CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 77869/01
by Danuta WITASZAK and Bogusława WITASZAK
against Poland

The European Court of Human Rights (Fourth Section), sitting on 7 March 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 17 February 2001,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Danuta Witaszak and Ms Bogusława Witaszak, are Polish nationals who were born in 1965 and 1958 respectively and live in Nowogród Bobrzański.

A. The circumstances of the case

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

In the evening of 4 June 2000 the applicants had drinks in a bar in Płock. At 6 p.m. approximately the bartender called the police, complaining that the applicants were noisy and boisterous, were drunk and upset other clients.

The police came and took the applicants to the Płock sobering-up centre (*Izba Wytrzeźwień*). The breathalyser test was applied, which showed that the first applicant had 2,52 ‰ of alcohol in the breath. After the breathalyser test the police took the applicants to the local police station and put them in a cell until 6 a.m. on the following day.

In the morning of 5 June 2000 the applicants were told that proceedings were to be instituted against them on charges of having caused a disturbance of public order.

A police officer who was to question the second applicant, having perused the file, told her that she had been arrested without a proper justification and that she would be immediately discharged. She was discharged immediately afterwards. The first applicant was also released at noon approximately, apparently after having been told that she would be charged with having caused a disturbance of public order.

On 11 June 2000 the applicants submitted a complaint to the Płock District Court about their unjustified detention.

The first applicant argued that she had not disturbed public order and that therefore there was no basis on which to arrest and detain her. The second applicant likewise submitted that she had not been intoxicated and had not disturbed public order. She also submitted that she had not been served with the report of her arrest and detention.

By a decision of 28 August 2000 the Płock District Court, having examined the applicants' complaints, dismissed them and held that their detention was justified, lawful and conducted in a way provided for by law.

The court observed that detention in a sobering-up centre could be ordered, under Article 40 of the 1982 Education in Sobriety and the Fight against Alcoholism Act in respect of persons who were intoxicated and behave offensively in a public place or a place of employment, were in a condition endangering their life or health, or were themselves endangering other persons' life or health.

In the applicants' case it was not only their subjective views which should be taken into account, but, first and foremost, the testimony given by the bartender. When interviewed by the police, she had testified that both applicants had been intoxicated, behaved aggressively, used vulgar words and upset other clients. They had failed to react to the bartender's requests to calm down and that was why the bartender had decided to call the police. After the police had come and had confirmed, by a breathalyser test, that the applicants were intoxicated, they were arrested as provided for by Article 40 of the said law.

As to the manner in which the arrest had been carried out, the court did not find any irregularities. It had regard to the fact that before a decision to detain them until they had sobered up was given, the applicants' intoxication had been confirmed, and that a physician of the Sobering-Up Chamber had decided that they were fit to be detained in the police station. An appropriate report had been drafted in respect of the applicant's detention and arrest. Further, certain procedural measures were to be taken, but as the applicants were intoxicated, it was necessary to wait until they sobered up. These measures were taken in the early morning of the next day and afterwards the applicants were released.

On 21 September 2000 the applicants complained to the police that they did not have any access to the reports of their arrest and detention.

In reply of 25 September 2000 the Płock City Police informed them that under Article 244 of the Code of Criminal Procedure persons taken to a sobering up centre did not have the status of a suspect or of an accused in criminal proceedings. Accordingly, the police was not obliged to give them access to these reports and the applicants were refused such access.

B. Relevant domestic law and practice

A. Arrest of intoxicated persons under the Law of 26 October 1982 on Education in Sobriety and the Fight against Alcoholism

The Law of 26 October 1982 on Education in Sobriety and the Fight against Alcoholism (*Ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi)* provides, *inter alia*, for the detention of intoxicated persons who disturb public order.

Article 40 §§ 1 and 2 of the Law provides that intoxicated persons who behave offensively in a public place or a place of employment, are in a condition endangering their life or health, or are themselves endangering other persons' life or health, may be taken to a sobering-up centre or a public health-care establishment, or to their place of residence. In the absence of a sobering-up centre in the vicinity, such persons may be detained at the police station.

A person arrested and, subsequently, confined in a sobering-up centre under Article 40 of the Law was not entitled to bring proceedings challenging the lawfulness of the deprivation of his liberty since only a person arrested on suspicion of having committed an offence could appeal against a decision to arrest him or her (see the Supreme Court judgment No. I KZP 43/91 of 12 February 1992, *OSNKW* 1992 No. 5-6/32).

Under Article 40 § 3 (b) of the Law, as amended on 27 April 2001, a person arrested and detained under the provisions of the Law for the purposes of sobering-up is entitled to request a court to examine retrospectively the lawfulness of such detention. Such a request is to be

submitted to the district court in the jurisdiction of which the person was either arrested or detained. The court shall examine such a request within 7 days. The provisions of the Code of Criminal Procedure apply in such proceedings.

This amendment came into force on 27 June 2001.

Under Article 464 of the Code of Criminal Procedure, parties to criminal proceedings are entitled to participate in the court session at which appeals against interlocutory decisions and orders are examined, but only when such decisions terminate the proceedings in a criminal case.

In other situations, a decision as to whether the parties are to be allowed to attend the court session at which an appeal against decisions and orders other than those which terminate the proceedings is examined, is left to the court's discretion.

B. The Constitutional Court judgment of 11 June 2002

The Constitutional Court examined a complaint in which the complainant argued that Article 40 § 3 (b) of the 1982 Law was incompatible with the right to personal liberty guaranteed by the Constitution. It was submitted that this provision did not ensure that procedural guarantees attached to that right were respected in the proceedings in which the lawfulness of the detention in a sobering-up centre.

The Court held that this provision was unconstitutional and incompatible with the constitutional guarantees of the right to liberty. The Court observed that Article 40 § 3 (b) generally referred to the provisions of the Code of Criminal Procedure as applicable in the proceedings concerning the judicial review of detention under the provisions of the 1982 Law. Article 464 of that Code, concerning appeals against interlocutory decisions, provided for the presence of parties at court sessions at which their appeals against interlocutory decisions and orders terminating the proceedings were examined. In respect of all other appeals, a court could allow the parties to attend such a session.

The Court observed that it was insufficient from the point of view of procedural guarantees of the right of liberty and security that the presence of the parties at a court session concerning a judicial review of a decision to detain a person in the sobering-up centre was not mandatory, but left to the court's discretion.

It further observed that proceedings in which the lawfulness of deprivation of liberty was examined should meet at least certain requirements of a fair hearing, given the importance of the right to personal liberty in a democratic society. The public character of proceedings was one of the elements of the fair hearing. The public character of proceedings was to be understood, on the one hand, in such a way that the general public should be allowed to attend court sessions held in such proceedings. On the other hand, it also meant that the parties should be given an opportunity to

participate in such sessions in a manner enabling them to submit their arguments to the court and, in particular, to be heard by the court. In this connection, the Court concluded that Article 40 § 3 (b) was unconstitutional insofar as it was understood and applied as not allowing the party to effectively participate in the judicial review of the lawfulness of the detention ordered on the basis of the 1982 Law by attending a relevant court session.

COMPLAINTS

The applicants complain that their arrest and subsequent detention in the Płock sobering-up centre and subsequently at the police station from 4 to 5 June 2000 had been unlawful and arbitrary and had therefore amounted to a violation of Article 5 § 1 of the Convention. There were no reasonable grounds on which to accept that they had disturbed public order. First they were informed that they had been arrested under the 1982 Act to sober up, but on the morning of 5 June 2000 they were told that it was because "investigative measures" had to be taken in respect of a criminal case to be instituted against them.

They complain under Article 5 § 2 that their right to be informed promptly of the reasons of their arrest was breached.

The applicants further complain under Article 13 that they did not have a right to challenge the lawfulness of their arrest and detention. Applicable law as it stood at the relevant time did not provide for it and it was a matter of pure luck that the court examined their complaint.

Lastly, they complain that the proceedings in which they challenged the lawfulness of their detention were unfair. This was so because the court's decision was based on incomplete and biased material submitted to the police. They also submit that in the proceedings in which the court examined their appeal against the detention order they did not have access to the case-file and to the material gathered by the police, and that the police, when requested afterwards to give them such access, refused it.

THE LAW

1. The applicants complain that their arrest and subsequent detention in the Płock sobering-up centre and subsequently at the police station from 4 to 5 June 2000 was unlawful and arbitrary and therefore amounted to a violation of Article 5 § 1 of the Convention.

They complain under Article 5 § 2 that their right to be informed promptly of the reasons of their arrest was breached. First they were

informed that they had been arrested under the 1982 Act to sober up, but on the morning of 5 June 2000 they were told that it was because "investigative measures" had to be taken in respect of their case.

They complain that the proceedings in which they challenged the lawfulness of their arrest and detention were unfair. This was so because the court's decision was based on incomplete and biased material submitted to the police. They also submit that in these proceedings they did not have access to the case-file and to the material gathered by the police and that the police, when requested afterwards to give them such access, refused it.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicants complain under Article 13 that they did not have a right to challenge the lawfulness of their arrest and detention. Applicable law as it stood at the relevant time did not provide for it and it was a matter of pure luck that the court examined their complaint.

The Court acknowledges that until 27 June 2001 the Law of 26 October 1982 on Education in Sobriety and the Fight against Alcoholism did not expressly and specifically provide for a judicial procedure in which the lawfulness of the detention effected under the provisions of this Law could be challenged and reviewed. It was only as a result of the amendment to that Law enacted on 27 April 2001 that such a right was expressly recognised.

However, the Court observes that the applicants complained to the court in the jurisdiction of which their arrest and detention were effected. In their submissions, they challenged the lawfulness of their arrest and detention on 4 June 2000 and argued that the deprivation of liberty was, in the light of the circumstances, unjustified. The Płock District Court admitted their complaints and examined the merits of the complaints, referring to Article 464 of the Code of Criminal Procedure. When doing so, the court examined the applicants' arguments concerning the alleged unlawfulness of their detention, considered them ill-founded and held that their detention was justified, lawful and conducted in a way provided for by law.

It is true that the applicants' appeals failed. However, the Court reiterates that Article 13 of the Convention requires that any individual who has been harmed by a measure allegedly contrary to the Convention should have a remedy before a national authority in order both to have his claim decided (*Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, pp. 29-30, § 77). That provision does not, however, require the certainty of a favourable outcome (see the D. v. the United Kingdom judgment of 2 May 1997, *Reports* 1997-III, p. 798, § 71).

In the present case, the national judicial authority examined the substance of the applicants' complaint about the alleged unlawfulness of the

deprivation of liberty under the provisions of the 1982 Act of which they now complain to the Court. The Court considers that the mere fact that it proved unsuccessful does not suffice for a finding that no effective remedy was available to them in respect of their Convention complaints (see, *mutatis mutandis,* No. 33979/96, Dec. 21 March 2000, No. 45701/99, Dec. 7 June 2001).

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaints concerning the alleged unlawfulness of their arrest and detention, about the authorities' failure to inform them promptly of the reasons for their arrest and about the alleged lack of adversarial proceedings in which their retrospective appeal against the detention order was examined;

Declares inadmissible the remainder of the applicants' complaints.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President