



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF MIERNICKI v. POLAND

(Application no. 10847/02)

JUDGMENT

STRASBOURG

27 October 2009

FINAL

10/05/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Miernicki 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 Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 6 October 2009,

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

PROCEDURE

1. The case originated in an application (no. 10847/02) 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 Jan Miernicki (“the applicant”), on 12 June 2001.

2. The applicant was represented by Ms A. Kawecka-Guzek, a lawyer practising in Zielona Góra. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. On 8 October 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

4. The applicant was born in 1951 and lives in Zgorzelec. He is currently detained in Wołów Prison.

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

5. On 23 August 2000 the applicant was arrested by the police on suspicion of having committed, *inter alia*, several offences of drug trafficking and leading an organised armed criminal gang. On 25 August 2000 the Wrocław District Court (*Sąd Rejonowy*) ordered his detention pending trial. It relied on a reasonable suspicion that the applicant had committed the offences with which he had been charged and the likelihood of a severe sentence of imprisonment being imposed on him. Further, the court stressed that the applicant could tamper with evidence, in particular given that he had been charged with being the leader of an organised armed criminal gang.

6. On 17 November 2000 and 28 March 2001 the Jelenia Góra Regional Court extended the applicant's detention.

7. On 10 May 2001 the Wrocław Court of Appeal dismissed the applicant's appeal against the decision of 28 March 2001. The court noted that the reasons for his detention were still valid. Moreover, it referred to the strong risk that the applicant could jeopardise the proper course of the investigation. The court held that according to the testimonies of the key prosecution witness (*świadek koronny*), even during his detention the applicant had tried to threaten witnesses in the case.

8. On 26 July 2001 the Jelenia Góra Regional Court extended the applicant's detention. On 16 August 2001 the Wrocław Court of Appeal (*Sąd Apelacyjny*) extended the applicant's detention to 30 September 2001. A subsequent extension was ordered by the Wrocław Court of Appeal on 25 September 2001. The decision was served on the applicant on 2 October 2001. In his appeal, the applicant alleged that he had been illegally deprived of his liberty for two days, due to the fact that the decision in question had been served on him after the expiry of the previous detention order given on 16 August 2001.

9. On 17 October 2001 the Wrocław Court of Appeal dismissed the applicant's appeal. The court explained that the first-instance decision had indeed been served on him on 2 October 2001, in compliance with the law. It underlined the fact that the order had been given before the expiration of the previous one.

10. In their decisions concerning the extension of the applicant's detention, the courts relied on the likelihood that he had committed the offences as the leader of an organised armed criminal gang. They attached importance to the grave nature of these offences and the likelihood of a severe sentence of imprisonment being imposed on him. Furthermore, they referred to the complexity of the case, the fact that many suspects were involved and that some of them had not yet been arrested. They stressed that the detention was justified by the need to obtain further evidence, in

particular, to have witnesses examined by the German authorities by means of a rogatory letter, to obtain expert reports and to hear a key prosecution witness.

11. The applicant's appeal against the detention order, likewise his further appeals against decisions to extend his detention and all his subsequent, numerous applications for release and appeals against refusals to release him, were unsuccessful. The courts held that the reasons for his detention were still valid.

12. On 15 November 2001 the applicant and 14 co-defendants were indicted before the Jelenia Góra Regional Court (*Sąd Okręgowy*). The bill of indictment against the applicant comprised several charges of drug trafficking, leadership of an armed organised criminal gang, incitement to produce a radio bomb and circulating forged banknotes.

13. The detention was then subsequently extended by the Jelenia Góra Regional Court on 27 November 2001 and 28 May 2002 and later by the Wrocław Court of Appeal on 8 August 2002. The courts repeated the grounds given in the previous decisions.

14. On 16 September 2002 the Wrocław Court of Appeal dismissed an appeal by the applicant against the extension of his detention ordered on 8 August 2002. One of the judges (W.K.) dismissing the appeal had also presided over the court's session on 8 August 2002.

15. On 15 January 2003 the Wrocław Court of Appeal extended the applicant's detention. The court relied on the grounds given in the previous decisions.

16. During the trial, on 12 July 2002, the Jelenia Góra Court adjourned the first-instance hearing. It was resumed after forty-nine days, that is, on 30 August 2002. The applicant unsuccessfully objected to the continuation of the hearing. Under the relevant provisions of the Code of Criminal Procedure, he requested that the first-instance hearing be recommenced from the beginning. The court rejected the applicant's objection, despite the fact that it admitted that the continuation of the hearing had been in breach of certain provisions of the Code of Criminal Procedure.

17. In the course of the investigation and the trial, the courts informed the prosecutor and the applicant's lawyer about the dates of the sessions concerning the extension and the review of the applicant's detention. Nevertheless, the applicant's lawyer failed to attend some of the sessions.

18. Between 1 March 2002 and 28 February 2003 the court held fifteen hearings.

19. On 7 March 2003 the Jelenia Góra Regional Court convicted the applicant as charged and sentenced him to eight years' imprisonment. He appealed, alleging, *inter alia*, that the first-instance judgment should be quashed due to errors of fact, evidence and procedure, in particular the erroneous continuation of the first-instance hearing in August 2002.

20. After the delivery of the first-instance judgment, the applicant's detention was extended on several occasions.

21. On 30 October 2003 the Wrocław Court of Appeal upheld the first-instance judgment.

22. On an unknown date in February 2004 the applicant's lawyer lodged a cassation appeal. However, he did not raise an issue in relation to the adjournment of the first-instance hearing in July 2002 and its subsequent continuation on a later date.

23. On 10 February 2005 the Supreme Court dismissed the cassation appeal.

24. The applicant is serving a prison sentence.

B. Censorship of the applicant's correspondence

25. Five envelopes in which the applicant sent his letters to the Court in 2002 bear red stamps reading “censored” (*cenzurowano*), with no signatures. It appears that the envelopes had been cut open and subsequently resealed with adhesive tape. According to the postage stamps the letters were posted on 19 and 23 April, 21 August, 30 October and 28 November 2002.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Preventive measures, including pre-trial detention

26. The relevant domestic law and practice concerning the imposition of pre-trial detention (*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. Procedure for disqualification of a judge

27. At the relevant time the Code of Criminal Procedure (*Kodeks postępowania karnego*) did not provide for any specific legal rules concerning disqualification of a judge deciding on the extension of a detainee's pre-trial detention.

28. Article 40 § 1 of the Code of Criminal Procedure provides:

“A judge is *ex lege* disqualified from his participation in a case, if: ...

6) he has participated, in a lower court, in the delivery of a decision subject to an appeal, or has himself delivered a ruling subject to an appeal ...”

29. Article 42 of the Code of Criminal Procedure provides for the procedure for disqualification of a judge:

“§ 1. A disqualification shall be effected by the judge *ex officio*, by the court of its own motion, or upon a challenge made by a party to the proceedings.

§ 2. Upon discovery by a judge of grounds for his disqualification pursuant to Article 40, he shall disqualify himself by a written statement to be filed in the record of the case; another judge shall be substituted in his place.

§ 3. A judge against whom an application to challenge has been lodged pursuant to the provisions of Article 41 may file an appropriate written statement in the record of the case, and shall cease to participate in the case. He must, however, take measures which are not amenable to delay.

§ 4. Except in the event referred to in paragraph 2 above, the decision on a disqualification shall be made by the court before which the proceedings are pending; the judge concerned shall not participate in the panel which is to adopt the decision on that disqualification. If no such panel can be formed, the decision on the disqualification shall be made by a court of higher instance”.

30. As can be seen from a decision of the Katowice Court of Appeal, delivered on 19 October 2005 (no. II AKz 644/05), the wording “[a judge] shall be disqualified” (“*wylączony od udziału w sprawie*”), which is used in Article 40 § 1 of the Code of Criminal Procedure, does not mean that such a judge should be excluded from delivery of a judgment only. In the opinion of the court the provision in question should also apply to all procedural decisions during the criminal proceedings, such as, for example, the imposition of pre-trial detention. The court underlined the fact that in respect of such procedural decisions the broad definition “participation in a case” should apply. On the contrary, if the disqualification of a judge only meant that no second judgment could be given by the same judge, then the legislator would have adopted a narrower definition, namely, “participation in examination of the merits of the case” (“*wylączony od udziału w rozpoznaniu sprawy*”). A similar opinion was expressed by the Supreme Court (*Sąd Najwyższy*) in its decision of 10 August 2004 (no. III KZ 9/04) and of 10 March 1997 (no. V KZ 24/97). The Supreme Court underlined the fact that Article 40 § 1 of the Code of Criminal Procedure provides for procedural guarantees, which cannot be interpreted narrowly.

C. Monitoring of detainees' correspondence

31. The legal provisions concerning the monitoring of detainees' correspondence applicable at the relevant time are set out in the Court's judgment in the case of *Michta v. Poland*, no.13425/02, §§ 33-39, 4 May 2006.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF IMPARTIALITY OF THE COURT DECIDING ON THE LAWFULNESS OF THE APPLICANT'S DETENTION

32. The applicant complained, without invoking any provisions of the Convention, that the decision of the Wrocław Court of Appeal of 16 September 2002 dismissing his appeal against the decision of the Wrocław Court of Appeal dated 8 August 2002 to extend his pre-trial detention was unlawful because one of the judges who participated in the dismissal of that appeal had presided over the court's session at which the detention had been extended on 8 August 2002.

33. The Court notes that this complaint falls to be examined under Article 5 § 1 of the Convention in conjunction with Article 5 § 4 of the Convention, which, in so far as relevant, read as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

4. 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.

...”

34. The Government contested that argument.

A. Admissibility

1. The Government's preliminary objection on exhaustion of domestic remedies

35. The Government submitted that the applicant had not exhausted available domestic remedies. In this connexion, they pointed out that the applicant, although represented by a defence lawyer, had not raised the substance of his complaint before the domestic organs. They submitted that the applicant's lawyer had been present at the session held on 8 August 2002. He had subsequently been duly summoned for the session scheduled for 16 September 2002 but he had failed to attend. Had he been present, he could have challenged judge W.K for bias.

36. The Government further argued that the applicant could have drawn the attention of the domestic courts to the wrong composition of the court dealing with his appeal at any later stage of the proceedings.

37. The applicant did not comment.

2. The Court's assessment

38. The Court notes that the applicant could not appeal against the decision of 16 September 2002. By this decision the Wrocław Court of Appeal dismissed the applicant's appeal against the decision of 8 August 2002. Furthermore, the Court observes that the Government did not point to any existing remedy which, with a sufficient degree of certainty, could have afforded redress in respect of the breaches alleged.

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

3. Conclusion as to 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

1. The parties' submissions

(a) The applicant

41. The applicant maintained that the composition of the court which decided on his appeal against the detention order was not in conformity with the domestic law.

(b) The Government

42. The Government admitted that the Wrocław Court of Appeal had not acted in accordance with the relevant provisions of the Code of Criminal Procedure in that the bench of three judges that had given the decision of 16 September 2002 had been composed contrary to the domestic law. The Government therefore accepted that Article 5 § 1 of the Convention had been violated.

The Government refrained from expressing their position on the alleged violation of Article 5 § 4 of the Convention.

2. *The Court's assessment*

(a) **Article 5 § 1 of the Convention**

(i) *General principles*

43. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof (see, among other authorities, *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 44, judgment of 4 August 1999, and *Baranowski v. Poland*, no. 28358/95, § 50, judgment of 28 March 2000).

44. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can, and should, exercise a certain power of review of such compliance (see *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and decisions* 1996-III, § 41).

(ii) *Application of the above principles in the present case*

45. In the present case, the applicant's appeal against the extension of his detention was examined and dismissed on 16 September 2002 by the Wrocław Court of Appeal, which was composed of three judges, including W.K, who had given the first-instance decision. The next decision extending the applicant's detention was given on 15 January 2003 (see paragraphs 14 and 15 above).

46. The Court observes that, according to Article 40 § 1 of the Code of Criminal Procedure, a judge is *ex lege* disqualified from his participation in a case, if he has participated, in a lower court, in the delivery of a decision subject to an appeal. Moreover, it is his obligation to disqualify himself from the proceedings. Thus, the fact that the same judge was deciding in the lower and in the higher court on the extension of the applicant's detention was contrary to the domestic law.

47. The court therefore concludes that during the period starting with the defective decision of 16 September 2002 and ending on 15 January 2003, when the decision “in accordance with a procedure prescribed by law” was given, the applicant's detention was unlawful (see paragraph 46 above).

It follows that the requirement under Article 5 § 1 to comply with a procedure prescribed by law was not observed and for that reason there has been a violation of the provision.

(b) Article 5 § 4 of the Convention

48. The Court does not consider it necessary to examine separately the complaint about the impartiality of the court under Article 5 § 4 in view of its finding (see paragraph 47 above) that the applicant's detention was unlawful between 16 September 2002 and 15 January 2003.

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

49. The applicant complained that the length of his detention on remand 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.”

50. The Government contested that argument.

A. Admissibility

51. 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

52. The applicant's detention started on 23 August 2000, when he was arrested on suspicion of having committed several offences of drug trafficking and leading an organised armed criminal gang. On 7 March 2003 the Jelenia Gora Regional Court convicted him as charged.

53. As from that date he was detained “after conviction by a competent court”, within the meaning of Article 5 § 1 (a) and, consequently, that period of his detention falls outside the scope of Article 5 § 3 (*Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI).

54. Accordingly, the period to be taken into consideration amounts to two years, six months and thirteen days.

2. The parties' submissions

(a) The applicant

55. The applicant argued that the length of his detention had been unreasonable. He stressed that the authorities had failed to exercise all due diligence when dealing with his case.

(b) The Government

56. The Government first presented some statistical data, indicating that in the years 2000-2005 the number of indictments and convictions in cases concerning organised crime had increased both in absolute terms and in relation to other crimes. In 2004 there were 617 indictments in such cases and 220 persons were convicted. They argued that in organised crime cases the authorities were faced with particular problems relating to the taking and assessment of evidence and various logistical issues.

57. With reference to the present case, the Government argued that the applicant's detention had not been unreasonably lengthy. They submitted that the courts had given relevant and sufficient reasons for holding the applicant in custody for the entire period in question.

58. They stressed that the applicant's detention had been justified by the strong suspicion that he had committed the offences with which he had been charged, the fact that the seriousness of the charges against him attracted a heavy sentence and the complexity of the case. They further argued that the applicant's detention had been justified in order to secure the proper conduct of the proceedings, as there had been a risk that he would tamper with evidence. This risk was increased by the fact that the charges against the applicant concerned numerous offences committed by an organised criminal group, that he had been accused of being the leader of the group and that he had attempted to threaten witnesses.

59. Lastly, they 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.

3. The Court's assessment

(a) General principles

60. 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, have been stated in a number of its previous judgments (see, among many other authorities, *Kudła v. Poland*, cited above, § 110 *et seq.*, 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

61. 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 complexity of the case, (3) the severity of the penalty to which he was liable and (4) the risk that he might tamper with evidence. As regards the latter, they relied on the fact that the applicant had attempted to intimidate some witnesses (see paragraphs 5, 7, 10 and 13 above).

62. The applicant was charged with numerous counts of drug smuggling committed in an organised and armed criminal group (see paragraph 12 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 *Bak v. Poland*, no. 7870/04, § 57, 16 January 2007).

63. 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 constituted valid grounds for his initial detention.

64. However, with the passage of time, those grounds became less and less relevant. The Court must then establish whether the other grounds adduced by the courts – namely, the severity of the anticipated sentence and the risk that the applicant would tamper with evidence, were “relevant” and “sufficient” (see *Kudła*, cited above, § 111).

65. According to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that he 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 re-offending, the gravity of the charges cannot by itself justify long periods of detention on remand (see, for instance, *Ilykov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001).

66. As regards the risk of pressure being brought to bear on witnesses or of the obstruction of the proceedings by other unlawful means, the Court notes that at the initial stages of the proceedings the judicial authorities presumed that such risks existed on the ground that the applicant had been the leader of an organised criminal group. Moreover, the Court notes that the applicant made attempts to intimidate certain witnesses during the proceedings (see paragraphs 5 and 7 above).

67. In this respect, taking into account the particular circumstances of the instant case, the Court considers that the severity of the likely penalty taken in conjunction with the risk flowing from the nature of the applicant's criminal activities justified holding him in custody for the relevant period.

68. It remains for the Court to ascertain whether the authorities, in dealing with the applicant's case, displayed the diligence required under Article 5 § 3 (see *McKay*, cited above, § 44). In this regard, it would

observe that the investigation was completed by the prosecution authorities within a short period of time. The Court notes that it took the trial court three and a half months to prepare the case for the first hearing. Moreover, the hearings were held at regular intervals (see paragraphs 15 and 17 above). Lastly, the Court notes that the criminal case at issue was a complex one on account of the number of co-accused and the charges against them. A significant amount of evidence had to be examined in the course of the proceedings. The Court therefore concludes that the length of the investigation and the trial was justified by the exceptional complexity of the case. For these reasons, the Court considers that the domestic authorities handled the applicant's case with acceptable expedition.

In the view of the foregoing, the Court concludes that there has been no violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF EQUALITY OF ARMS

69. The applicant complained about the procedure relating to the extension of his pre-trial detention. In particular, he alleged that neither he nor his lawyer had been notified of the court sessions at which his detention had been extended. He submitted that they had been prevented from attending them.

70. This complaint falls to be examined under Article 5 § 4 of the Convention, which reads as follows:

“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.”

71. The Government contested the applicant's submissions and held that they were untrue. They submitted that as it transpired from the court files at their disposal, the applicant's lawyer had been notified of all the courts' sessions at which his detention had been extended and the sessions at which the appeals against a decision to impose or to extend his detention were to be considered. He had been entitled to take part in them. The lawyer had been duly summoned to those sessions, although he had been absent from some of them. The Government maintained that, taking into consideration all the proceedings for the review of the lawfulness of the applicant's pre-trial detention, the principles guaranteed in Article 5 § 4 of the Convention had been respected in the present case.

72. The procedure for the extension of the applicant's pre-trial detention during the period under consideration was based on Article 249 § 5 of the Code of Criminal Procedure, which requires the domestic courts to inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning extension of detention on remand, or an appeal against a decision to impose or to extend detention on remand is to be considered. It is open to the lawyer to attend such sessions. In this connection the Court observes that in the present case there is no evidence that the courts departed from the normal procedure and that the applicant's lawyer was not duly summoned to the court sessions. Moreover, the applicant has not advanced any argument that his defence, as assured by his lawyer or at any other stage, was inadequate.

73. In view of the above, the Court is of the opinion that the proceedings in which the extension of the applicant's detention was examined satisfied the requirements of Article 5 § 4 (see *Telecki v. Poland*, (dec.), no. 56552/00, 3 July 2003, and *Celejewski*, cited above).

74. It follows that this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

75. The Court raised of its own motion an issue under Article 8 of the Convention on account of the fact that the applicant's correspondence with the Court had been censored. This provision, in its relevant part, reads:

“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.”

76. The Government contested that argument.

A. Admissibility

1. The Government's preliminary objection on exhaustion of domestic remedies

77. The Government submitted that the applicant had not exhausted all available domestic remedies. He had failed to bring an action under Article 24 § 2, in conjunction with Article 448 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 to make a claim in respect of non-pecuniary damage.

78. In this connection, the Government relied on the Warsaw Regional Court's judgment of 27 November 2006 in which a prisoner had been awarded 5,000 Polish zlotys (PLN) in damages from the State Treasury for a breach of the confidentiality of his correspondence with the Central Board of the Prison Service and the Central Electoral Office. The Regional Court held that the confidentiality of correspondence was a personal right protected under Article 23 of the Civil Code whose breach could entitle the claimant to an award in respect of non-pecuniary damage. Furthermore, the Government relied on the Srem District Court judgment of 21 December 2005 which was upheld in part by the Poznan Regional Court judgment of 19 May 2006. In that case a detainee had been awarded PLN 1,000 in damages from the State Treasury for the opening of a letter from the European Court of Human Rights by the authorities of the Detention Centre.

79. The applicant did not comment.

2. The Court's assessment

80. The Court notes that the complaint under Article 8 of the Convention concerning the alleged censorship of the applicant's correspondence was raised of its own motion. The letters at issue were sent by the applicant to the Court and he could not have been aware that they had been censored by the authorities. In those circumstances, the applicant cannot be required to bring any domestic proceedings to obtain redress for the alleged breach of his right to respect for his correspondence.

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

3. Conclusion as to admissibility

82. 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. Existence of an interference

83. The Court notes that five envelopes in which the applicant sent his letters to the Court in 2002 bear red stamps reading "censored" (*cenzurowano*), with no signatures. It appears that the envelopes had been cut open and subsequently resealed with adhesive tape (see paragraph 24 above).

84. 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; *Pisk-Piskowski v. Poland*, no. 92/03, § 26, 14 June 2005; and *Micha* cited above, § 58). It follows that in respect of all of the applicant's letters there was an “interference” with his right to respect for his correspondence under Article 8.

2. Whether the interference was “in accordance with the law”

85. The Government did not indicate a concrete legal basis in the domestic law for the impugned interference. The Court notes that the interference took place in May 2002 when the applicant had been detained pending trial.

86. The Court observes that, according to Article 214 of the Code of Execution of Criminal Sentences, persons detained on remand should enjoy the same rights as those convicted by a final judgment. Accordingly, the prohibition on 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 the applicant (see *Micha*, cited above, and *Kwiek v. Poland*, no. 51895/99, § 44, 30 May 2006). Thus, the interference with the applicant's correspondence with the Court was not “in accordance with the law”.

87. 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. Consequently, the Court finds that there has been a violation of Article 8 of the Convention as regards the applicant's letters addressed to the Court.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Ill treatment in detention

88. The applicant complained under Article 3 of the Convention about degrading treatment during his detention, in particular that he was detained in small and crowded cells, forced to share them with smokers and not allowed to take off his handcuffs during breaks in hearings for the purpose of consuming his meals.

89. The Court notes that despite extensive correspondence, the applicant did not produce any *prima facie* evidence confirming any of the above allegations. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

B. The unfairness of the applicant's detention

90. Without invoking any provisions of the Convention, the applicant complained in substance that his detention had been in breach of Article 5 § 1 of the Convention. He also raised a complaint that he had been unlawfully detained between 1 and 2 October 2001.

91. 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 a criminal offence as part of an organised armed criminal gang. 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.

92. As regards the complaint that he was unlawfully detained between 1 and 2 October 2001, it should be noted that the applicant's detention was extended before the expiration of a previous detention order.

93. It follows that these complaints are inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to paragraph 4 of that Article.

C. Unfairness of the criminal proceedings

94. The applicant also complained under Article 6 of the Convention about the outcome of and procedural shortcomings in the criminal proceedings against him, in particular that the first-instance hearing had not been restarted in August 2002 after his procedural objection made in accordance with provisions of the Code of Criminal Procedure.

95. The first complaint is limited to challenging the result of the proceedings. Assessing the circumstances of the case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly. 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.

96. As far as the applicant complained about the failure to restart the first-instance hearing in August 2002, the issue was not raised in the cassation appeal filed by his lawyer. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

D. Length of the proceedings

97. Further, under Article 6 of the Convention, the applicant complained about the length of the criminal proceedings.

98. However, the Court observes that the applicant failed to avail himself of any of the following remedies provided for by Polish law. When the proceedings were pending he could have made a complaint under sections 5 and 18 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”). After the termination of the trial, he could have brought a civil action under Article 417 of the Civil Code read together with section 16 of the above-mentioned Law (as to the effectiveness of the latter remedy, see *Krasuski v. Poland*, judgment of 14 June 2005, no. 61444/00, § 72, ECHR 2005-V (extracts)).

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

E. Ban on visits in detention

99. Lastly, the applicant complained under Article 8 of the Convention that during his detention he had not been allowed to maintain personal contact with his family for fifteen months and that his extended detention had put a severe strain on him and his family.

100. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, help him to maintain contact with his close family (see, *mutatis mutandis*, *Messina v. Italy* (no.2) no. 25498/94, § 61, 28 September 2000).

101. In the present case the applicant failed to produce any *prima facie* evidence to substantiate the alleged limitations put on the number of family visits, supervision over those visits or their subjection to a special prison regime or special visiting arrangements.

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicant submitted in his observations that he wished to uphold his earlier claims both for pecuniary and non-pecuniary damage. In his earlier submissions he had claimed 5,000,000 United States dollars (USD).

104. The Government contested the claim and requested the Court, should it find a violation of the Convention in the present case, to hold that the finding of a violation in itself provides sufficient just satisfaction.

105. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects that 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 1,500 under this head.

B. Costs and expenses

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the length of the applicant's detention, the lawfulness of the decision reviewing his detention, non-observance of the principle of the impartiality of the court reviewing his detention on 16 September 2002 and censorship of correspondence admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in the period between 16 September 2002 and 15 January 2003;

3. *Holds* that it is not necessary to examine separately the complaint under Article 5 § 4 of the Convention about the impartiality of the court reviewing the applicant's detention;
4. *Holds* that there has been no violation of Article 5 § 3 of the Convention;
5. *Holds* that there has been a violation of Article 8 of the Convention;
6. *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 1,500 (one thousand 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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President