

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

FOURTH SECTION

DECISION

Application no. 37775/09
Wiesław PUSTELNIK
against Poland

The European Court of Human Rights (Fourth Section), sitting on 23 October 2012 as a Chamber composed of:

Päivi Hirvelä, *President,*
Lech Garlicki,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 26 June 2009,

Having regard to the observations submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Wiesław Pustelnik, is a Polish national, who was born in 1968 and lives in Czechowice-Dziedzice. His application was lodged on 26 June 2009. He was represented before the Court by Mr J. Gałkowski, a lawyer practising in Bielsko-Biała.

A. The circumstances of the case

1. The period of the applicant's detention

2. From 20 September 2006 until 17 October 2007 and from 24 October until 28 November 2007 the applicant was in pre-trial detention in Mysłowice Remand Centre.

3. The applicant's subsequent detention in several other prisons and remand centres is not the subject of the instant application. On an unspecified date, presumably in June 2011, the applicant was released and he is currently at liberty.

2. Conditions of the applicant's detention in Mysłowice Remand Centre

4. The applicant's description of the conditions of his detention, as reproduced from the materials of his civil action, may be summarised as follows.

5. All the cells to which the applicant was assigned in Mysłowice Remand Centre at the material time, with the exception of cell no. 114, were overcrowded to the point that the applicant had less than the statutory minimum standard of 3 square metres (m^2) of personal space.

6. The applicant had a one-hour period of outdoor exercise every day. He spent the remaining twenty-three hours inside his cell.

7. The toilet annex in each of the applicant's cells was one metre away from the dining table and was separated from the rest of the cell by a cloth.

8. The cells were infested with cockroaches and other bugs.

9. There was only cold running water in the tap and the applicant had to use it for his every-day toiletry needs and for washing dishes. The applicant had one hot shower per week.

3. Strip searches

10. The applicant was detained under an ordinary security regime. He was not classified as a "dangerous detainee". He claimed that during his detention he had frequently and routinely been subjected to a personal check (*kontrola osobista*) by the guards of Mysłowice Remand Centre. In his submission, he had to strip naked in front of a guard and bend over to show his anus. In the applicant's view the "visual penetration" by the guard could be compared to sexual harassment and he felt humiliated each time he had undergone a personal check.

11. As submitted by the penitentiary authorities in the course of the civil proceedings, the applicant, just like any other detainee in Mysłowice Remand Centre, had been subjected to a body search each time he left or returned to the remand centre's main wing (*pawilon główny*). That practice

was aimed at preventing the distribution of dangerous or illicit objects among detainees. It was stressed that body searches had always been performed in an enclosed room and without the presence of unauthorised persons.

12. The applicant did not give any further details about the practice of body checks. He did not indicate the dates of the impugned incidents or their total number. He did not submit how often he had left the remand centre's main wing and whether he had been subjected to a personal check when going to his outdoor exercise, a visit or on other occasions.

13. During his detention, the applicant did not file any formal complaints with the penitentiary authorities about the impugned practice of subjecting him to body checks.

4. Civil proceedings for compensation against the State Treasury

14. On 18 November 2007 the applicant lodged a civil action in tort, seeking 500,000 Polish zlotys (PLN) (approximately 120,000 euros (EUR)) in compensation for the suffering which he claimed to have experienced in Mysłowice Remand Centre due to the inadequate living conditions and body searches.

15. The applicant's submissions to the domestic court about the conditions of his detention and the manner of performing personal checks by the guards were similar to the above description (see paragraphs 5-13 above). The applicant claimed that, when he had been detained in Mysłowice Remand Centre, he had felt "traumatised" and had difficulties sleeping.

16. On 14 January 2008 the respondent party, namely the State Treasury and Mysłowice Remand Centre, asked that the case be dismissed.

17. They submitted that the maximum allowed capacity had, at the relevant time, been exceeded in Mysłowice Remand Centre. As a consequence, the remand centre's governor, acting under the 2006 Ordinance, decided to reduce the statutory minimum standard of 3 m². He informed a competent penitentiary judge of that decision. The governor acted, therefore, within the law.

18. Furthermore, the authorities confirmed, to a large extent, the applicant's submissions as to the overall living and sanitary conditions in the remand centre. They stressed, however, that the cells had always been sufficiently ventilated and that the furniture, such as tables, could be freely moved around the cell so that detainees could have their meals in a more comfortable atmosphere, further away from the toilet annex. It was also submitted that the remand centre was disinfected twice a month by a specialised independent company. Sanitary inspections carried out on a regular basis did not reveal any irregularities.

19. As to the applicant's body searches, the authorities invoked Article 116 § 2 (3) of the Code of Execution of Criminal Sentences and

section 72 of the 2003 Ordinance, which laid down the rules concerning body searches of detainees and convicted persons. It was further noted that the applicant, just like any other detainee in Mysłowice Remand Centre, had been subjected to a body search each time he left or returned to the remand centre's main wing. That practice was aimed at preventing the distribution of dangerous or illicit objects among detainees. It was stressed that body searches had always been performed in an enclosed room and without the presence of unauthorised persons.

20. Lastly, the remand centre's authorities argued that the applicant had not experienced mental suffering due to the conditions of his detention. He had been under the constant supervision of a psychiatrist and neurologist because he had in the past been diagnosed with personality disorders and alcoholism. During his medical consultations the applicant did not complain about any negative effects of his detention.

21. On 23 October 2008 the Katowice Regional Court (*Sąd Okręgowy*) gave judgment partly in the applicant's favour and awarded him compensation in the amount of PLN 3,000 (approximately EUR 716).

22. The domestic court established that, at the relevant time, Mysłowice Remand Centre, which had a maximum allowed capacity of 399 places, had been severely overcrowded. For example, as of 22 November 2006, 571 detainees and as of 14 November 2007, 478 detainees were held there. Throughout his detention in the remand centre, the applicant was assigned subsequently to fifteen different cells. In each of those cells, with the single exception of cell no. 114, the available space per person was below the statutory minimum standard of 3 m². Between September 2006 and December 2007 the remand centre's governor sent monthly reports to the penitentiary authorities informing them about the rates of overcrowding at any given time.

23. The domestic court further established that, as a result of the overcrowding, not all detainees could fit around the dining table inside the cell. Many had to have their meals sitting on the bed. The table in the applicant's cell was situated one metre away from the toilet annex. The particular position and certain technical problems with the windows limited air circulation and access to natural light. As a result the applicant's cells were insufficiently ventilated and lit.

24. It was also confirmed that the toilet annexes in Mysłowice Remand Centre were either not separated from the rest of the cell or separated by a cloth hung over a metal rod which was permanently attached to the walls. In the applicant's cells the toilet annexes were separated with a bed sheet. In the court's opinion, such separation did not provide sufficient privacy because the toilet was very near the beds and dining tables.

25. The domestic court also established that, despite the efforts of the remand centre's administration, the applicant's cells had been infested with cockroaches.

26. As to the practice of body searches, the domestic court found the explanations provided by the remand centre to be true. In consequence, the applicant's claim for compensation on this account was considered unjustified.

27. Having analysed the applicant's medical history, the domestic court agreed that the living conditions in the remand centre had not been the cause of the applicant's anxiety and sleeping difficulties.

28. In its reasoning on the merits, the Katowice Regional Court relied on the judgments of the Supreme Court of 28 February 2007 and of the Constitutional Court of 26 May 2008, as well as the jurisprudence of the European Court of Human Rights.

29. It concluded that the applicant's detention in overcrowded cells (during 348 out of a total of 458 days), in inadequate sanitary conditions (cockroaches and the lack of sufficient separation of the toilet annex), with insufficient ventilation and lighting, had given rise to suffering and humiliation which had exceeded the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. That, in turn, constituted an infringement of the plaintiff's personal rights protected by Article 24 of the Civil Code (*Kodeks Cywilny*). Moreover, the domestic court held that the requirement of Article 24 of the Civil Code, namely that the act or omission leading to the infringement of a personal right had to be unlawful, was satisfied in the light of the finding of the Constitutional Court that Article 248 of the Code of Execution of Criminal Sentences was unconstitutional.

30. In its analysis concerning compensation, the domestic court reiterated that according to Article 448 of the Civil Code and the established domestic practice, compensation for a breach of a personal right should be "just" and, therefore, it should be of an economically significant value and not merely symbolic.

Weighing in the balance all the circumstances of the case, the domestic court awarded the applicant PLN 3,000 (approximately EUR 715).

31. The domestic court decided not to order the applicant to bear any of the costs of the proceedings (*koszty procesu*) and waived his court fee (*koszty sądowe*).

32. The applicant did not appeal against that judgment.

33. On 13 February 2009 the Katowice Court of Appeal (*Sąd Apelacyjny*) dismissed the appeal brought by the respondent party. The appellate court upheld the first-instance judgment.

34. A cassation appeal to the Supreme Court (*Sąd Najwyższy*) was not available due to the low amount of the claim.

B. Relevant domestic law and practice

1. General rules concerning conditions of detention

35. A detailed description of the relevant domestic law and practice concerning general rules governing the conditions of detention in Poland and domestic remedies available to detainees alleging that conditions of their detention were inadequate are set out in the Court's pilot judgments given in the cases of *Orchowski v. Poland* (no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) on 22 October 2009 (see §§ 75-85 and §§ 45-88 respectively). More recent developments are described in the Court's decision in the case of *Łatak v. Poland* (no. 52070/08) on 12 October 2010 (see §§ 25-54).

2. Provisions pertaining to body search of persons in detention

36. The so-called personal check (*kontrola osobista*) of convicted persons is authorised and defined by Article 116 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*), which in its relevant part reads as follows:

> "§ 1 A convicted person must obey the regulations concerning ... prison order and execute the orders of supervisors and other authorised persons, in particular:
>
> ...
>
> § 2 In cases justified by internal order and security a convicted person will be subjected to a personal check.
>
> § 3 A personal check means an inspection of the body and checking of clothes, underwear and footwear as well as [other] objects in a [prisoner's] possession. The inspection of the body, checking of clothes and footwear shall be carried out in a room, in the absence of third parties and persons of the opposite sex and shall be effected by persons of the same sex."

37. Moreover, section 72 (1) of the Ordinance of the Minister of Justice of 31 October 2003 on the security of the establishments of the Prison Service (*Rozporządzenie Ministra Sprawiedliwości w sprawie sposobów ochrony jednostek organizacyjnych Służby Więziennej*), authorises a personal or cursory (*kontrola pobieżna*) check of a convicted person in a detention facility in order to find dangerous or illicit objects or to foil an escape, or in any other justified cases.

COMPLAINT

38. The applicant complained under Article 3 of the Convention of his detention in overcrowded and bug-infested cells and of the allegedly degrading manner of conducting his personal check by the remand centre guards.

THE LAW

39. The applicant complained under Article 3 of the Convention of his detention in overcrowded and bug-infested cells and of the allegedly degrading manner in which his person had been checked by the remand centre guards. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

40. The Government did not submit any comments on the case, the application being one of the many applications communicated after the adoption of the pilot judgments in the cases of *Orchowski v. Poland* and *Norbert Sikorski v. Poland*, cited above, and the leading inadmissibility decision in the case of *Łatak v. Poland*, cited above. The Court recalls that the Government in those two cases made extensive submissions on domestic remedies, in particular these provided by the civil law. They argued that in circumstances similar to these of the present case, the applications should be declared inadmissible on the ground of non-exhaustion of domestic remedies (see *Orchowski,* cited above, §§ 94-98 and *Łatak,* cited above, §§ 62-65).

41. The rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention 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 also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions 1996-IV*).

42. In the context of Polish applications involving complaints about conditions of detention, including overcrowding, the Court has already held that, in cases where an applicant has been either released or placed in conditions compatible with the requirements of Article 3 of the Convention, a civil action under Article 24 read in conjunction with Article 448 of the Civil Code can be considered an effective remedy for the purposes of Article 35 § 1 of the Convention.

However, given that the relevant practice of the Polish civil courts developed gradually over time, the Court held that this remedy could be regarded as effective only as from 17 March 2010 (see *Piechowicz v. Poland*, no. 20071/07, § 182, 17 April 2012 with further refecrences to *Orchowski v. Poland*, cited above, § 154; and *Łatak v. Poland*, cited above, §§ 79-81 and 85).

43. Indeed, before that date the civil remedy in question was considered ineffective, especially when an applicant prisoner was still detained in the impugned conditions. To that end, in its pilot judgment in *Orchowski v. Poland* (cited above), the Court observed that "prior to the judgments of the Supreme Court of 28 February 2007 and of the Constitutional Court of 26 May 2008, Polish courts have consistently interpreted Article 24 § 1 of the Civil Code as being conditional on two elements, one of them being that the infringement alleged must have resulted from an unlawful act or omission. The analysis of the relevant Polish case-law shows that the policy of reducing the space for each individual in detention establishments was considered to be in accordance with domestic law."

Further in the same judgment, however, the Court took note of a number of decisions from late-2007 and 2008, which appeared to show that "the domestic civil courts have become more inclined to find an infringement of a prisoner's personal rights and to award him compensation when the latter proved that he had been detained for a considerable amount of time in inadequate living and sanitary conditions in a cell in which the minimum statutory standard of 3 m² per person was not respected" (see *Orchowski*, cited above, § 108).

44. In the instant case, the Court cannot but observe that the applicant's own civil action, which had been filed just ten days before his release from Mysłowice Remand Centre and which resulted in two rulings partly in his favour, is a perfect example of that emerging jurisprudence which was very much welcomed by the Court.

45. The Court recalls that on 23 October 2008 the Katowice Regional Court awarded the applicant PLN 3,000 on account of the infringement of his personal rights caused by his detention in overcrowded cells and in inadequate sanitary and living conditions, giving rise to suffering and humiliation which had exceeded the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see paragraph 29 above). It must also be noted that in its reasoning on the merits, the Katowice Regional Court relied on the above-mentioned judgments of the Supreme Court and Constitutional Court, as well as on the Convention case-law (see paragraph 28 above).

46. Consequently, in spite of the general ineffectiveness of the civil remedy at the material time, the Court considers that in the individual circumstances of this applicant, his civil action proved to be effective both in theory and practice.

47. If, however, as it is now claimed before the Court, the applicant was not satisfied with a part of or the entire ruling of the first-instance court - for example, he wished to claim higher compensation for the inadequate conditions of his detention it was open to him to lodge an appeal.

An appeal was filed in the applicant's case but only by the respondent. Nothing in the applicant's submissions or in the case file indicates that the applicant was prevented from lodging an appeal, whether by law or in practice. The applicant simply failed to pursue his claim to the appellate court.

48. In view of the above, the Court considers that the applicant failed to properly use a remedy which was available and sufficient to afford redress for the breaches alleged.

49. As to the complaint about the practice of body checks, it must be observed that the very limited material submitted by the applicant does not allow the Court to establish any essential details concerning the impugned practice, namely the number or the frequency of the incidents complained of. On the other hand, it is clear that the applicant did not file any formal complaints with the penitentiary authorities to challenge the very fact of his being subjected to personal checks or the manner of conducting them (see paragraphs 10-13 above).

50. In the light of the above considerations, the present application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Päivi Hirvelä
President