



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

FOURTH SECTION

CASE OF FRIEDENSBURG v. POLAND

(Application no. 44025/08)

JUDGMENT

STRASBOURG

27 April 2010

FINAL

27/07/2010

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

In the case of Friedensberg 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 30 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 44025/08) 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 Robert Friedensberg (“the applicant”), on 13 April 2007.

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

3. On 18 February 2009 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

A. Criminal proceedings against the applicant

4. The applicant was born in 1971 and lives in Krasnystaw.

5. On 28 October 2005 the applicant was detained on remand by the decision of the Puławy District Court (*Sąd Rejonowy*).

6. The pre-trial detention was subsequently extended by the domestic courts.

7. During the detention the applicant served two prison sentences (of ten and four months respectively), ordered in different sets of criminal proceedings against him.

8. On 6 March 2007 the Puławy District Court convicted the applicant of numerous counts of robbery and sentenced him to three years' imprisonment.

9. On 27 September 2007 the Lublin Regional Court (*Sąd Okręgowy*) upheld the judgment of the District Court.

10. On 21 November 2007 the applicant's legal-aid counsel found no grounds for lodging a cassation appeal with the Supreme Court (*Sąd Najwyższy*).

B. Monitoring of the applicant's correspondence

11. While detained in the course of the above-mentioned proceedings, the applicant's correspondence was censored on several occasions.

12. All envelopes produced by the applicant bear a stamp that reads: "The Puławy District Court, Censored, date ..." (*Sąd Rejonowy w Puławach, Ocenzurowano, dnia...*) and an illegible signature. Those envelopes contained the following:

a) one letter from the Lublin Oncological Centre (sent on 3 March 2006 and stamped on 15 March 2006);

b) one letter from a hospital in Lublin (sent on 10 March 2006 and stamped on 20 March 2006);

c) two letters from a sheltered-work factory (the first letter sent on 7 March 2006 and stamped on 20 March 2006; the second letter sent on 11 April 2006 and stamped on 24 April 2006);

d) one letter from a bank in Poniatowa (sent on 5 September 2006 and stamped on 18 September 2006);

e) one letter from the Opole Lubelskie District Employment Office (*Powiatowy Urząd Pracy*) (sent on 31 March 2006 and stamped on 11 April 2006);

f) three letters from the Lublin Municipal Disability Evaluation Board (*Miejski Zespół do Spraw Orzekania o Niepełnosprawności*) (the first letter sent on 27 February 2006 and stamped on 6 March 2006; the second letter sent on 26 January 2007 and stamped on 1 February 2007; the third letter sent on 8 March 2007 and stamped on 15 March 2007);

g) one letter from the ING Bank (sent on 10 May 2007 and stamped on 22 May 2007);

h) three letters from the Lublin Social Security Board (*Zakład Ubezpieczeń Społecznych*) (the first letter sent on 18 April 2006 and stamped on 10 May 2006; the second letter sent on 17 August 2006 and stamped on

24 August 2006; the third letter sent on 20 February 2007 and stamped on 1 March 2007).

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. The relevant domestic law and practice concerning the censorship of prisoners' correspondence are 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

14. 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

1. As regards nine letters sent to the applicant between February and September 2006

15. With regard to the following:

a) one letter from the Lublin Oncological Centre (sent on 3 March 2006 and stamped on 15 March 2006);

b) one letter from a hospital in Lublin (sent on 10 March 2006 and stamped on 20 March 2006);

c) two letters from a sheltered-work factory (the first letter sent on 7 March 2006 and stamped on 20 March 2006; the second letter sent on 11 April 2006 and stamped on 24 April 2006);

d) one letter from a bank in Poniatowa (sent on 5 September 2006 and stamped on 18 September 2006);

e) one letter from the Opole Lubelskie District Employment Office (sent on 31 March 2006 and stamped on 11 April 2006);

f) one letter from the Lublin Municipal Disability Evaluation Board (sent on 27 February 2006 and stamped on 6 March 2006);

g) two letters from the Lublin Social Security Board (the first letter sent on 18 April 2006 and stamped on 10 May 2006; the second letter sent on 17 August 2006 and stamped on 24 August 2006)

- the Court notes that the alleged censorship of the applicant's correspondence took place between February and September 2006. However, the applicant lodged his application with the Court on 14 April 2007, that is more than six months after the alleged censorship had occurred (see, for example, *Garycki v. Poland*, no. 14348/02, § 76, 6 February 2007).

16. It follows that with regard to the above-mentioned nine letters the complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

2. As regards four letters sent to the applicant between January and May 2007

17. With regard to the following letters:

a) two letters from the Lublin Municipal Disability Evaluation Board (the first letter sent on 26 January 2007 and stamped on 1 February 2007; the second letter sent on 8 March 2007 and stamped on 15 March 2007);

b) one letter from the Lublin Social Security Board sent on 20 February 2007 and stamped on 1 March 2007);

c) one letter from the ING Bank (sent on 10 May 2007 and stamped on 22 May 2007)

- 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 the 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.

The claimant, Mr Sobolewski, had subsequently lodged a complaint with the European Court of Human Rights, which was declared inadmissible, as the violation of his rights guaranteed by Article 8 of the Convention had been recognised and remedied at the national level (see *Sobolewski v. Poland* (no.1), no. 39655/05, 16 December 2008).

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 the secrecy of his correspondence with the Central Board of the Prison Service and the Central Electoral Office. The Regional Court held that the 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 (*Sąd Apelacyjny*) on 28 June 2007.

20. The applicant submitted that he had complained about the censorship of his correspondence to the prosecution and judiciary authorities. He did not submit any documents in support of his claim.

21. 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).

22. The censorship in the present case concerned four letters sent to the applicant on 26 January, 20 February, 8 March and 10 May 2007.

23. The Court notes that the alleged interference with the applicant's correspondence in respect of those four letters occurred after the delivery of the Poznań Regional Court's judgment of 19 May 2006, but before the Warsaw Court of Appeal gave its judgment of 28 June 2007. It further notes that the applicant's complaint was lodged on 13 April 2007, i.e. also before the delivery of that judgment (see paragraphs 1 and 12 above).

24. 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; *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).

25. As to the Poznań Regional Court's judgment of 19 May 2006 (partly amending the Śrem District Court's judgment), furnished by the Government in the present case as another example of the effectiveness of a claim for breach of personal rights in respect of the secrecy of correspondence (see paragraph 18 above), the Court observes that this judgment was, at the time of its delivery, no more than an isolated example of jurisprudence, rather than a sufficiently established judicial practice.

In so far as the Government rely on the subsequent Court's decision in *Sobolewski* (*Sobolewski v. Poland*, cited above), the question in that case concerned not the effectiveness of the remedy in question but the separate issue of whether the applicant could still be considered a victim. The issue of exhaustion was not addressed by the Court.

26. The Court has already welcomed the case-law developments in Poland concerning the principle of civil liability in respect of breach of the right to the secrecy of correspondence (see *Kotowski v. Poland*, no. 12772/06, § 22, 29 September 2009).

In its recent judgment in the case of *Biśta v. Poland* (no. 22807/07, §§ 47-49, 12 January 2010, not final) the Court decided that the applicant's complaint about the alleged censorship of his correspondence was inadmissible for failure to make use of the available domestic remedy, that is a civil claim for damages for a breach of personal rights in respect of the secrecy of correspondence. However, in that case, the interference with the applicant's right under Article 8 of the Convention had occurred after 28 June 2007, that is after 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 19 above).

27. This being so, the Court is of the opinion that the Government's examples of domestic courts' judgments delivered before the censorship of the applicant's correspondence occurred 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 material time.

28. 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.

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

30. 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

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

(b) the Government

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

2. The Court's assessment

(a) Whether there was interference

33. The Court notes that two envelopes in which the Lublin Municipal Disability Evaluation Board's letters of 26 January and 8 March 2007 were sent to the applicant bear a stamp indicating that they were censored.

34. Furthermore, two envelopes containing a letter from the Lublin Social Security Board and a letter from the ING Bank sent to the applicant on 20 February and 10 May 2007 respectively, bear a stamp, which shows that their content had been censored.

35. All envelopes produced by the applicant bear a stamp that reads: "The Puławy District Court, Censored, date ..." (*Sąd Rejonowy w Puławach, Ocenzurowano, dnia...*) and an illegible signature.

36. 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).

37. 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”

38. 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).

(i) The applicant's correspondence with the Lublin Municipal Disability Evaluation Board and with the Lublin Social Security Board

39. The Court notes that the interference with the applicant's right to respect for his correspondence with the Lublin Municipal Disability Evaluation Board and with the Lublin Social Security Board took place on three occasions when the applicant was detained in a remand centre.

40. 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 State authorities contained in Article 102 (11) of the same Code, which expressly relates to convicted persons, was also applicable to persons detained on remand. (see *Michta v. Poland*, cited above, § 61, and *Kwiek v. Poland*, no. 51895/99, § 44, 30 May 2006).

41. Therefore, censorship of the applicant's correspondence with the Lublin Municipal Disability Evaluation Board and the Lublin Social Security Board, being State institutions, was contrary to the domestic law. It follows that the interference in the present case was not “in accordance with the law”.

42. Accordingly, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with. There has consequently been a violation of Article 8 in respect of the above-mentioned correspondence.

(ii) The applicant's correspondence with the ING Bank

43. As regards the letter sent to the applicant by the ING Bank on 10 May 2007, the Court observes that, according to Article 217a(1) of the Code of Execution of Criminal Sentences, a detainee's correspondence can be censored by the authority at whose disposal he remains. Thus, censorship of that letter was in accordance with domestic law.

(c) Whether the interference was “necessary in a democratic society”

44. It remains to be ascertained whether the interference was necessary in a democratic society in line with the requirements of Article 8 § 2 of the Convention.

45. The Court notes that, unlike in the case of *Kwiek* (see *Kwiek v. Poland*, cited above, §§47-49), the Government failed to submit any arguments making it possible to assess the need for censorship of the applicant's correspondence with his bank and the aim of such interference with his right under Article 8. Hence, the Court cannot but conclude that the requirements of Article 8 § 2 were not complied with (see also *Bobel v. Poland*, no. 20138/03, § 64, 22 January 2008).

46. Consequently, the Court finds that there has been a violation of Article 8 of the Convention in respect of the applicant's correspondence with the ING bank.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed that 4,400 Polish zloty (PLN) (1,100 euros (EUR)) in respect of damage.

49. The Government contested this claim.

50. 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 awards the applicant EUR 1,100 in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

52. 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 under Article 8 of the Convention concerning the censorship of the applicant's correspondence of 26 January, 20 February, 8 March and 10 May 2007 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention in respect of the letters sent to the applicant on 26 January, 20 February, 8 March and 10 May 2007;
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 1,100 (one thousand one hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into Polish zlotys 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.

Done in English, and notified in writing on 27 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President