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

# FIRST SECTION

# DECISION

Application no. 568/19
Sebastian MYŚLIWIEC
against Poland

The European Court of Human Rights (First Section), sitting on 30 November 2021 as a Committee composed of:

Lorraine Schembri Orland, *President,*
Krzysztof Wojtyczek,
Ioannis Ktistakis, *judges,*

and Attila Teplán, Acting Deputy Section Registrar,

Having regard to the above application lodged on 24 December 2018,

Having regard to the observations submitted by the Polish Government ("the Government") and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Sebastian Myśliwiec, is a Polish national who was born in 1975 and lives in Częstochowa. He was represented before the Court by Mr C. Dolivet, a lawyer practising in Paris.

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

### A. The circumstances of the case

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

4. On 1 December 2016 the Częstochowa Regional Prosecutor (*Prokurator Okręgowy*) charged the applicant with setting up and leading an organised criminal group, whose aim was to commit tax offences (in particular, through participation in a so-called "value-added tax (VAT) carousel"). He was also charged with illegal possession of a firearm, extortion

of VAT returns from the State Treasury, filing false declarations in tax proceedings and several counts of issuing inaccurate invoices.

5. On 30 March 2017 the Częstochowa District Court (*Sąd Rejonowy*) ordered the applicant's detention on remand from the date of his arrest. The court relied on the risk of obstruction of justice and the likelihood of the severe penalty – ten to fifteen years' imprisonment – to which the applicant would be liable. The applicant's lawyer appealed against that decision. His appeal was dismissed by the Częstochowa Regional Court (*Sąd Okręgowy*) on 11 May 2017.

6. Since the applicant resided in the United Kingdom, on 17 July 2017 a European arrest warrant was issued in respect of him. A request by the applicant for issuance of a letter of safe conduct (*list żelazny*) was denied on 5 July 2017. On 9 August 2017 the applicant travelled to Poland on his own initiative and turned himself in to the authorities. On the same day, he was detained on remand.

7. On 22 August 2017 the applicant was questioned. He pleaded not guilty to all charges.

8. On 25 August 2017 the Częstochowa Regional Court extended his detention on remand until 7 November 2017. The court held that the risk of obstruction of justice continued to exist on account of the fact that the applicant had been charged with leading an organised criminal group. The court also held that the applicant posed a serious risk of absconding, even though he had turned himself in on his own initiative. In the court's view, the applicant's network of contacts and his financial status would have allowed him to evade the authorities. The applicant's lawyer appealed against that decision; however, the appeal was dismissed on 7 September 2017.

9. On 3 November 2017 the Częstochowa Regional Court again extended the applicant's detention on remand, subject to a proviso that if bail in the amount of 1,000,000 Polish zlotys (PLN – approximately 250,000 euros (EUR)) were posted by 17 November 2017, he would be released. On 7 November 2017 the Częstochowa Regional Prosecutor requested that the court suspend the execution of its order until it had become final. The court granted the prosecutor's request and suspended the order. On 9 November 2017 the same prosecutor issued an injunction against the applicant, by securing his property to cover the payment of any fine and forfeiture of any assets which might be imposed in his case. The total value of the secured assets was PLN 5,713,884 (EUR 1,428,500).

10. On 15 November 2017 the Katowice Court of Appeal (*Sąd Apelacyjny*) amended the Częstochowa Regional Court's ruling of 3 November 2017 by eliminating from it the proviso that if bail were posted, the applicant would be released.

11. The applicant appealed against the injunction of 9 November 2017, but his appeal was dismissed by the Katowice Court of Appeal on 14 February 2018.

12. On 26 January 2018 the Częstochowa Regional Court extended the applicant's detention for a further three months, that is, until 7 May 2018. It relied on the high probability that the applicant had committed the crimes with which he had been charged and on the general risk of his obstructing the proceedings on account of the fact that he had been charged with participation in an organised criminal group. The court also relied on the possibility that the applicant might abscond, since he had previously resided in the United Kingdom and was wanted under a European arrest warrant.

13. The applicant appealed. His appeal was dismissed by the Katowice Court of Appeal on 14 February 2018.

14. On 27 April 2018 the Częstochowa Regional Court extended the applicant's detention for a further three months, that is, until 4 August 2018. The court relied on the high probability that the applicant had committed the offences with which he had been charged. It found that only the most severe preventive measure could secure the proper course of the proceedings. This finding was justified by the risk that the applicant might abscond, since he had lived abroad and he had the necessary contacts and financial means. The court further found that the applicant might obstruct the proceedings; in that connection, it relied on the fact that the applicant had tried to hide some documents that could serve as evidence in the proceedings. Lastly, the court referred to the severe penalty to which the applicant was liable.

15. The applicant appealed against the decision of 27 April 2018, but his appeal was dismissed by the Katowice Court of Appeal on 30 May 2018.

16. On 26 July 2018 the Katowice Court of Appeal, relying on the same grounds as in the previous decisions, extended the applicant's detention until 24 September 2018. The court also held that although the applicant had returned to Poland of his own accord rather than under the European arrest warrant, his network of contacts and financial status made it all the more likely that he might try to abscond and hide from the authorities abroad.

17. On 21 August 2018 the Katowice Court of Appeal dismissed an appeal by the applicant against the decision to extend his detention.

18. The applicant failed to submit copies to the Court of the subsequent decisions extending his detention. However, on 6 March 2020 his lawyer informed the Court that as of 29 March 2019, the applicant had been in detention on remand. On that date, the Częstochowa Regional Court remitted the bill of indictment filed against the applicant to the Regional Prosecutor's Office. It found that additional enquiries had to be made and that some of the charges needed to be reformulated. In particular, the court ordered the prosecutor to obtain financial records from banks, to appoint expert witnesses who could verify the data stored in the computer systems, and to confront some of the applicant's testimonies with those of other witnesses.

19. On 28 June 2019 the applicant was released from detention, having posted bail.

## B. Restrictions on the applicant's contact with his sons

20. The applicant is married to M., who resides in the United Kingdom with the couple's three children: twin brothers born in 2012 and another son born in 2015. M. is also suspected of participating in the criminal organisation allegedly led by the applicant. Apparently, M. was placed under house arrest pending the hearing concerning her extradition to Poland pursuant to a European arrest warrant.

21. On 28 November 2017 the applicant's lawyer submitted a request asking the prosecutor to allow the applicant to communicate with his minor children (aged five years old and two years old at that time). The lawyer argued that the applicant and his sons had suffered by being apart with no possibility of communicating with each other.

22. On 11 December 2017 the Częstochowa Regional Prosecutor denied the request on the grounds that the children were residing with their mother, who was a suspect in the same proceedings, and that the applicant might try to influence her testimony. The applicant did not appeal against the refusal.

23. On 14 May 2018, in his appeal against the decision of 27 April 2018 extending his detention on remand, the applicant indicated that he and his sons were suffering as a result of their lack of contact with each other and that he feared the further deterioration of his family life. On 26 July 2018 the Katowice Court of Appeal dismissed his appeal. It briefly stated that it could not discern any negative conditions stemming from his prolonged detention, especially in the light of the penalty to which he would likely be liable (a minimum sentence of three years' imprisonment).

24. On 2 August 2018, permission for the applicant to communicate with his children was denied again, on the same grounds. The prosecutor indicated that the children could visit their father personally in the remand centre or write him a letter. On 9 August 2018 the applicant's lawyer unsuccessfully appealed against that refusal.

25. The applicant provided the Court with letters from his sons' teacher and a psychological evaluation performed by the UK-based ACCESS service, which had attributed one of his sons' academic and behavioural problems to the lack of contact with the applicant.

26. On 13 December 2018 the Częstochowa Regional Court authorised the applicant to contact his sons by telephone.

27. On 6 March 2020 the applicant's lawyer informed the Court that, as of 29 March 2019, the applicant had still been prevented from contacting his sons.

## C. Relevant domestic law and practice

### *1. Detention on remand and other preventive measures*

28. The relevant domestic law and practice concerning detention on remand (*tymczasowe aresztowanie*), the grounds for its extension, release from detention and rules governing other so-called "preventive measures" (*środki zapobiegawcze*) are set out in *Gołek v. Poland* (no. 31330/02, §§ 27-33, 25 April 2006), *Celejewski v. Poland* (no. 17584/04, §§ 22-23, 4 May 2006), and *Kauczor v. Poland* (no. 45219/06, §§ 25-33, 3 February 2009).

29. Other relevant domestic law and practice concerning family visits is outlined in Gradek *v. Poland* (no. 39631/06, §§ 20‑24, 8 June 2010).

### *2. Use of telephones and other means of communication by detainees*

30. Article 217c of the Code of Execution of Criminal Sentences, in so far as relevant, provides:

> "§ 1. A detainee on remand:
>
> 1) may use a phone ... subject to the restrictions mentioned in paragraphs 2 and 3, and after having obtained the consent of the body conducting the proceedings;
>
> 2) may not use any other means of communication (fixed or wireless).
>
> § 2. The body conducting the proceedings shall issue an order of consent for the use of a phone, unless there is a reasonable concern that it will be used for:
>
> 1) the illegal obstruction of criminal proceedings;
>
> 2) the commission of a crime and, in particular, incitement of others to commit a crime.
>
> § 3. If a detainee on remand is subject to the authority of several bodies conducting proceedings, each of these bodies shall grant its consent, unless they agree otherwise."

# COMPLAINTS

31. The applicant complained under Article 5 § 3 of the Convention that the length of his detention on remand had been excessive and that the securing of his property had effectively prevented him from posting bail.

32. He also complained under Article 8 of the Convention about the deprivation of personal contact with his sons for a significant period of time.

# THE LAW

33. The applicant argued that his detention, which had lasted for one year and ten months, had been excessive in length. He also complained that the securing of his property had been arbitrary and had been used exclusively for the purpose of preventing him from posting bail. Lastly, he submitted that the

restrictions placed on his personal contact with his three sons had resulted in a breach of Article 8 of the Convention.

## A. The parties' submissions

### *1. The Government*

34. The Government submitted that the application should be declared inadmissible under Article 35 § 3 (a) of the Convention because the applicant had abused the right of individual application.

35. The Government argued that the applicant had withheld and misrepresented information concerning the core of his complaints under Article 5 § 3 and Article 8 of the Convention. In particular, they indicated that the applicant had been released from detention on 28 June 2019 after having posted bail. They further submitted that the applicant had failed to inform the Court that on 15 November 2017 the Katowice Court of Appeal had amended the Częstochowa Regional Court's ruling of 3 November 2017 (see paragraph 9 above) by eliminating from it the proviso that if bail were posted, the applicant would be released.

36. Consequently, the prosecutor's decision of 9 November 2017 had not had any actual impact on the applicant's ability to post bail.

37. The Government further submitted that by virtue of a decision given by the Częstochowa Regional Court on 13 December 2018, of which the applicant had also failed to inform the Court, he had been authorised to contact his children by phone (see paragraph 26 above). Withholding information about the above-mentioned decision could have given the false impression that the applicant had been denied telephone contact with his children throughout the entire period of his detention on remand.

### *2. The applicant*

38. The applicant asserted that he had kept the Court duly informed and had responded in a timely fashion to all the requests for information. He argued that the decision given by the Katowice Court of Appeal on 15 November 2017 had been irrelevant, since at the time of the injunction securing the applicant's property, the prosecutor could have reasonably suspected that his appeal might be dismissed. He concluded by stating that, by securing the applicant's assets, the prosecutor had ensured that bail could not be posted, even if the Katowice Court of Appeal ruled in his favour.

39. Referring to the Government's submissions concerning his failure to inform the Court of the contents of the decision given by the Częstochowa Regional Court on 13 December 2018, the applicant explained that his application had been dispatched on 24 December 2018, that is, several days after that decision had been delivered. Considering that the applicant's lawyer was based in Paris, he submitted that he had been unable to learn of the

contents of that decision in such a short time. He also argued that a meaningful family bond with his minor children could not have been maintained by telephone, and thus the decision was irrelevant for the purpose of assessing the merits of his complaint raised under Article 8 of the Convention.

### B. The Court's assessment

40. The Court reiterates that the submission of incomplete and thus misleading information may amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose it (see, among others, *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014).

41. The Court notes at the outset that the applicant failed to submit complete information, and this had a misleading effect. Although he acted through a professional lawyer and supplied the Court with voluminous evidence in support of his claims, he made no mention of the decision given by the Katowice Court of Appeal on 15 November 2017 (see paragraph 10 above) or the decision given by the Częstochowa Regional Court on 13 December 2018 (see paragraph 26 above). The Court also notes that the applicant failed to inform the Court about the exact date of his release from detention.

42. Moreover, in his letter of 6 March 2020, the applicant's lawyer explicitly stated that as of 29 March 2019, the applicant had still been prevented from contacting his family. No explanation as to the latter statement has been provided in the applicant's reply to the Government's observations.

43. The Court must further examine whether the information referred to in the previous paragraphs concerned the very core of the case and, if so, whether the explanation for the applicant's omission was sufficient (see, *mutatis mutandis*, *Gross*, cited above, § 28).

44. As regards the complaint raised under Article 5 § 3 of the Convention, the Court reiterates that the conditions imposed on a suspect to ensure his or her appearance at trial – such as the establishment of an appropriate amount of bail – may be, depending on the circumstances of the case, of the utmost importance for assessing the merits of such a complaint (see, for example, *Kolakovic v. Malta*, no. 76392/12, §§ 68-69, 19 March 2015, and *Gafà v. Malta*, no. 54335/14, §§ 70-71, 22 May 2018).

45. The applicant argued extensively that the prosecutor's decision of 9 November 2017 had been arbitrary and had prevented him from posting bail. The Court concludes that the information relating to the decision given by the Katowice Court of Appeal on 15 November 2017 concerned the very core of the case, since that ruling amended a prior decision conditionally releasing the applicant on bail. Furthermore, it is obvious that the information

regarding the date of an applicant's release from detention is crucial for the assessment of a complaint under Article 5 § 3 of the Convention.

46. As regards the applicant's complaint under Article 8 of the Convention, the Court is satisfied that the information concerning the length of the restriction imposed on his enjoyment of the right to respect for his private and family life also concerns the very core of the case. It notes that the applicant complained of a total lack of contact with his family, including by telephone. Thus, the Court is not convinced that the decision of 13 December 2018 was irrelevant for the purpose of examining his complaint under Article 8 of the Convention.

47. It remains to be examined whether the explanation offered by the applicant for his omissions was sufficient.

48. In this connection, the Court notes that the applicant argued that the omitted information regarding the ruling of the Katowice Court of Appeal of 15 November 2017 had been irrelevant, but he offered no explanation as to why he had failed to inform the Court about it. Considering the significant number of documents supplied by the applicant, it does not appear that he had been prevented from accessing the contents of that ruling or that he had not known about its delivery.

49. Turning to the fact that on 13 December 2018 the applicant was authorised to contact his sons, the Court finds it credible that the applicant's lawyer (based abroad) had only later become aware of that decision. However, no explanation was provided as to why he subsequently failed to inform the Court about the change of circumstances in his case.

50. The Court reiterates that, pursuant to Rule 47 § 7 of the Rules of Court, applicants are under a continuous obligation to keep the Court informed of any change of circumstances relevant to their pending application. Moreover, a professional representative bears a particular responsibility not to make misleading submissions (see *Gross*, cited above, § 33). The Court realises that in cases pertaining to ongoing events, such as those brought during extensive and complex investigations, access to certain documents may be restricted. Nevertheless, it is incumbent upon the applicant to direct the Court's attention to such facts. In the case at hand, no such arguments were raised.

51. The Court thus concludes that the applicant failed to provide a sufficient explanation for his omissions.

52. Considering the scope and importance of the information withheld, the Court upholds the Government's preliminary objection that the applicant's conduct constituted an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 13 January 2022.

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| Attila Teplán<br>Acting Deputy Registrar | Lorraine Schembri Orland<br>President |