Court sees no reason to conclude that an appeal against the decision of 21 July 2003¹, notified to the applicant on the day of the funeral, could be considered an effective remedy capable of offering him redress in respect of his complaint.

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

21. 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. The parties' arguments

22. The applicant complained that the authorities' refusal to grant him permission to leave the prison in order to attend his father's funeral caused him suffering and humiliation. He submitted that he had already served over 3 months of his one-year prison sentence. During his detention he had often been commended on his good behaviour and had remained in contact with his family and relatives. The applicant maintained that those circumstances should have been taken into consideration when deciding on whether to grant him leave to attend his father's funeral.

23. The Government submitted that the applicant had been convicted of domestic violence and subsequently breached the terms of his probation. Moreover, another set of proceedings was pending against the applicant in which he had been charged with driving while under the influence

¹ Rectified on 4 June 2009: "21 June 2003" was changed to read "21 July 2003".

of alcohol. The Government also submitted that the applicant had lodged his request late, only on 21 July 2003 although he had learned about his father's death on 20 July 2003. This had left the authorities only limited time to deal with it. Finally, the Government submitted that following the applicant's request the Director of the Prison had issued an opinion proposing that he should not be granted leave. The Government stated: "the Director pointed out that the applicant had a negative criminal and social forecast".

2. Helsinki Foundation for Human Rights

24. The Third Party underlined the importance of temporary leave for the process of the re-socialisation of prisoners and referred to the Council of Europe recommendations in this regard. They pointed to several shortcomings in the application of the legal regulations governing compassionate leave from prisons. Firstly, the wording of the domestic law left wide discretion to the State particularly as regards the classification as to what circumstances could be regarded as "especially important". Moreover, the authorities usually provided very limited reasoning for their decisions so that prisoners were not sufficiently informed of the reasons for the refusals. They submitted that a prisoner should not be obliged to produce a formal death certificate as it normally took time and delayed the procedure while other arrangements could be made for the authorities to confirm the prisoner's assertion and a certificate could be delivered at a later stage. Moreover, there should be a right to an expeditious appeal against a decision of the Penitentiary Judge as the 7-day time-limit could not be considered adequate in cases characterised by urgency.

3. The Court's assessment

25. The Court observes that any interference with an individual's right to respect for his private and family life will constitute a breach of Article 8, unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought to be achieved (see, among other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 45, ECHR 2000-VIII).

26. The Court observes that Article 8 of the Convention does not guarantee a detained person an unconditional right to leave prison in order to attend the funeral of a relative. It is up to the domestic authorities to assess each request on its merits. Its scrutiny is limited to consideration of the impugned measures in the context of the applicant's Convention rights, taking into account the margin of appreciation left to the Contracting States (see *Płoski v. Poland*, no. 26761/95, § 38, 12 November 2002). The Court emphasises that, even if a detainee by the very nature of his situation must be subjected to various limitations of his rights and freedoms, every

such limitation must nevertheless be justifiable as necessary in a democratic society. It is the duty of the State to demonstrate that such necessity really existed (ibid § 35).

27. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued. In determining whether an interference was “necessary in a democratic society” the Court will take into account that a margin of appreciation is left to the Contracting States. Furthermore, the Court cannot confine itself to considering the impugned facts in isolation, but must apply an objective standard and look at them in the light of the case as a whole (see, among other authorities, *Matter v. Slovakia*, no. 31534/96, § 66, 5 July 1999).

28. Turning to the circumstances of the present case the Court firstly notes that the Government failed to submit any arguments relating to the existence of the interference, its lawfulness and the aim pursued. In the absence of the parties’ comments the Court considers that the refusal to allow the applicant to attend his father’s funeral constituted an interference with his right to respect for his private and family life. The interference, which was based on Article 141 § 4 of the 1997 Code of Execution of Criminal Sentences, was “in accordance with the law” and could be considered to be in the interests of “public safety” or “for the prevention of disorder or crime”.

29. Looking at the circumstances of the events in question in the light of the case as a whole, and taking into account the margin of appreciation left to the respondent State, the Court observes that the applicant was serving a one year prison term. The applicant had been convicted of domestic violence, his term of imprisonment had been originally suspended in favour of probation, and there is no indication that he was a dangerous criminal or that he had acted in an organised criminal gang. There is no appearance that the applicant had ever previously been convicted or detained; although the Government submitted that he had been simultaneously involved in another set of criminal proceedings for driving while under the influence of alcohol, they failed to inform the Court if he had been convicted of the offence. The applicant was thus not a habitual offender whose return to prison could not be guaranteed. In particular, there is no evidence that after the courts decided to enforce his suspended sentence the applicant had failed to report to the prison or attempted to avoid the penalty. At the time of the events in question, on 22 July 2003, the applicant had already served almost four months of his sentence. Thus, the Prison Director’s negative recommendation regarding the applicant’s request referred to by the Government does not seem to be supported by facts.

30. Furthermore, the Court considers that the domestic authorities dismissed his application for leave from prison without giving any

meritorious reasons for their assessment that the applicant's situation was not "especially important" (see paragraph 11 above). In the absence of such grounds it is difficult for the Court to understand the reasons for which the Penitentiary Judge dismissed the applicant's request. The decision gave no considerations to other measures expressly provided for by law which could have facilitated and secured the applicant's stay outside the prison such as the possibility of escorted leave (see *Ploski*, cited above, § 36). Finally, it is regrettable that Penitentiary Judge's decision did not take into account the above-mentioned *Ploski* judgment, in which the Court several months earlier had found a violation of Article 8 of the Convention in circumstances very similar to those in the instant case.

31. Finally, the Court notes that the Government submitted that the applicant made his request to the domestic authorities late, only on 21 July 2003², whereas he had learned about his father's death on 20 July 2003³. However, it appears from the facts of the case that the applicant obtained a formal death certificate on 20 July 2003⁴, which was a Sunday. He lodged a formal request on the next day, a Monday, and the Penitentiary Judge was able to issue his decision on the same day, thus before the date of the funeral. The Court does not consider that the applicant was negligent in submitting his request.

32. The Court is aware of the problems of a financial and logistical nature caused by escorted leaves including the shortage of police and prison officers. However, taking into account the seriousness of what was at stake, namely refusing an individual the right to attend the funeral of his parent, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leave – could have been found (*ibid* § 37).

33. The Court concludes that, in the particular circumstances of the present case, and notwithstanding the margin of appreciation left to the respondent State, the refusal of leave to attend the funeral of the applicant's father, was not "necessary in a democratic society" as it did not correspond to a pressing social need and was not proportionate to the legitimate aims pursued. There has therefore been a violation of Article 8 of the Convention.

² Rectified on 4 June 2009: "21 June 2003" was changed to read "21 July 2003".

³ Rectified on 4 June 2009: "21 June 2003" was changed to read "21 July 2003".

⁴ Rectified on 4 June 2009: "20 June 2003" was changed to read "20 July 2003".

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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.”

35. The applicant did not submit a claim for just satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention.

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