

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

FIRST SECTION

CASE OF NOWAK v. POLAND

(Application no. 60906/16)

JUDGMENT

STRASBOURG

13 October 2022

This judgment is final but it may be subject to editorial revision.



In the case of Nowak v. Poland,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Pere Pastor Vilanova*, President,*
Jovan Ilievski*,*
Raffaele Sabato*, Judges,*
and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 60906/16) 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") on 22 December 2016 by a Polish national, Mr Sebastian Nowak, born in 1985 and detained in Sieradz ("the applicant");

the decision to give notice of the complaints concerning the applicant's strip searches and monitoring of his telephone conversations to the Polish Government ("the Government"), represented by their Agent, Mr J. Sobczak of the Ministry of Foreign Affairs;

the parties' observations;

Having deliberated in private on 20 September 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns subjecting the applicant prisoner to the practice of strip searches and monitoring of his telephone conversations.

I. MEASURES DURING THE APPLICANT'S DETENTION

2. From 9 February to 16 June 2010 and from 28 April to 6 December 2011 the applicant served a sentence in Kamińsk Prison.

3. He was classified as a first-time offender, during his first term of detention, and as a habitual offender, during his second term. He was not under a special regime for dangerous prisoners. Throughout his detention, he was held in a total of eleven cells.

4. He was not subjected to any tests to check whether he had been taking drugs or unauthorised medicine during the period in question. Irrespective of this, on an unspecified date he was diagnosed with drug addiction and sent for rehabilitation.

5. The applicant was routinely subjected to frisking and he was also subjected to full body searches (strip searches).

6. The applicant submitted that in total, during both terms of his detention, he had been subjected to 369 full body searches. He had been strip-searched every day: on each admission to and discharge from the prison; whenever he had moved cells; whenever he had walked to another wing and back; and

during daily routine cell inspections. The Government informed the Court that no official records could be produced in this respect.

7. It is stipulated that the applicant's strip searches took place in the office of the duty officer or, occasionally, in the empty visiting room, because Kamińsk Prison had no designated room for that purpose. They were conducted by two male officers. The applicant had to bend over to enable the visual examination of his anus and his body. He was not touched by the officers. During the search, the applicant was standing on a plastic platform which had kept his feet off the cold floor.

8. Telephone conversations in closed-type prisons, such as Kamińsk Prison – with the exception of conversations with defence lawyers – were, at the material time, routinely monitored by prison wardens pursuant to Article 90 (9) of the Code of Execution of Criminal Sentences.

9. The Government submitted that all prisoners were informed of that practice. The applicant claimed that he had not received any prior notification to that effect when he had been in Kamińsk Prison.

10. No official records of the applicant's telephone calls could be produced. The logs which recorded the applicant's outgoing calls no longer existed and his incoming calls had not been recorded at all.

II. CIVIL ACTION

11. In 2013 the applicant filed a civil action for compensation for breach of the secrecy of his communications and for infringement of his dignity on account of, among other things, strip searches in Kamińsk Prison.

12. On 4 November 2015 the Bartoszyce District Court dismissed this action on the grounds that the monitoring of the applicant's telephone conversations and strip searches had been in accordance with the law, and that the applicant had not been debased or humiliated.

13. On 8 June 2016 the Olsztyn Regional Court dismissed an appeal by the applicant. The reasoned judgment was served on the applicant on 29 June 2016, together with the instructions on how to lodge a cassation appeal with the Supreme Court.

14. The applicant did not lodge a cassation appeal.

III. COMPLAINT

15. The applicant complained under Articles 3 and 8 of the Convention that, during the two above-mentioned periods of his detention in Kamińsk Prison, he had been subjected to routine and unjustified strip searches, which he had found debasing and humiliating. He also raised a general complaint that his telephone calls in prison had been monitored.

THE COURT'S ASSESSMENT

I. ADMISSIBILITY

A. The Government's preliminary objections regarding the application

16. The Government argued that the case was inadmissible for non-exhaustion of domestic remedies. Firstly, during his detention, the applicant had not lodged any complaints with the prison governor or prison judge about the body searches or the monitoring of his telephone conversations. Secondly, in his civil proceedings, he had not lodged a cassation appeal.

17. More recently, the Government argued that the application should be declared inadmissible for abuse of the right of application because in April 2019 the applicant's representative and life partner at the time had been caught carrying amphetamine concealed on her person when entering the prison where the applicant was detained. She had been criminally charged. The Court has not been informed by any party about the outcome of that case.

18. Leaving aside the issue of whether or not a remedy had existed under the applicable law which would have allowed the applicant to lodge, during his detention, a complaint with the prison judge or the governor, the Court notes that regarding complaints about events that occurred during an applicant's detention, it has already held that where an applicant has been released from detention, a civil action can be considered an effective remedy for the purposes of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Pustelnik v. Poland* (dec.), no. 37775/09, § 42, 23/10/2012).

19. Given that the applicant's complaints only relate to the years 2010 and 2011 and that he lodged his application with the Court in 2016, the Court is satisfied that the applicant's civil action constituted an effective remedy which was available and sufficient to afford redress in respect of the breaches alleged. Moreover, in the specific circumstances of the case, the Court considers that a cassation appeal in the applicant's civil case would have been without any prospects of success. In particular, the courts of first and second jurisdiction that had examined the applicant's action, were unanimous in their conclusion that the security measures to which the applicant had been subjected in Kamińsk Prison had been lawful and that the applicant had not proved any harm. Pursuant to the applicable procedural law, a cassation appeal may not be based on allegations concerning the establishment of facts or the evaluation of evidence. The applicant's case did not call for the examination by the Supreme Court as it did not raise any important legal issue or revolve around a legal provision that would raise serious doubts or cause discrepancies in the domestic jurisprudence.

20. Lastly, the Court reiterates that an application may only be rejected as an abuse of petition in specific circumstances (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014).

21. Having regard to its case-law, the Court finds no grounds on which to hold that the present case was brought in abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.

22. It follows that the Government's preliminary objections must be dismissed.

B. The complaint under Article 3 of the Convention concerning strip searches

23. The general principles concerning Article 3 and the minimum severity of ill-treatment to be attained in the context of strip searches of prisoners are set out in *Dejnek v. Poland*, no. 9635/13, §§ 59-60, 1 June 2017.

24. The Court observes that the applicant was not classified as a dangerous detainee and, as such, he was not subjected to any other security measures on top of being frisked and strip searched (see paragraphs 2 and 4 above; contrast, *Piechowicz v. Poland*, no. 20071/07, §§ 73-77, 17 April; or *Bechta v. Poland*, no. 39496/17, § 32, 20 May 2021). His treatment was not arbitrary, as the authorities had acted on suspicion that he was trafficking psychotropic substances (see paragraphs 33 and 34 below; contrast, *Roth v. Germany*, nos. 6780/18 and 30776/18, § 70, 22 October 2020). The body inspection was carried out in a secluded place and performed by male officers who did not touch or insult the applicant (see paragraph 7 above; contrast, *Valašinas v. Lithuania*, no. 44558/98, § 26, ECHR 2001-VIII; or *El Shennawy v. France*, no. 51246/08, §§ 43-46, 20 January 2011). The Court therefore concludes that there is no basis for finding that the strip searches, in and of themselves, and despite their frequent recurrence, included any element of debasing or humiliating treatment which attained the minimum level of severity necessary to bring Article 3 of the Convention into play (see, *mutatis mutandis*, *Dejnek*, cited above, §§ 64-65; and *S.J. v. Luxembourg (no. 2)*, no. 47229/12, §§ 56-62, 31 October 2013; contrast *Iwańczuk v. Poland*, no. 25196/94, § 57, 15 November 2001; *Valašinas,* cited above, §§ 116-18; *Roth*, cited above § 72; and *Bechta,* cited above*,* § 33).

C. The complaint relating to the monitoring of the applicant's telephone conversations under Article 8 of the Convention

25. The general principles concerning Article 8 and the monitoring of prisoner's telephone conversations are set out in *Lebois v. Bulgaria*, no. 67482/14, §§ 61-62, 19 October 2017.

26. The monitoring of the applicant's private telephone conversations while he was serving criminal sentences in Kamińsk Prison constituted an

interference with his "private life" and his "correspondence" within the meaning of Article 8 of the Convention (see, *mutatis mutandis*, *Lebois*, cited above, §§ 63-64). The measure had a basis in domestic law (Articles 90, 105, and 242 § 10 of the Code of Execution of Criminal Sentences) and was conducted with the aims of preventing the commission of further crimes by prisoners and of maintaining order in prison.

27. The Court stresses that the wording of the applicable law (in particular, Article 90 of the Code of Execution of Criminal Sentences) was clear as to the practice of monitoring prisoners' telephone conversations in closed-type prisons. Kamińsk was a closed-type prison, with a corresponding security regime that included monitoring of telephone conversations *via* devices installed in the office of the duty officer. Whether or not the applicant had officially been informed of the practice of the blanket monitoring of private telephone conversations on his first admission to Kamińsk Prison (see paragraph 9 above), he would certainly have become aware of it soon afterwards. The applicant could have therefore controlled his conduct (contrast, *mutatis mutandis, Doerga v. the Netherlands*, no. 50210/99, § 52, 27 April 2004). The monitoring regime was required given that the prison's population included re-offenders, offenders with a negative criminal prognosis and prisoners with addictions. The applicant had a record of drug addiction and, in the second period of his detention which is the subject of the present application, he was also classified as a recidivist offender (see paragraphs 3 and 4 above). The decision to have him committed to Kamińsk Prison was made by a penitentiary commission following the applicant's individualised assessment. While in prison, the applicant was put under closer supervision in view of his behaviour and the suspicion of illicit conduct, namely of possibly arranging that persons visiting him in prison bring him medicine or drugs (see paragraphs 17 and 33 below). Anyhow, Article 8 does not in itself guarantee a right to telephone calls and allows that means of communication, if provided, may be subject to restrictions in view of the ordinary and reasonable requirements of imprisonment (see, *Lebois*, cited above, § 61; *A.B. v. the Netherlands*, no. 37328/97, §§ 92-93, 29 January 2002; and *Ciszewski v. Poland* (dec.), no 38668/97, 6 January 2004). A similar approach is taken by the Recommendation Rec(2006)2 of the Committee of Ministers to member States of the Council of Europe on European Prison Rules (11 January 2006) in Rule 24.2. It is not disputed that the applicant could also communicate with his private or family circle through means other than telephone conversations. Given all these considerations, the Court finds that, in the very special circumstances of the present case, the interference with his Article 8 rights was justified and proportionate (see, *Ciszewski*, cited above; contrast, *mutatis mutandis*, *Nusret Kaya and Others v. Turkey*, nos. 43750/06 and 4 others, § 36, ECHR 2014 (extracts)).

D. Conclusion on admissibility

28. In the light of the above considerations, the applicant's complaints under Article 3 concerning the strip searches and under Article 8 in relation to the monitoring of the applicant's telephone conversations are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must therefore be declared inadmissible.

29. The applicant's complaint under Article 8 concerning the strip searches is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

II. MERITS OF THE COMPLAINT UNDER ARTICLE 8 CONCERNING THE STRIP SEARCHES

30. The general principles concerning Article 8 of the Convention and strip searches of prisoners detained under a regular security regime have been summarised in *Dejnek*, cited above, § 70.

31. In the present case, the strip searches to which the applicant was subjected while he was serving criminal sentences in Kamińsk Prison constituted interference with his "private life" within the meaning of Article 8 of the Convention (see, *mutatis mutandis*, *Lebois*, cited above, §§ 63-64).

32. The strip searches of had a basis in domestic law (Article 116 of the Code of Execution of Criminal Sentences, and section 72(1) of the Ordinance of 31 October 2003 of the Minister of Justice on the security of the establishments of the Prison Service). They were conducted with the aim of maintaining order in prison and preventing the applicant from using illicit and harmful substances (see paragraphs 33 and 34 below).

33. As to whether the applicant's strip searches were proportionate, the Government have argued that the measure was justified because enhanced security measures had been called for and had indeed been a general policy of Kamińsk Prison – a closed-type detention facility with a great many prisoners, including habitual offenders and prisoners with addictions. They had also been conducted for the applicant's own safety, as he had, at the relevant time, been suspected of possession of illicit medicine and he had, overall, been known as a troublesome prisoner who had been under the special supervision of his prison tutor.

34. The Government explained that the prison authorities had been tipped off that the applicant had been hoarding medicine. They also furnished a copy of a letter (dated 14 August 2014) in which the applicant's prison supervisor explained that the applicant had been very badly behaved, and he had not got along with his cellmates.

35. The applicant submitted that the body searches had not been justified because he had never received a serious disciplinary punishment, he had

never been caught trying to traffic illicit objects or to hoard any medicine. At the material time, he had not been prescribed any permanent pharmacological treatment. Lastly, he claimed that he had never made any complaints about his fellow cellmates. He submitted a document from his prison supervisor (dated 14 December 2016) which confirmed this.

36. The Court observes that the Government have not provided any evidence in support of their statement in respect of the applicant's alleged hoarding of medicine, or possession of illicit medicine, during his time in the prison (compare, *mutatis mutandis*, *Dejnek*, cited above, § 73).

37. The Court is aware of the need to ensure security in institutions where people are deprived of their liberty and the difficulty in running such establishments. It considers, however, that highly invasive and potentially debasing measures like strip searches require a plausible justification. It does not appear that such a justification was given to the applicant by the prison authorities in the instant case (see, *mutatis mutandis*, *Dejnek*, cited above, § 75).

38. As for the manner in which the applicant's strip searches were conducted, the Court observes that pursuant to the "European Prison Rules" (see paragraph 27 *in fine* above), prisoners should never be required to be completely naked for the purpose of a search (see, Commentary on Rule 54).

39. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to provide sufficient and relevant reasons justifying the applicant's strip searches. Given their number, frequency and method, the Court also concludes that the measures were excessively burdensome to the applicant.

40. It follows that there has been a violation of Article 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage for violations of Articles 3 and 8. He did not make any claim in respect of costs and expenses incurred before the domestic courts or before the Court.

42. The Government submitted that the claim was exorbitant.

43. The Court notes that it has found a violation only of Article 8 in respect of the strip searches and awards the applicant 3,000 EUR in respect of non-pecuniary damage, plus any tax that may be chargeable.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 concerning the strip searches admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention in relation to the strip searches;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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 13 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Pere Pastor Vilanova President