AS TO THE ADMISSIBILITY OF

Application No. 27714/95
by Boguslaw BERLINSKI
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 16 June 1995 by Boguslaw BERLINSKI against Poland and registered on 26 June 1995 under file No. 27714/95;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 8 October 1996 and the observations in reply submitted by the applicant on 28 October 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen born in 1947, is an unemployed physician residing in Lublin.

The facts of the case, as submitted by the parties, may be summarised as follows:

Particular circumstances of the case

In 1993 the Lublin District Public Prosecutor instituted criminal proceedings against the applicant on suspicion of uttering threats. The psychiatrists from the Institute of Psychiatry and Neurology in Pruszków fixed the date of the examination on 1 March 1994 and summoned the applicant for that date. The applicant did not comply with the summons and stated that he would not cooperate in the future. Subsequently other dates were proposed to the applicant.

In view of the applicant's lack of cooperation, on 4 October 1994 the Prosecutor ordered that on 13 October 1994 at 10.00 a.m. he should be taken by the police to be examined in a psychiatric hospital.

The policemen, who had had earlier contacts with the applicant, anticipated difficulties in making the applicant comply with the order. Therefore it was decided that they would proceed to the applicant's arrest earlier than it was determined in the Public Prosecutor's order.

On 12 October 1994 at 6.00 a.m. two policemen from the District Police Headquarters in Lublin came to the applicant's apartment. They ordered him to accompany them to the police station N° 4 in Lublin. They threatened him with use of force if he resisted. Subsequently they took him to the police station and informed him of the Prosecutor's decision. He was released at 8.30 a.m. upon signing an undertaking that he would report at the police station on the next day in order to be taken to the hospital in Pruszków.

On 13 October 1994 the applicant failed to appear at the police station. He was apprehended by the police and taken to the Pruszków Mental Hospital for the examination.

On 14 October 1994 the applicant requested that criminal proceedings be instituted against the policemen concerned for abuse of power.

On 30 November 1994 the Lublin District Public Prosecutor discontinued the criminal proceedings against the policemen who had arrested the applicant. It was established that on 4 October 1994 the Prosecutor had ordered that the applicant be taken to be observed in a mental hospital for the purposes of the criminal proceedings against him. The observation was to begin on 13 October 1994. In view of the fact that the applicant had previously on several occasions refused to participate in the proceedings and had to be brought to the Prosecutor's office by the police, the police had decided that he would be arrested one day before, on 12 October 1994. On 12 October 1994 at 6.00 a.m. two policemen had come to the applicant's apartment. They had ordered him to accompany them to the police station N° 4 in Lublin. He had been released at 8.30 a.m. The Prosecutor considered that the decision to arrest the applicant was irregular "from the formal point of view" ("z formalnego punktu widzenia") as the arrest had not been carried out on the date indicated in the order of 4 October 1994. However, this decision had been taken in order to secure the applicant's attendance at the observations. It could have been envisaged, given the applicant's hostile attitude in the past, that he would fail to appear. The Prosecutor further considered that eventually the applicant had not been detained for 48 hours as it had initially been envisaged and that he had been released, having agreed to come to the hospital on the next day. The Prosecutor noted that eventually the applicant had failed to appear as agreed. The Prosecutor concluded that the police decision to arrest the applicant did not breach in any way the applicant's right to personal liberty, even though the date of the arrest was not the same as the date indicated in the Prosecutor's order. Therefore there were no grounds for continuing criminal proceedings against the police as no offence had been committed.

The applicant appealed against this decision. He complained that his arrest had been unlawful and unjustified. He submitted that he had never refused to be served summonses for the purposes of criminal proceedings against him. He submitted that eventually he had been taken to the hospital by the police on 13 October 1994, i.e. on the date indicated in the Prosecutor's order, which, in his view, proved that his arrest on 12 October 1994 had not served any purpose. He stated that his arrest constituted a breach of his human rights and was meant as a harassment.

On 17 February 1995 the Lublin Regional Public Prosecutor dismissed the applicant's appeal. The Prosecutor considered that when investigating the applicant's complaint the District Prosecutor had taken ample evidence and had correctly assessed it. In particular, he had been right in taking into consideration that the applicant had failed several times to comply with summonses for psychiatric examination. This was a crucial fact in the case which indicated that the applicant's arrest had been justified, regard being had to its aim, namely the necessity of determining the applicant's mental state for the purposes of the criminal proceedings against him. No breach of the applicant's personal liberty or of his human rights in general had been established.

Relevant domestic law

Under Chapter 23 of the Code of Criminal Procedure, the lawfulness of the Public Prosecutor's decision to arrest a person can be challenged before a court. The Supreme Court decided in one of its decisions that the competent court examines the lawfulness of arrest even after the person has been released (SN WZP 1/91, OSNKW, pz. 10).

Chapter 50 of the Code of Criminal Procedure provides for compensation regarding damages arising out of imprisonment resulting from conviction which has subsequently been quashed and the convicted person was acquitted, for obviously unjustified detention on remand and for arrest and detention up to 48 hours. The Regional Court in whose region the detained person was released is competent to examine whether the conditions for granting compensation are met. The decision of the Regional Court can be appealed to the Court of Appeal. The claim for compensation for obviously unjustified arrest must be filed within three months from the date of release.

COMPLAINTS

The applicant complains under Article 5 paras. 1, 2 and 5 of the Convention that his detention was unjustified as he is mentally fit. He further claims that his arrest was unlawful, in particular in view of the fact that it was carried out one day before the date for which it had been ordered by the Public Prosecutor.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 June 1995 and registered on 26 June 1995.

On 27 June 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 8 October 1996. The applicant replied on 28 October 1996.

THE LAW

1. The applicant complains under Article 5 paras. 1, 2 and 5 (Art. 5-1, 5-2, 5-5) of the Convention that his detention was unjustified as he is mentally fit. He further claims that his arrest was unlawful, in particular in view of the fact that it was carried out one day before the date for which it had been ordered by the Public Prosecutor.

Article 5 (Art. 5) in its relevant parts reads 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: ...

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; ...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. ...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted.

The Government submit in this respect that the applicant did not exhaust all domestic remedies available to him under Polish law in respect of the complaint under Article 5 para. 1 (Art. 5-1) of the Convention about the unlawfulness of his arrest. He had at his disposal a complaint to the court. In such proceedings the court would examine the lawfulness of his arrest. This remedy should be considered effective and sufficient, as it clearly transpires from a decision of the Supreme Court that the competent court examines the lawfulness of arrest even after the person has been released (SN WZP 1/91, OSNKW, pz. 10). The applicant could have availed himself of this remedy, notwithstanding the fact that his detention was very short. Had the applicant exhausted this particular remedy, it would then have been open to him to claim compensation for an unlawful arrest before a civil court if the court found in his favour.

The Government conclude that the applicant did not exhaust any of the relevant domestic remedies.

The applicant submits that the remedy relied on by the Government, i.e. the complaint to the court about the unlawful arrest, would have been bound to fail. The court would limit itself to stating that the arrest was lawful and did not amount to a deprivation of liberty. He states that not being a lawyer he was not aware of the available remedies.

The Commission recalls that the obligation to exhaust domestic remedies requires the exhaustion of those remedies that relate to the breaches alleged and that are available, adequate and sufficient (N° 11681/85, Dec. 11.12.87, D.R. 54, p. 101).

The Commission observes that the applicant had at his disposal a specific judicial remedy to complain about the alleged unlawfulness of his arrest, i.e. a complaint to the court under Chapter 23 of the Code of Criminal Procedure. This remedy aims at obtaining a determination of whether the arrest was lawful and justified. It transpires from the case-law of the Supreme Court that it can be filed after the release of the detained person. The applicant chose not to pursue this remedy, but requested that criminal proceedings be instituted. The Commission considers that the procedure referred to by the Government constitutes an adequate and sufficient remedy to complain about the alleged unlawfulness of the arrest.

The Commission concludes that the applicant did not exhaust the domestic remedies available to him under Polish law in respect of his complaint under Article 5 para. 1 (Art. 5-1) of the Convention. It follows that this part of the application must be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

2. Insofar as the applicant complains about his arrest under Article 5 para. 2 (Art. 5-2) of the Convention, the Commission observes that the applicant has not substantiated his complaint that he was not informed promptly of the reasons of his arrest.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. As regards the applicant's complaint under Article 5 para. 5 (Art. 5-5) of the Convention, the Government submit that pursuant to Chapter 50 of the Polish Code of Criminal Procedure compensation for unjustified arrest may be claimed before a court. A relevant claim must be filed within three months from release. The applicant failed to file such a claim. It is true that he requested that criminal proceedings be instituted against the policemen concerned, but this cannot be regarded as a remedy either in respect of the unlawful arrest, or aiming at obtaining compensation for unjustified arrest.

The applicant submits that in the light of the Public Prosecutor's refusal to institute criminal proceedings against the policemen, his claim for compensation was devoid of any prospects of success.

The Commission observes that Polish law provides for compensation regarding damages arising out of unjustified arrest and detention up to forty-eight hours. The claim for compensation for an obviously unjustified arrest must be filed with the Regional Court in whose jurisdiction the detained person was released within three months from the date of release. Under those provisions the decision of another authority that the arrest was unlawful is not a necessary prerequisite to institute the compensation proceedings; it is enough to claim that the arrest was unjustified. In the present case the Commission considers that the lack of a decision issued in judicial review proceedings as to the unlawfulness of the applicant's arrest did not make it impossible for him to institute such proceedings. Further, in the light of the acknowledgement in the Public Prosecutor's decision that the applicant's arrest had been "irregular", this remedy was not devoid of prospects of success. However, the applicant did not lodge a compensation claim.

The Commission concludes that the applicant had at his disposal a remedy satisfying the requirements of Article 5 para. 5 (Art. 5-5) and that his complaint is in this respect manifestly il-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber