



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF KOTOWSKI v. POLAND

(Application no. 12772/06)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment may be subject to editorial revision.

In the case of Kotowski 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 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 12772/06) 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 Marek Kotowski (“the applicant”), on 12 March 2006.

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

3. On 25 March 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 1964 and lives in Bydgoszcz.

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

5. On 13 July 2005 the applicant was arrested on suspicion of physical and mental cruelty towards his common-law wife. On 16 July 2005 he was detained on remand. The court relied on the reasonable suspicion that the applicant had committed the offence with which he had been charged, which was supported by evidence from witnesses and documents. The court also relied on the risk that he might tamper with evidence, since the victim was his next of kin.

6. On 12 October 2005 the Bydgoszcz District Court (*Sąd Rejonowy*) extended his detention until 13 January 2006. It referred to the likelihood of a severe sentence of imprisonment being imposed on the applicant. It also relied on the risk that he might tamper with evidence.

7. On 4 January 2006 the court extended the applicant's detention until 13 April 2006. On 10 April 2006 it ordered that the term should be extended until 13 July 2006. The court referred to the grounds for detention listed in the previous decisions.

8. In the meantime, the District Court had proceeded with the trial. The hearings were held on 29 November 2005, 4 January, 6 February and 8 May 2006. The court heard evidence from 12 witnesses and in the course of the proceedings two expert reports were given.

9. In the course of the proceedings the applicant made numerous, unsuccessful applications for release and appealed, likewise unsuccessfully, against refusals to release him and decisions extending his detention.

10. On 11 May 2006 the Bydgoszcz District Court convicted the applicant as charged and sentenced him to 3 years' imprisonment. He appealed.

11. The applicant's detention was subsequently extended on several occasions.

12. On 5 January 2007 the Bydgoszcz Regional Court (*Sąd Okręgowy*) upheld the trial court's judgment.

13. On 17 August 2007 the Supreme Court (*Sąd Najwyższy*) dismissed the applicant's cassation appeal as being manifestly ill-founded.

B. Censorship of the applicant's correspondence

14. On 2 October 2006 the applicant complained that the Court's letter of 15 September 2006 had been censored by the authorities. The envelope of this letter, produced by the applicant, bears a red stamp that read: "Censored" (*Cenzurowane*).

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. 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

16. 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

17. 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.

18. 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.

19. 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.

20. The applicant did not comment.

21. The censorship in the present case concerned one Court letter of 15 September 2006.

22. The Court welcomes the case-law developments cited by the Government. However it considers that the two examples of domestic case-law provided by the Government do not constitute evidence of a 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 date of introduction of the instant application. It is true that in its decision in the case of *Sobolewski v. Poland* (no.1), (no. 39655/05, 16 December 2008), the Court noted that the applicant prisoner had obtained compensation for the interference with his correspondence and had thus obtained adequate redress. However, in that case, the question concerned not the effectiveness of the remedy under the relevant provisions of the Civil Code but the separate issue of whether the applicant could still be considered a victim. The Court did not pronounce on the issue of exhaustion. As to the decision of the Warsaw Court of Appeal of 28 June 2007 invoked by the Government, the Court observes that it was delivered after the date of introduction of the application, and on that account cannot be held against the applicant.

23. 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.

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

25. 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

26. The Court notes that an envelope in which a Court letter of 15 September 2006 was sent to the applicant bears a stamp indicating that the letter had been censored (see paragraph 14 above).

27. 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).

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

29. 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).

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

31. 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 Court's letter to the applicant was contrary to the domestic law. It follows that the interference in the present case was not "in accordance with the law".

32. 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.

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

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

A. The lawfulness of the applicant's detention

34. The applicant complained under Article 5 § 1 of the Convention that he was unjustifiably held in detention on remand. Moreover, he complained that during his pre-trial detention no consideration had been given to the possibility of imposing on him other, less severe, preventive measures.

35. The Court notes that the applicant's detention was based on Article 249 § 1 of the 1997 Code of Criminal Procedure. In this case the applicant was detained on a reasonable suspicion of having committed physical and mental cruelty towards his common-law wife. The decision to place him 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. It follows that in that sense, the applicant's detention was "lawful" within the meaning of Article 5 § 1 of the Convention.

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

B. Unfairness of the criminal proceedings

37. The applicant also complained under Articles 6 of the Convention that the criminal proceedings in his case were unfair.

38. However, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

39. In the present case the applicant did not allege any particular failure to respect his right to a fair hearing on the part of the relevant courts. Indeed, his complaints are limited to challenging his allegedly wrongful conviction. Assessing the circumstances of the case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

43. The Government contested this claim.

44. The Court awards the applicant EUR 500 in respect of non-pecuniary damage.

B. Costs and expenses

45. The applicant submitted no claim for costs and expenses.

C. Default interest

46. 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 500 (five hundred 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 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President