

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

FOURTH SECTION

DECISION

Application no. 13384/10
by Jan WATROS
against Poland

The European Court of Human Rights (Fourth Section), sitting on 31 January 2012 as a Chamber composed of:

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 24 February 2010,

Having regard to the unilateral declaration submitted by the respondent Government on 28 July 2011, requesting the Court to strike the application out of the list of cases, and the applicant's reply to the Government's declaration,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Jan Watros, is a Polish national who was born in 1962 and lives in Nałęczów. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. First request for compassionate leave

3. On 31 July 2009 the applicant, who, at the time, was detained in Chełm Remand Centre, requested the penitentiary judge of the Lublin Regional Court (*Sąd Okręgowy*) to grant him compassionate leave from prison to see his terminally ill father. In support of his request, the applicant submitted two medical certificates issued on 23 July 2009 by the chief surgeon of the public hospital in Puławy. The first certificate stated that the applicant's father suffered from "a cancerous stomach disease, in a very advanced stage" and that "radical treatment was not possible". According to the other certificate – a "medical treatment information card" – the applicant's father had undergone treatment and had been prescribed further analgesic treatment and supervision by the local general practitioner, following which he had been released from the hospital.

4. On 7 August 2009 the penitentiary judge refused to grant the applicant's request. The refusal was couched in the following terms:

> "The convict requested authorisation for temporary release from prison in order to see his seriously ill father.
>
> Pursuant to section 141a § 1 of the Code of Execution of Criminal Sentences, a convict's temporary release from prison may be authorised in situations of particular importance for the convict, for a period of no longer than 5 days.
>
> It should be observed that situations of particular importance for the convict, as provided for by the provision cited above, are most importantly unforeseen events as well as other events which arise in connection with the convict's family or personal situation, which require his indispensable presence outside prison. Therefore, such events must be sudden and exceptional.
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> The convict's argument that he would like to see his ill father is subjectively important, but it does not fit within the category of "situations of particular importance" foreseen by section 141a § 1 of the Code of Execution of Criminal Sentences. It is not a sudden event, as the father has been ill for a long time and – as can be gathered from the contents of the request – the convict keeps contact with him in a legally permissible manner.
>
> The main and natural consequence of imprisonment is the actual isolation of the convict from his family and the deprivation of the possibility to live together with the family, family contacts being limited to those maintained by way of family visits in prison. The provision quoted above does not allow for changing that state of affairs and may only be applied in very particular situations.
>
> Furthermore, a decision to grant temporary release from prison must also take into account the aims sought to be achieved by the penalty imposed.
>
> The convict cannot be given a positive socio-criminological forecast with a view to his release from prison, regard being had to his previous criminal record, the date of

> completion of his sentence (28 February 2011) and the fact that he does not participate in any social rehabilitation programme.
>
> It is true that there exists a possibility to authorise temporary release from prison under a prison escort or in another person's company, foreseen for convicts whose personal conduct warrants a conclusion that, if released unaccompanied, they would disobey the law. Nonetheless, it is first of all necessary to conclude that there exists a "situation of particular importance". As it has been already indicated above, the situation indicated by the convict does not constitute such a situation."

5. On an unknown date, the applicant appealed against that decision.

6. On 9 August 2009 the applicant's father died.

7. On 28 September 2009 the Lublin Regional Court upheld the impugned decision. It stressed that it was only competent to review the lawfulness of the penitentiary judge's decision. It further observed that, in his appeal, the applicant had merely expressed a point of view different from that of the penitentiary judge and had not argued that the refusal had been unlawful. The Regional Court held that the impugned decision had been well-reasoned and correct. It went on to underscore that "situations of particular importance", within the meaning of section 141a § 1 of the Code of Execution of Criminal Sentences, were to be understood as extraordinary, exceptional situations of such nature that the convict's failure to attend would have had irremediable consequences.

8. The Regional Court concluded that the penitentiary judge's decision had been lawful both as to the merits and from the procedural angle. In its view, it had been given by the competent authority in the form provided for by the law and was *intra vires*.

2. Second request for compassionate leave and the attendance at the funeral

9. On 10 August 2009 the applicant requested the penitentiary judge to grant him temporary leave from prison to attend his father's funeral.

10. On the same day the penitentiary judge granted the applicant's request, authorising him to leave the prison under a prison escort. The judge's decision was justified as follows:

> "... The indicated event is a situation of particular importance for the convict and warrants an authorisation under section 141a § 1 of the Code of Execution of Criminal Sentences.
>
> However, having regard to: the nature of the offences committed by the convict in conditions described by section 64 of the Criminal Code [he being a habitual offender]; his unpredictable conduct when serving his sentence; his participation in the illegal inmate subculture and the fact that he was serving his sentence under the ordinary scheme [not involved in any social rehabilitation programme], the penitentiary judge concludes that the leave from prison should be carried out under the escort of Prison Service officers".

11. On 11 August 2009 the applicant attended the funeral under the escort of prison service officers.

12. On 20 August 2009 he filed a complaint with the Director of Chełm Remand Centre, complaining about the treatment to which he had been allegedly subjected during the funeral. He complained that the prison officers had made it difficult for him to use the toilet before the funeral, had not allowed him to approach his father's coffin and maliciously scorned him in the presence of his family. He moreover complained that he had been handcuffed and had to wear prison clothes throughout the funeral ceremony.

13. In his reply of 8 September 2009, the Director of Chełm Remand Centre explained that the applicant had been allowed to use the toilet before the funeral but that this had been delayed by the need to first locate the toilet and then to secure the surrounding area. He further asserted that the applicant had been kept in the escort car until the arrival of the funeral procession. He was then allowed to approach the coffin and later escorted inside the church. Lastly, the Director explained that the handcuffs had been necessary due to security concerns and the applicant's aggressive behaviour during the funeral ceremony.

14. On 16 September 2009 the applicant appealed against that decision.

15. On 16 November 2009 the Regional Director of the Prison Service (*Dyrektor Okręgowy Służby Więziennej*) endorsed the reply given to the applicant's complaint by the Director of Chełm Remand Centre. He reiterated that the handcuffs had been used in accordance with the relevant provision of the 1996 Prison Service Act and that this had been dictated by security concerns. He also addressed the issue of prison clothes, finding on the basis of the relevant provision of the Code of Execution of Criminal Sentences that the applicant was not allowed to wear his own clothes unless he obtained prior authorisation. Further, the Regional Director of the Prison Service found that the prison escort had not hindered the applicant in using the toilet. He finally observed that the escort had been carried out in a lawful manner and that the applied security measures had not compromised the solemn character of the funeral ceremony.

B. Relevant domestic law and practice

1. Compassionate leave from prison

16. Article 141a of the Code of Execution of Criminal Sentences reads, in so far as relevant, as follows:

> "1. In cases which are of particular importance for a convicted person, he or she may be granted permission to leave prison for a period not exceeding five days, if necessary under the escort of a prison officer or in the company of another trustworthy person (*osoba godna zaufania*).

2. Use of a prisoner's own clothes during the funeral

17. Pursuant to Article 90 § 5 of the Code of Execution of Criminal Sentences, prisoners in a remand centre with a closed regime (*typu zamkniętego*) are allowed to use their own undergarments and shoes. Subject to prior authorisation by the director of the remand centre, they may also be allowed to use their own clothes.

3. Use of handcuffs

18. Article 19 § 1 (4) of the Prison Service Act of 26 April 1996, applicable at the relevant time, provides that prison service officers are authorised to apply, in the line of duty, means of physical coercion such as handcuffs to persons deprived of liberty. By paragraph 2 of the same provision, means of physical coercion could generally only be used, if necessary, in order to counteract attempts at taking the life of a person or committing suicide, damaging another person's or own health, inciting mutiny, manifesting disobedience, committing serious violations of public order, damaging property or absconding.

19. Article 19 § 5 provides that, in justified cases, during escort or convoy of a detainee, handcuffs, a restraining belt or shackles may be used in order to prevent absconding or to counteract visible aggressiveness. By paragraph 6, means of physical coercion shall not be used for a period longer than necessary.

20. Article 21 of the 1996 Prison Service Act provides that the use of means of physical coercion should be proportionate to the level of danger and that it should result in minimal harm to the person to which it is applied.

21. Practical details of the use of handcuffs by the officers of the Prison Service was at the relevant time governed by the Ordinance of the Council of Ministers of 20 November 1996 on specific conditions of use of means of physical coercion, firearms or public order enforcement dogs by prison service officers and on the applicable procedures (*rozporządzenie Rady Ministrów w sprawie szczegółowych warunków stosowania środków przymusu bezpośredniego oraz użycia broni palnej lub psa służbowego przez funkcjonariuszy Służby Więziennej oraz sposobu postępowania w tym zakresie*).

4. Civil law remedies

22. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*dobra osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions."

23. Article 24, paragraph 1, of the Civil Code provides:

> "A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of infringement [the person concerned] may also require the party who caused the infringement to take the necessary steps to remove the consequences of the infringement ... In compliance with the principles of this Code [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest."

24. Article 445 § 1 of the Civil Code, applicable in the event that a person suffers a bodily injury or a health disorder as a result of an unlawful act or omission of a State agent, reads as follows:

> "...The court may award to the injured person an adequate sum in pecuniary compensation for the damage suffered."

25. Under Article 448 of the Civil Code, a person whose personal rights have been infringed may seek compensation. That provision, in its relevant part, reads:

> "The court may grant an adequate sum as pecuniary compensation for non-material damage (*krzywda*) suffered to anyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of whether he or she seeks any other relief that may be necessary for removing the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific public interest."

COMPLAINTS

26. The applicant complained that the refusal to allow him to leave the prison in order to see his incurably ill father had violated Article 8 of the Convention.

27. The applicant moreover complained that the manner in which the prison escort officers had treated him during his father's funeral had been incompatible with human dignity, in breach of Article 3 of the Convention. In particular, he complained that he had been handcuffed and had not been allowed to wear his own clothes during the funeral; that the prison escort had made it difficult for him to use the toilet before the funeral; and that they had publicly scorned him and had not allowed him to approach his father's coffin.

THE LAW

A. Refusal of leave from prison

28. The applicant complained about a violation of his right to respect for his private and family life on account of the authorities' refusal to allow him to leave the prison in order to see his incurably ill father.

29. Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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."

30. By letter dated 28 July 2011 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by this part of the application. They further requested the Court to strike out this part of the application in accordance with Article 37 of the Convention.

31. The declaration provided as follows:

> "The Government hereby wish to express – by way of a unilateral declaration – their acknowledgment of the fact that the decision of 7 August 2009 of the penitentiary judge of the Lublin Regional Court, refusing to allow the applicant to see his terminally ill father, violated the applicant's right to respect for his family life, as guaranteed by Article 8 § 2 [sic] of the Convention.
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> In these circumstances, and having particular regard to the violation of Article 8 § 2 of the Convention, the Government declare that they offer to pay the applicant the amount of PLN 8,000 (eight thousand Polish zlotys), which they consider to be reasonable in the light of the Court's case law.
>
> ...
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> The sum referred to above, which is to cover any pecuniary and non-pecuniary damage as well as costs and expenses, will be free of any taxes that may be applicable. It will be payable within three months from the date of notification of the decision taken by the Court pursuant to Article 37 § 1 of the European Convention on Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from expiry of that period until settlement, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.
>
> The Government would respectfully suggest that the above declaration might be accepted by the Court as 'any other reason' justifying the striking out of the case of the Court's list of cases, as referred to in Article 37 § 1 (c) of the Convention."

32. In a letter of 3 October 2011 the applicant submitted that he was not interested in the Government's proposal. Instead, he requested them

to reconsider his own friendly settlement proposal, the terms of which he had set out in a previous letter to the Court.

33. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

34. It also recalls that in certain circumstances, it may strike out an application or part thereof under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

35. To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey* [GC], no. 26307/95, §§ 75-77, 6 May 2003; *WAZA Spółka z o. o. v. Poland* (dec.), no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.), no. 28953/03, 18 September 2007).

36. The Court has established in a number of cases brought against Poland its practice concerning complaints about the violation of detainees' right to respect for private and family life on account of the refusal of compassionate leave from prison (see, for example, *Płoski v. Poland*, no. 26761/95, §§ 32-39, 12 November 2002; *Czarnowski v. Poland*, no. 28586/03, §§ 25-33, 20 January 2009; *Krym v. Poland* (dec.), no. 26938/05, 7 October 2008; *Wadielac v. Poland* (dec.), no. 14260/09, 25 May 2010; *Jurga v. Poland* (dec.), no. 30540/09, 22 June 2010; and *Giszczak v. Poland*, no. 40195/08, §§ 36-41, 29 November 2011 (not yet final)).

37. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – the Court considers that it is no longer justified to continue the examination of this part of the application (Article 37 § 1 (c)).

38. Moreover, given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to do so (Article 37 § 1 *in fine*).

39. Accordingly, this part of the application should be struck out of the list.

B. Remaining complaints under Article 3 of the Convention

40. The applicant complained that the manner in which the prison escort officers had treated him during his father's funeral had been incompatible with human dignity, in breach of Article 3 of the Convention. In particular, he complained that he had been handcuffed, not allowed to wear his own clothes during his father's funeral, that the prison escort officers had publicly scorned him, hindered him in using the toilet before the funeral and prevented him from approaching his father's coffin.

41. Article 3 of the Convention provides:

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

42. The Government submitted that the applicant should have lodged a civil action under Article 24 read in conjunction with Article 448 of the Civil Code, seeking compensation from the State Treasury for a breach of his personal rights. Moreover, they pointed out that the applicant had not requested the director of the remand centre for authorisation to wear his own clothes during the funeral ceremony. Consequently, they invited the Court to declare this part of the application inadmissible for non-exhaustion of domestic remedies. Lastly, they submitted that the applicant's complaints were in any event manifestly ill-founded, as the restrictions complained of had been dictated by considerations of security and crime prevention and by the applicant's aggressive behaviour. They considered that, in any event, the impugned restrictions had not exceeded what was reasonably considered necessary in the circumstances of the case.

43. The applicant did not comment on the Government's submissions.

44. The Court recalls that the fact alone of being handcuffed does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence (see *Raninen v. Finland*, no. 20972/92, § 56, 16 December 1997; *Garriguenc v. France* (dec.), no. 21148/02, 15 November 2007; *A.J.P. v. France*, no. 17020/05, § 88, 29 October 2009; *Kashavelov v. Bulgaria*, no. 891/05, § 38, 20 January 2011; *Mirosław Garlicki v. Poland*, no. 36921/07, § 74, 14 June 2011).

45. The Court observes that the applicant in the present case did not complain about the use of force but rather about the allegedly degrading treatment inflicted upon him by the prison escort officers during his father's funeral. In particular, he complained about being handcuffed and publicly exposed to his family members and other persons who attended the ceremony, as well as about other restrictive measures and the behaviour of

the escort officers which, in his view, had infringed his dignity and had been aimed at humiliating him.

46. The Court considers that the coincidence of the above-mentioned measures, if it revealed the existence of a pattern of behaviour aimed at debasing or humiliating the applicant, might reach a degree of intensity which exceeds the level inherent in every arrest and detention and bring such a situation within the ambit of degrading treatment prohibited by Article 3 of the Convention (*Mirosław Garlicki v. Poland*, cited above, § 75). The public nature of the treatment or the mere fact that the victim is humiliated in his own eyes may be a relevant consideration (*Raninen*, cited above, § 55; *Archip v. Romania*, no. 49608/08, § 53, 27 September 2011).

47. However, the Court cannot examine the merits of the complaint under Article 3, as it considers that the applicant did not make use of any domestic remedies. In particular, having regard to the circumstances of the case and to the scope of the applicant's complaint, the Court is not convinced that the penitentiary complaint which he had filed on 20 August 2009 with the Director of Chełm Remand Centre was a remedy capable of providing adequate redress for the alleged breach of his rights under Article 3 of the Convention. In this respect, the Court reiterates, having regard to the principle of subsidiarity, that where the alleged violation of Article 3 no longer continues and cannot be eliminated with retrospective effect, the only means of redress for the applicant is pecuniary compensation (see *Orchowski v. Poland*, no. 17885/04, § 109, 22 October 2009).

48. Given the specific nature of the Convention claim at hand, the Court considers in the circumstances of the present case that the most appropriate remedy which the applicant should have availed himself of was a civil action for compensation for the infringement of his personal rights, under Article 24 read in conjunction with Article 448 of the Civil Code. Article 23 of the Civil Code contains a non-exhaustive list of personal rights which include, *inter alia*, health, liberty and honour, and which are interpreted by established domestic jurisprudence as also including a person's dignity (see paragraph 22 above).

49. In this regard, the Court refers by way of example to some of its prior cases where it has already found that a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code could be considered an "effective remedy" for the purposes of Article 35 § 1 of the Convention in respect of complaints relating to violations of personal rights on account of inadequate conditions of detention (*Łatak v. Poland* (dec.), no. 52070/08, 12 October 2010, § 80), medical care in detention (*Nocha v. Poland* (dec.), no. 21116/09, 27 September 2011), degrading treatment in the course of a person's arrest (*Mirosław Garlicki v. Poland*, cited above, § 77), or in

connection with censorship of detainee's correspondence (*Biśta v. Poland*, no. 22807/07, §§ 48-9, 12 January 2010).

50. Having regard to the above considerations, the Court is of the opinion that the applicant in the present case should have made use of the aforementioned civil action to claim compensation from the State for having been subjected to the alleged violation of his dignity.

51. Furthermore, as regards the specific issue of authorisation to wear his own clothes during the funeral, the Court observes that on 10 August 2009 the applicant requested the penitentiary judge to allow him to attend the funeral which was to take place on the following day. The Court considers that nothing prevented the applicant from requesting the Director of Chełm Remand Centre, on the same day, to grant him leave to wear his own clothes during the funeral ceremony. The applicant failed to explain why, in his view, he had not availed himself of this opportunity, explicitly foreseen by the relevant provision of the Code of Execution of Criminal Sentences.

52. In conclusion, the Court finds that by failing to have recourse to any of the above-mentioned domestic remedies, in particular a civil action for compensation for the infringement of personal rights and a request for leave to wear his own clothes during the funeral, the applicant failed to exhaust the available remedies provided for by Polish law.

53. It follows that the complaint under Article 3 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration in respect of the complaint under Article 8 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in so far as it relates to the above complaint, in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible.

Lawrence Early
Registrar

David Thor Björgvinsson
President