



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

FOURTH SECTION

CASE OF GRADEK v. POLAND

(Application no. 39631/06)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

08/09/2010

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

In the case of Gradek 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,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 18 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 39631/06) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Paweł Gradek (“the applicant”), on 22 September 2006.

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

3. The applicant alleged, in particular, applicant alleged, in particular, that his right to respect for his family life had been infringed.

4. On 1 September 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

5. The applicant was born in 1972 and lives in Łódź.

6. On 20 October 2004 the Łódź District Court ordered the applicant's pre-trial detention for a period of fourteen days. The court referred to the reasonable suspicion that the applicant was guilty of fraud while acting in an organised group.

7. On 6 June 2006 the applicant was arrested. On 13 June 2006 the Łódź District Court ordered his detention for a period of three months. The court held that there was a reasonable suspicion that the applicant had committed the offences with which he had been charged (including establishing and leading an organised criminal group). Furthermore, he had confessed to the charges. The court also stressed that the detention was necessary in order to ensure the proper course of the proceedings, in particular as the applicant had been in hiding.

8. In July his detention was extended until 6 November 2006. The court repeated the reasons previously given.

9. On 14 June and 3 July 2006 the applicant's wife, M.G., asked for permission to visit her husband in prison. On 20 June and 5 July 2006 respectively, the Łódź Regional Prosecutor refused her requests. The prosecutor made handwritten notes on M.G.'s applications – “no permission” and “permission refused” respectively (“*brak zgody*”, “*nie wyrażam zgody*”).

10. On 24 July 2006 the applicant was again refused permission to be visited by his wife and children by the Piotrków Trybunalski District Court. The prosecutor made a handwritten note on the applicant's motion “permission refused” (“*nie wyrażam zgody*”).

11. On 24 September 2006 the applicant was visited by his daughter.

12. On 26 October 2006 the Łódź District Court extended the applicant's detention until 6 May 2007. The court held that the original reasons for his detention were still valid. The court also referred to the likelihood of a heavy sentence and the fact that the applicant had acted in a criminal group. The court further refused the applicant's request for release.

13. On 21 February 2007 the Łódź District Court refused the applicant's application for release and the replacement of detention by more lenient preventive measures. The court referred to the grounds given in previous decisions.

14. The trial began on 4 April 2007. There were sixteen other co-accused in the proceedings. The prosecutor asked the court to hear 106 witnesses.

15. At the hearing held on 29 May 2007 the applicant again asked for the preventive measure to be changed. The court refused his request and extended the detention until 31 July 2007.

16. Between 8 June 2007 and 2 May 2008 the applicant was visited by his wife on twelve occasions.

17. The applicant's detention was subsequently extended on several occasions, in particular on 23 August and 5 October 2007.

18. On 8 May 2008 the applicant was released from detention.

19. It would appear that the proceedings are pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Pre-trial detention.

20. The relevant domestic law and practice concerning the imposition of pre-trial detention (*aresztowanie tymczasowe*), the grounds for its extension, release from detention and the rules governing other “preventive measures” (*środki zapobiegawcze*) are set out 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. Prison visits

1. *Code of Execution of Criminal sentences*

21. Article 217 § 1 of the Code of Execution of Criminal Sentences of 1997, as applicable at the material time, provided as follows:

“A detainee is allowed to receive visitors, provided that he obtains permission from the authority at whose disposal he remains [investigating prosecutor at the investigative stage or from the trial court once the trial has begun]. If the detainee remains at the disposal of several authorities, it is necessary to obtain permission from all of them unless they decide otherwise.”

2. *Constitutional Court's judgment of 2 July 2009 (no. K. 1/07)*

22. The judgment was given following a constitutional complaint lodged by the Ombudsman, alleging that Article 217 § 1 of the Code of Execution of Criminal Sentences had been incompatible with a number of constitutional provisions, including the principle of protection of private and family life (Article 47 of the Constitution), the principle of proportionality (Article 31 § 3 of the Constitution), Article 8 of the ECHR and Article 37 of the UN Convention of the Rights of the Child. The Constitutional Court's judgment became effective on 8 July 2009, on the date of its publication in the Journal of Laws (*Dziennik Ustaw*).

23. The Constitutional Court ruled that Article 217 § 1, in so far as it did not specify the reasons for refusal of family visits in pre-trial detention, was incompatible with the above provisions. The court held that this provision did not indicate with sufficient clarity the limitations on a detainee's constitutional right to protection of private and family life. The court also considered that Article 217 § 1 was incompatible with the Constitution in so far as it did not provide for a possibility to appeal against the prosecutor's decision to refuse a family visit in pre-trial detention.

3. *Amendments to the Code of Execution of Criminal Sentences*

24. On 5 November 2009 the parliament adopted amendments to Article 217 of the Code of Execution of Criminal Sentences. In particular, subparagraphs 1a-1f were added. These provisions provide in particular that a detainee is entitled to at least one family visit per month. In addition, they indicate clearly the conditions for refusing a family visit to a detainee and provide an appeal procedure against such a refusal. The amendments enter into force on 8 June 2010.

4. *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted on 11 January 2006*

25. The relevant extracts from the Recommendation read as follows:

“Part II Conditions of imprisonment

Contact with the outside world

24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

24.3 National law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted.

24.4 The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

24.5 Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so. ”

THE LAW

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

26. The applicant complained that the length of his detention on remand had been excessive. He relied on Article 5 § 3 of the Convention, which provides 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.”

27. The applicant's detention started on 6 June 2006, when he was arrested on suspicion of fraud committed while acting in an organised criminal group and also establishing and leading an organised criminal group. He was released from detention on 8 May 2008. Accordingly, the period to be taken into consideration amounts to one year, eleven months and two days.

28. The Government submitted that the domestic authorities had shown special diligence in the proceedings. There was a strong likelihood that the applicant had committed the offences with which he was charged, in particular leading and organising a criminal gang. In addition there was a serious risk of the applicant going into hiding since the authorities had had to search for the applicant for more than a year and a half by means of a wanted notice. They also stressed that the proceedings had been very complex as they had concerned a large number of co-accused and numerous witnesses had been heard. Lastly, they were of the opinion that the length of the applicant's detention was closely connected with the proper conduct of the proceedings and the circumstances of the case.

29. The applicant maintained that his detention had been excessively long.

30. The Court firstly 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 set out 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 *Bak v. Poland*, no. 7870/04, §§ 56-65, 16 January 2007).

31. Turning to the circumstances of the instant case, the Court notes that the grounds given by the judicial authorities to justify the applicant's continuous detention satisfied the requirement of being “relevant” and “sufficient”. It further notes that his detention was reviewed by the courts at regular intervals and that the case was very complex. In this connection the Court observes that the courts stressed the need to verify evidence from sixteen suspects and one hundred and six witnesses, and that there was

an extensive body of evidence to be considered. The Court also accepts that the reasonable suspicion that the applicant had committed serious offences, together with the likelihood of a severe sentence being imposed on him, warranted his initial detention.

32. Lastly, the Court observes that the applicant was charged with fraud committed while acting in an organised criminal gang. In addition he was charged with establishing and leading an organised criminal gang. As to these charges, the Court reiterates that they constitute a factor to be considered when assessing compliance with Article 5 § 3 (see *Bqk*, cited above, §§ 57 and 60).

33. For these reasons, the Court also finds that the domestic authorities cannot be criticised for failure to observe “special diligence” in the handling of the applicant's case.

34. In view of the above considerations and in the light of the criteria established in its case-law in similar cases, the Court considers that the applicant's detention does not disclose any appearance of a breach of the “reasonable time” requirement of Article 5 § 3 of the Convention. This complaint is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicant complained that during his detention he had been deprived of personal contact with his family for a significant period of time, in breach of Article 8 of the Convention which provides as relevant:

“1. Everyone has the right to respect for his ... family life...

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.”

36. The Government contested that argument.

A. Admissibility

37. The Court notes that the application 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' arguments*

38. The Government agreed that there could have been an interference with the applicant's right to respect for private and family life in view of his detention. However, in their opinion this interference was justified under Article 8 § 2 of the Convention. They further submitted that during the applicant's detention he had had regular contact with his family. Between 8 June 2007 and 2 May 2008 the applicant had been visited by his wife on twelve occasions, that is, once a month on average. Between 19 September 2006 and 15 April 2008 the applicant had also been visited by his daughter on fifteen occasions. Lastly, he had been visited by his parents on 22 November 2006 and 12 July 2007. In addition, the Government stressed that on sixteen occasions the applicant had contacted the members of his family by telephone. They concluded that there was no violation of Article 8 in the present case.

39. The applicant objected to the Government's submissions.

2. *The Court's assessment*

(a) General principles

40. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on 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, assist him in maintaining contact with his close family (see, *mutatis mutandis*, *Messina v. Italy* (no. 2) no. 25498/94, § 61, 28 September 2000, unreported).

41. Such restrictions as limitations on the number of family visits, supervision of those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special arrangements for visits constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision (*ibid.* §§ 62-63; see also *Kucera v. Slovakia*, no. 48666/99, §§ 127-128, 17 July 2007).

42. Nevertheless, any restriction of that kind must be “in accordance with the law”, must pursue one or more legitimate aims listed in paragraph 2 and, in addition, must be justified as being “necessary in a democratic society”. The expression “in accordance with the law” not only necessitates compliance with domestic law, but also relates to the quality of that law (see, *Niedbala v. Poland*, no. 27915/95, § 79, 4 July 2000). The Court recalls that domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals

the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (*Domenichini v. Italy* judgment of 15 November 1996, *Reports* 1996-V, p. 1800, § 33).

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

(i) Existence of interference

43. The Court notes at the outset that the applicant had not been visited by any members of his family between 6 June 2006 and 19 September 2006 (see paragraphs 7 and 11 above). In addition, his wife's applications for permission to visit him in prison were refused without any reasons (see paragraphs 9,10 above).

44. The Government did not dispute that the restrictions on the applicant's personal contact with his family constituted an "interference" with his right to respect for his family life. The Court sees no reason to hold otherwise.

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

45. The Court observes that the contested measure was applied under Article 217 § 1 of the Code of Execution of Criminal Sentences. The Court further notes that this provision, as applicable at the material time, gave the relevant authority (prosecutor or court) the power to grant permission for family visits in prison. The law, however, provided no details as regards the conditions for granting such permission, no guidance as to how the authorities might decide whether the prohibition of visiting rights was merited in a particular case, and what factors might be relevant to that decision. It further did not provide for a possibility to appeal against the refusal of visits. The decision was left to the authorities' absolute discretion.

46. In this respect the Court notes that on 2 July 2009 the Constitutional Court declared Article 217 § 1 of the Code of Execution of Criminal Sentences unconstitutional (see paragraphs 22 and 23 above).

47. The Court further observes, that it had already held that Article 217 § 1 of the Code of Execution of Criminal Sentences did not indicate with reasonable clarity the scope and manner of the exercise of any discretion conferred on the relevant authorities to restrict visiting rights (see *Wegera v. Poland*, no. 141/07, § 74-75, 19 January 2010).

48. For these reasons the Court concludes that the unreasoned refusal of family visits in detention in the applicant's case was not in accordance with the law. There has accordingly been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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.”

50. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention.

Done in English, and notified in writing on 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President