



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF PASTERNAK v. POLAND

(Application no. 42785/06)

JUDGMENT

STRASBOURG

16 July 2009

FINAL

10/12/2009

This judgment may be subject to editorial revision.

In the case of Pasternak 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,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 23 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 42785/06) 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 Adam Pasternak (“the applicant”), on 17 October 2006.

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

3. On 26 May 2008 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

4. The applicant was born in 1970 and lives in Warsaw.

A. The first set of criminal proceedings against the applicant

5. On 22 June 2005 the Katowice Appeal Prosecutor (*Prokuratur Prokuratury Apelacyjnej*) charged the applicant with fraud and dealing in stolen goods committed in an organised criminal group.

6. On 29 June 2005 the Katowice District Court (*Sąd Rejonowy*) remanded the applicant in custody in view of the reasonable suspicion that he had committed the offences in question. It further considered that there was a risk that he would obstruct the proper conduct of the investigation. The court also stressed the likelihood that a heavy penalty would be imposed on him.

7. In the course of the investigation the applicant's detention was extended regularly by the Katowice Regional Court (*Sąd Okręgowy*) and the Wrocław Court of Appeal (*Sąd Apelacyjny*). The courts repeated the grounds originally given for his detention. The applicant appealed unsuccessfully against the subsequent decisions.

8. On 13 and 30 October and 6 December 2005 the applicant lodged unsuccessful applications with the Appeal Prosecutor for his detention to be lifted and replaced by another preventive measure.

9. On 14 February 2006 the Wrocław Court of Appeal did not extend the applicant's pre-trial detention. The court prohibited the applicant from leaving the country and ordered police supervision.

10. The applicant submits that despite the Court of Appeal's decision to release him he was kept in detention until 17 February 2006, the date when new charges were laid against him and the Katowice District Court remanded him in custody in another set of proceedings.

B. Second set of criminal proceedings against the applicant

11. On 17 February 2006 the Katowice Appeal Prosecutor charged the applicant with armed robbery, hostage taking and fraud committed in an organised group.

12. On the same date the Katowice District Court remanded the applicant in custody in view of the reasonable suspicion that he had committed the offences in question. It further considered that there was a risk that he would obstruct the proper conduct of the investigation. It referred to the complexity of the case and the large number of persons involved. The court also stressed the likelihood that a heavy penalty would be imposed on him. The applicant unsuccessfully appealed against the decision.

13. On 24 February and 30 May 2006 the applicant lodged applications with the Prosecutor of Appeal for his detention to be lifted and replaced by another preventive measure. He referred to his state of health and the deterioration of his family relationships. On 24 March and 5 June 2006 respectively the Prosecutor of Appeal dismissed his applications.

14. On 8 May 2006 the Katowice Regional Court extended the applicant's detention. The court repeated the grounds previously given by the District Court.

15. Subsequently, in the course of the proceedings the applicant's detention was extended regularly by the Katowice Regional Court and the Katowice Court of Appeal. The courts repeated the grounds originally given for his detention. The applicant appealed unsuccessfully against the subsequent decisions.

16. In the meantime, on 13 July 2006 and 22 January 2007 the applicant lodged applications with the Appeal Prosecutor requesting permission to call his daughter. Respectively, on 24 July 2006 and 5 February 2007 the Prosecutor refused his requests, referring in his decisions to the prohibition on using telephone and other communication devices by persons in pre-trial detention.

17. On 30 October 2007 the Katowice Regional Court sentenced the applicant to four years' imprisonment and ordered his release. It appears that he was released on the same day.

18. The proceedings are still pending before the appellate court.

C. Censorship of the applicant's correspondence

19. The applicant submitted that during his detention his correspondence with the Registry had been censored by the authorities. He produced a Court envelope sent on 25 October 2006, which bears the following stamp: "Censored, date ..." (*Cenzurowano, dnia ...*) and an illegible signature. It appears that the envelope had been cut open and subsequently resealed with adhesive tape.

20. He also produced a Court letter dated 27 March 2007, which bears a stamp: "Prosecutor of the Appeal Prosecution Office in Kraków delegated to the Katowice Appeal Prosecution Office, W. M." (*Prokurator Prokuratury Apelacyjnej w Krakowie del. Do Prokuratury Apelacyjnej w Katowicach, W. M.*), a handwritten "date ..., censored" (*Ocenzurowano*) and an illegible signature. The envelope in which the letter was delivered bears the following stamp: "Censored, date ..." It appears that the envelope had been cut open and subsequently resealed with adhesive tape.

21. On 9 May 2007 the Court received a letter from the applicant dated 14 March 2007. It bears the following stamp: "Prosecutor of the Appeal Prosecution Office in Kraków delegated to the Katowice Appeal Prosecution Office, W.M." (*Prokurator Prokuratury Apelacyjnej w Krakowie del. do Prokuratury Apelacyjnej w Katowicach, W.M.*), a handwritten "date..., censored" (*Ocenzurowano*) and an illegible signature.

II. RELEVANT DOMESTIC LAW

22. The relevant domestic law concerning censorship of detainees' correspondence is set out in the Court's judgment in the case of *Kliza v. Poland*, no. 8363/04, §§ 29-34, 6 September 2007.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

23. The applicant complained under Article 8 of the Convention that during his detention his correspondence was censored by the authorities. The relevant part of this provision reads as follows:

“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

24. The Government submitted that the applicant had not exhausted all available domestic remedies in that he had failed to bring an action under Article 24 §§ 1 and 2 in conjunction with Articles 417, 448 and 23 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.

25. In this connection, the Government relied on the Śrem District Court’s judgment of 21 December 2005 in which a prisoner had been awarded 3,000 Polish zlotys (PLN) in damages from the State Treasury for a breach of secrecy of his correspondence with the European Court of Human Rights. The judgment was partly amended on 19 May 2006 by the Poznań Regional Court, which reduced the amount of damages granted to the claimant.

26. Further, the Government provided an example of the judgment delivered by the Warsaw Regional Court on 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 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. The judgment was upheld by the Warsaw Court of Appeal on 28 June 2007.

27. The applicant submitted that his difficult financial situation as well as serious health problems had not allowed him to claim any damages before the domestic courts.

28. The Court observes that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion of domestic remedies contained in that provision requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

In addition, for the purposes of reviewing whether the rule of exhaustion has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar*, cited above, § 69).

29. The censorship in the present case concerned two Court letters sent to the applicant on 25 October 2006 and 27 March 2007 and a letter of 9 May 2007 sent by the applicant to the Court.

30. The Court notes that the alleged interference with the applicant's correspondence in respect of two letters sent by the Court occurred after the delivery of the Poznań Regional Court's judgment of 19 May 2006, but before the Warsaw Court of Appeal gave its 28 June 2007 judgment. Hence, any relevance that the latter judgment might possibly have in respect of the present case is reduced by the fact that it was given after the relevant time (see, among other authorities, *Lewak v. Poland*, no. 21890/03, § 25, 6 September 2007; *Kołodziński v. Poland*, no. 44521/04, § 29, 8 January 2008; and *Misiak v. Poland*, no. 43837/06, § 18, 3 June 2008).

31. The Court notes that the two examples of domestic case-law provided by the Government do not constitute evidence of sufficiently established judicial practice to show that a claim for damages under Article 24 §§ 1 and 2 in conjunction with Articles 417, 448 and 23 of the Civil Code was an effective remedy available in theory and practice at the material time.

32. In the circumstances of the case, it cannot therefore be said that any attempt by the applicant to seek redress by lodging such an action would have provided reasonable prospects of a successful outcome.

33. As to the letter of 9 May 2007, the Court notes that the complaint concerning the alleged censorship thereof was raised *ex officio*. The letter was sent by the applicant to the Court and he could not have been aware that it had been censored by the authorities. In those circumstances, the applicant could not be required to bring any domestic proceedings in order to obtain

redress for the alleged breach of his right to respect for his correspondence in respect of the letter of 9 May 2007.

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

35. 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 submissions before the court

(a) the applicant

36. The applicant submitted in general terms that the circumstances of his case disclosed a breach of the Convention.

(b) the Government

37. The Government refrained from expressing an opinion on the merits of the application.

2. The Court's assessment

(a) Whether there was interference

38. The Court notes that an envelope in which a Court letter of 25 October 2006 was sent to the applicant bears a stamp indicating that the letter had been censored (see paragraph 19 above).

39. Further, a Court letter dated 27 March 2007 carries a handwritten note demonstrating that it was censored by the authorities (see paragraph 20 above).

40. It appears that both Court envelopes had been cut open and subsequently resealed with adhesive tape.

41. Furthermore, the Court observes that a letter received from the applicant on 9 May 2007 (dated 14 March 2007) bears a stamp which shows that its content had been censored (see paragraph 21 above).

42. 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 and *Michta v. Poland*, no. 13425/02, § 58, 4 May 2006).

43. It follows that in respect of the applicant's letters there was "interference" with his right to respect for his correspondence under Article 8.

(b) Whether the interference was "in accordance with the law"

44. The Court reiterates that any "interference by a public authority" with the right to respect for correspondence will contravene Article 8 of the Convention unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 of that Article and is "necessary in a democratic society" in order to achieve them (see, among many other authorities, *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, p. 32, § 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, § 34; and *Niedbala v. Poland* no. 27915/95, § 78).

45. The Court notes that the interference with the applicant's right to respect for his correspondence took place on three occasions when the applicant was detained in a remand centre.

46. The Court observes that, according to Article 214 of the Code of Execution of Criminal Sentences, persons in detention 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 *Michta v. Poland*, no. 13425/02, § 61, 4 May 2006, and *Kwiek v. Poland*, no. 51895/99, § 44, 30 May 2006).

Thus, censorship of the applicant's 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".

47. 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.

48. Consequently, the Court finds that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 2 OF THE CONVENTION

49. The applicant complained that his detention in the period from 14 until 17 February 2006 had been unlawful, in particular that he had not been informed of the reasons for his detention. In this respect he relied on Article 5 §§ 1 and 2 of the Convention.

50. However, the Court notes that even assuming that the applicant had been remanded in custody until 17 February 2006 as he claimed, his

detention was in any event lifted more than six months before 17 October 2006, the date on which this complaint was submitted to the Court.

It follows that this complaint has been introduced out of time and must therefore be rejected in compliance with Article 35 §§ 1 and 4 of the Convention.

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

51. The applicant further complained that the length of his pre-trial detention in the second set of proceedings had been excessive. He relied on Article 5 § 3 of the Convention.

52. The Court notes that the applicant had been remanded in custody by the Katowice District Court on 17 February 2006. On 30 October 2007 the Katowice Regional Court sentenced the applicant to four years' imprisonment. He was released on the very same day. Accordingly, the period to be taken into consideration amounts to one year, eight months and twelve days.

The applicant was charged with armed robbery, hostage taking and fraud committed in an organised criminal group (see paragraphs 11 and 12 above). According to the well-established case law of the Court (see, among other authorities, *Bak v. Poland*, no. 7870/04, §§ 56-65, 16 January 2007; *Chruściński v. Poland*, no. 22755/04, §§ 34-42, 6 November 2007; and *Tomecki v. Poland*, no. 47944/06, §§ 29-37, 20 May 2008) and in view of the seriousness of the accusations and the fact that the case concerned a member of an organised criminal group, it cannot be said that the length of the applicant's detention had been excessive.

53. Consequently, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

54. Lastly, the applicant complained, invoking numerous provisions of the Convention, that on account of the lengthy detention his contacts with family members had deteriorated.

55. Having examined all the material in its possession, the Court finds nothing in the case file which might disclose any appearance of a violation of the rights guaranteed by the Convention.

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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 50,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

58. The Government claimed that the application was inadmissible for non-exhaustion of domestic remedies. They further submitted that, in any event, the sum claimed by the applicant was unreasonable in the light of the Court’s case-law concerning similar cases brought against Poland.

59. 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 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. The Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

60. The applicant did not claim any costs and expenses.

C. Default interest

61. 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 censorship of 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 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (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 16 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President