



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

FOURTH SECTION

CASE OF BIŚTA v. POLAND

(Application no. 22807/07)

JUDGMENT

STRASBOURG

12 January 2010

FINAL

12/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Biśta 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,

Mihai Poalelungi,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 22807/07) 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 Jerzy Biśta (“the applicant”), on 29 May 2007.

2. The applicant was represented by Mr M. Koniecznyński, a lawyer practising in Katowice. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. On 21 April 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 1954 and lives in Trzebinia.

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

5. On 9 August 2005 the applicant was arrested by officers of the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*) on suspicion of revealing State secrets and bribery. As submitted by the applicant, the officers had handcuffed and beaten him. He was taken to the Internal Security Agency and subsequently to the Kraków District Prosecutor's Office where he was again beaten and urged to confess. At the same time another group of armed officers had broken into his apartment and handcuffed and terrorised his wife. Their apartment was ransacked during the search for documents and other evidence.

6. On 11 August 2005 the Kraków District Court remanded him in custody, relying on the reasonable suspicion that he had committed the offences in question. It also considered that it was necessary to keep the applicant in detention in order to secure the proper conduct of the proceedings, given the risk that he might tamper with evidence or induce witnesses to give false testimony. The court also stressed the severity of the likely sentence to be imposed and the complexity of the case. The court found that there was a reasonable suspicion that the applicant, while at liberty, would have had unlimited opportunities to contact other persons who were directly linked to his criminal activities. In particular, the court considered that the applicant had presumably been acting with accomplices.

7. An appeal by the applicant against the detention order was dismissed on 8 September 2005 by the Kraków Regional Court.

8. In the course of the investigation, the applicant's detention was prolonged on several occasions, *inter alia* on 7 November and 29 December 2005 by the Szczecin District Court, on 17 March and 12 September 2006 by the Szczecin Regional Court, on 19 February and 27 April 2007 by the Szczecin Regional Court and on 4 July 2007 by the Szczecin Court of Appeal (until 15 October 2007). In all their decisions regarding detention the authorities repeatedly relied on the original grounds given for the applicant's detention. In addition, they considered that the need to secure the proper conduct of the proceedings, especially in view of the considerable number of witnesses to be heard and confronted, as well as the extensive body of evidence to be examined, justified holding him in custody.

9. Numerous appeals by the applicant against decisions prolonging his detention and all his subsequent applications for release were unsuccessful.

10. On 20 December 2005 the Szczecin Regional Prosecutor filed a bill of indictment against the applicant and twelve other co-accused. The applicant was charged with revealing state secrets and bribery. One hundred and four persons were listed to be examined as witnesses.

11. On 12 January 2006 a request to transfer the case to the Szczecin Regional Court was filed owing to the special nature of charges brought against the applicant, including, *inter alia*, revealing State secrets and involvement in the case of high-ranking police officers. On 27 January 2006 the request was granted by the Szczecin Court of Appeal.

12. On 3 October 2007 the Szczecin Court of Appeal decided not to allow the Szczecin Regional Court's request for a further extension of the applicant's detention. It ordered the imposition of another preventive measure. The court held that even if grounds for the initial detention of the applicant still remained valid, they no longer sufficed to justify extending it further beyond the permissible period of two years. Such lengthy prolongation of his detention would change it into an actual sentence and was contrary to the aim of Article 258 § 2 of the Code of Criminal Procedure. Lastly, the court stressed that the risk that the accused might influence the outcome of the evidentiary proceedings had ceased to exist.

13. On 11 October 2007 the Szczecin Regional Court lifted the detention order. No other preventive measure was ordered. The Kraków Appeal Prosecutor appealed.

14. On 24 October 2007 the Szczecin Court of Appeal quashed the decision of 11 October 2007 and remitted the case for reconsideration in respect of the need for applying preventive measures.

15. On 6 November 2007 the Szczecin Regional Court decided that the applicant could be released if he put up bail of 50,000 Polish zlotys (PLN). In addition, an order was given to seize his passport and he was placed under police supervision.

16. The applicant appealed and requested that the amount of bail be reduced.

17. On 5 December 2007 the Szczecin Court of Appeal allowed his request and set bail at PLN 20,000, to be deposited before 12 December 2007.

18. It appears that the applicant was eventually released on payment of the bail, at the latest on 15 December 2007. It further appears that the criminal proceedings are currently pending.

B. Censorship of the applicant's correspondence

19. On 22 October 2007 the applicant received a letter from the Szczecin Regional Court posted to the Szczecin Remand Centre bearing a stamp "censored" ("*ocenzurowano*").

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention on remand

20. The relevant domestic law and practice concerning the imposition of detention on remand (*aresztowanie tymczasowe*), the grounds for its prolongation, release from detention and rules governing other so-called “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. Censorship of correspondence

21. 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.

For further references concerning the relevant domestic law and practice concerning monitoring of correspondence, see, among other authorities, *Lewak v. Poland*, no. 21890/03, § 25, 6 September 2007; *Kołodziński v. Poland*, no. 44521/04, § 29, 8 January 2008; *Misiak v. Poland*, no. 43837/06, § 18, 3 June 2008.

C. Protection of personal rights

1. Civil Code

22. Article 23 of the Civil Code sets out a non-exhaustive list of the so-called “personal rights” (*dobra osobiste*) in the following way:

“The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions.”

Article 24 § 1 reads as follows:

“A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of infringement [the person concerned] may also require the party who caused the infringement to take the necessary steps to remove the consequences of the infringement ... In compliance with the principles of this Code [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest.”

Article 448 provides:

“The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) suffered to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest ...”

Article 442¹ of the Civil Code sets out limitation periods in respect of various claims based on tort, including actions for the infringement of personal rights. Article 442¹, in the version applicable as from 10 August 2007, reads, in so far as relevant, as follows:

“1. A claim for compensation for damage caused by a tort shall lapse three years following the date on which the claimant learned of the damage and of the persons liable for it. However, this time-limit may not be longer than ten years following the date on which the event causing the damage occurred.”

2. Domestic practice

23. For references concerning domestic practice and available remedies see, among other authorities, *Krawiecki v. Poland*, no. 49128/06, §§15-16, 9 June 2009 and the decision in the case of *Sobolewski v. Poland (no.1)*, no. 39655/05, 16 December 2008.

THE LAW

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

24. 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.”

25. The Government contested that argument.

A. Admissibility

26. The Government raised a preliminary objection as to the non-exhaustion of domestic remedies by the applicant. They maintained that the applicant could have filed a constitutional complaint with the Constitutional Court alleging that Article 263 § 4 of the Code of Criminal

Procedure, which allowed the extension of detention on remand without any time-limits, was contrary to the Constitution. In this connection, the Government further stressed that provided the constitutional complaint proved to be successful and Article 263 § 4 was declared unconstitutional, the applicant could subsequently have made a request to have the proceedings concerning the extension of his detention reopened or the relevant decision quashed, as provided by the relevant provisions of the Constitution read together with the Code of Criminal Procedure. Furthermore, the Government maintained that once the Constitutional Court ruled on the non-constitutionality of the provision in question, it was open to the applicant to make a request for compensation for manifestly unjustified detention on remand in accordance with the relevant provision of Article 552 § 4 of the Code of Criminal Procedure.

27. The applicant failed to submit observations in this respect.

28. At the outset the Court reiterates that it has already dealt with the question of the effectiveness of a constitutional complaint (see *Szott-Medyńska v. Poland*, no. 47414/99, 9 October 2003). There, the Court observed that a constitutional complaint could be recognised as an effective domestic remedy, within the meaning of the Convention, only where the following requirements were jointly met: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable to the revision of that type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which a finding of unconstitutionality had been made (see also *Pachla v. Poland* (dec.), no. 8812/02).

29. Turning now to the present case, it should be noted that the Government failed to specify the provision of the Constitution to which Article 263 § 4 of the Code of Criminal Procedure was contrary (see paragraph 25 above). Nor have the Government provided any further details as to the content of such a (hypothetical) constitutional complaint. Moreover, according to the established case-law, having exhausted one available remedy, namely an appeal against the decision extending further his detention, the applicant was not required to embark on another attempt to obtain redress by bringing a constitutional complaint (see *Kacprzyk v. Poland* no. 50020/06, § 30, 21 July 2009).

Having regard to the above, the Court finds that it cannot be said that the constitutional complaint would be an effective remedy within the meaning of the Convention, given the circumstances of the applicant's case.

30. Accordingly, the Court concludes that, for the purposes of Article 35 § 1 of the Convention, the applicant has exhausted domestic remedies and the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

31. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, neither is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

32. The applicant's detention started on 9 August 2005, when he was arrested on suspicion of revealing State secrets and bribery. On 5 December 2007 the Szczecin Court of Appeal eventually quashed the applicant's detention and ordered a preventive measure to be imposed *in lieu*. Subsequently the applicant was released, as it appears from the case file, at the latest on 15 December 2007.

Accordingly, the period to be taken into consideration amounts to approximately two years and four months.

2. The parties' submissions

(a) The applicant

33. The applicant stressed at the outset the long delays between court hearings which had contributed to the overall length of the proceedings pending which he had been detained. He further submitted that on numerous occasions he had filed requests for a review of his detention. Lastly, the applicant stressed that he had extensively contributed to the evidentiary proceedings by making ample submissions and giving detailed clarification of the facts of the case. Hence, there was no need for his prolonged detention. In addition, he underlined that he fulfilled the criteria for having a less severe penalty imposed (*nadzwyczajne złagodzenie kary*).

(b) The Government

34. The Government maintained that the applicant's detention was justified throughout its duration and in compliance with the prerequisites contained in Articles 258 and 259 of the Code of Criminal Procedure. It was grounded by the existence of strong evidence pointing to the applicant's guilt and the gravity of the charges brought against him. Furthermore, its purpose was to secure the proper conduct of the proceedings, which were extremely complex. As regards the latter, the Government stressed that the applicant had made attempts to obstruct the proceedings. They concluded that the applicant's complaint was manifestly ill-founded.

3. *The Court's assessment*

(a) General principles

35. The Court reiterates that the general principles regarding the right “to trial within a reasonable time or to release pending trial”, as guaranteed by Article 5 § 3 of the Convention, have been stated in a number of its previous judgments (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110 et seq., ECHR 2000-XI; and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-X, with further references).

(b) Application of the above principles in the present case

36. In their decisions regarding the applicant's detention, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely (1) the severity of the penalty to which he was liable; (2) the complexity and special nature of the case; (3) the need to secure the proper conduct of the proceedings, given the risk that the applicant might tamper with evidence or induce witnesses to give false testimony. As regards the latter, they specified that the applicant, while at liberty, would have had an unlimited possibility of contacting other persons who were directly linked to his criminal activities.

37. The Court accepts that the reasonable suspicion against the applicant of having committed the offences in question could initially have warranted his detention. Also, the complexity of the case and the need to secure the proper conduct of the proceedings constituted valid grounds for the applicant's initial detention.

38. 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, in particular with witnesses' testimonies – were “relevant” and “sufficient” (see *Kudła*, cited above, § 111).

39. Furthermore, the Court observes that the applicant was primarily detained on charges of revealing State secrets and bribery, allegedly committed together with some accomplices. These offences, even though they carried a severe penalty, were not violent crimes. Moreover, the applicant had not been formally charged with acting as part of an organised criminal gang. In these circumstances, the Court is not persuaded that the instant case presented particular difficulties for the investigating authorities and for the courts to determine the facts and mount a case against the defendant as would undoubtedly have been the case had the proceedings concerned organised crime (see *Celejewski*, cited above and *Bąk v. Poland*, no. 7870/04, § 56, ECHR 2007-II).

40. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

There has accordingly been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. Furthermore the applicant complained about the censorship of his correspondence, relying on Article 8 of the Convention, which in so far as relevant 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. The Government's preliminary objective on exhaustion of domestic remedies

42. The Government raised a preliminary objection as to the non-exhaustion of domestic remedies by the applicant as required by Article 35 § 1 of the Convention. They argued that it was open to the applicant to obtain redress as regards the alleged violation by means of an action for protection of his personal rights under Articles 23, 24§§1 and 2 in conjunction with Articles 417 and 448 of the Polish Civil Code on account of the infringement of the right to respect for his correspondence. In support of their argument the Government invoked the domestic courts' practice concerning *inter alia* protection against noise (the judgment of the Supreme Court of 22 March 1999, No. CRN 28/91) and the worship of a deceased person (the judgment of the Supreme Court of 13 January 1965). Further, they referred to the cases of a certain D.S., whose claim for protection of personal rights (secrecy of correspondence) was granted by the Śrem District Court on 21 December 2005 (upheld on 19 May 2006 by the Poznań Regional Court) and a certain A.K., whose similar action was admitted by the Warsaw Regional Court on 27 November 2006 (upheld on 28 June 2007 by the Warsaw Court of Appeal).

43. The applicant failed to submit observations in this respect.

B. The Court's assessment

44. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires an applicant first to use the remedies provided by the national legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275–76, §§ 51–52).

45. The Court notes that the Government referred first to cases brought before the Supreme Court concerning *inter alia* protection against noise and the worship of a deceased person, which did not concern the censorship of correspondence. Although these cases demonstrate the readiness of the domestic courts to develop the principles of civil liability and to apply them to new situations it cannot however be said that the cases relied on show conclusively that a remedy for the applicant's specific grievance was thereby available.

46. As to the remaining cases cited by the Government, the Court reiterates that in many previous cases it held that when the interference with a prisoner's correspondence occurred before the date of the judgment of the Warsaw Court of Appeal relied on by the Government any possible relevance was reduced by the fact that this judgment had been given after the censorship had occurred (see, among other authorities, *Pasternak v. Poland*, no. 42785/06, § 30, 16 July 2009; and *Misiak v. Poland*, no. 43837/06, § 18, 3 June 2008).

47. However, the Court observes that in the present case the interference complained of took place on 22 October 2007 (see paragraph 19 above), that is to say, after 28 June 2007, the date on which the Warsaw Court of Appeal had given its judgment granting compensation for the infringement of the secrecy of a prisoner's correspondence on account of censorship (see paragraph 42 above). Furthermore, given that the three-year limitation period for lodging a civil action under Articles 23 and 24 § 1 read in conjunction with Article 448 of the Civil Code has not yet expired (see paragraphs 19 and 22 above), the applicant can still make use of this remedy.

48. That being so, the Court considers that the complaint is premature and that the applicant should, as required by Article 35 § 1, first put the substance of his Convention claim under Article 8 before the domestic courts.

49. The Court would further observe that applicants with similar complaints based on interferences which occurred after 28 June 2007 are required to avail themselves of the provisions under Articles 23 and 24 § 1

read in conjunction with Article 448 of the Civil Code, failing which they will be considered to have failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

51. Lastly, the applicant complained, invoking Article 3 of the Convention, that violence was used during his arrest in August 2005 by officers of the Internal Security Agency, which amounted to inhuman and degrading treatment. In this connection he also submitted, relying on Article 8 of the Convention, that the degree of force used by the officers was excessive and resulted in his and his wife's sustaining very serious and long-term psychological damage.

52. The Court observes that the events complained of by the applicant took place in 2005, whereas his application was introduced in May 2007, hence outside the six month time-limit set down by Article 35 § 1 of the Convention. It follows that these complaints must also be rejected under Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed a lump sum of 20,000 euros (EUR) in respect of non-pecuniary damage.

55. The Government found the amount to be exorbitant.

56. The Court awards the applicant, ruling on an equitable basis, EUR 2,000 in respect of non-pecuniary damage resulting from the violation it has found of Article 5 § 3 of the Convention.

B. Costs and expenses

57. The applicant did not make any claim for costs and expenses involved in the proceedings.

C. Default interest

58. 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 length of the applicant's detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 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 2,000 (two 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 12 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President