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

FOURTH SECTION

CASE OF SŁAWOMIR MUSIAŁ v. POLAND

(Application no. 28300/06)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Sławomir Musiał v. Poland,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 28300/06) 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") by a Polish national, Mr Sławomir Musiał ("the applicant"), on 18 June 2006.

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

3. The applicant alleged that the medical care and treatment offered to him during his detention in Sosnowiec and Zabrze Remand Centres and Herby Stare Prison had been inadequate in view of his epilepsy, schizophrenia and other mental disorders. He also complained of overcrowding and poor conditions in the above-mentioned detention facilities.

4. On 30 August 2007 the President of the Fourth Section of the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention and Rule 41 of the Rules of the Court, it was decided to examine the merits of the application at the same time as its admissibility and to give priority to the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and is currently detained in Herby Stare Prison, Poland.

6. The applicant has been suffering from epilepsy since his early childhood. More recently he has been diagnosed with schizophrenia and other serious mental disorders. Prior to his detention, he had attempted to commit suicide and had received in-patient treatment in a psychiatric hospital.

A. The applicant's medical treatment in detention

7. On 19 April 2005 the Będzin District Court (*Sąd Rejonowy*) remanded the applicant in custody on suspicion of committing robbery and battery. Subsequently, the applicant's pre-trial detention was extended by the Będzin District Court in decisions of 14 October 2005 and 11 January 2006, and by the Myszków District Court in decisions of 5 June and 28 September 2006.

8. On being taken into detention, the applicant was committed to an unspecified remand centre, presumably Sosnowiec Remand Centre.

9. On 20 April 2005 he was taken to a State psychiatric hospital in Czeladź experiencing intensive auditory hallucinations of a psychotic nature. He remained there for two days.

10. On 22 April 2005 the applicant was committed to Zabrze Remand Centre but on the same day he was transferred to Rybnik Psychiatric Hospital for observation. On 17 or 18 July 2005 the applicant was transferred back to Zabrze Remand Centre and he remained there until 4 January 2006.

11. During his detention in Zabrze Remand Centre the applicant was taking psychotropic medicines and he was examined by a psychiatrist on 19 July, 23 August, 6, 21 and 27 September, 8 and 22 November, and 20 and 30 December 2005. In addition, the applicant was under the constant supervision of a psychologist who examined him on 19 July, 23 August, 15 November and 15 December 2005. Finally, the applicant was examined by a prison general practitioner in connection with dermatological problems, coughs, backaches and gastrological disorders.

12. From 4 January until 5 April 2006 the applicant was detained in Sosnowiec Remand Centre.

13. On 15 January 2006 he was again taken to Czeladź Psychiatric Hospital experiencing auditory hallucinations and suicidal thoughts. On the following day the applicant's condition stabilised. He was prescribed

medicines and returned to Sosnowiec Remand Centre. It was suggested that he should remain under psychiatric supervision.

14. On 23 January 2006 at about 11 p.m. the applicant attempted to hang himself in Sosnowiec Remand Centre. He was rescued by his fellow cellmates. Immediately afterwards he was examined by the in-house doctor, who did not find any injuries.

15. On 24 January 2006 the applicant was taken to Czeladź Psychiatric Hospital. Because of the lack of places, he was transported to Opole Psychiatric Hospital, where he was examined by doctors. The applicant was diagnosed with schizophrenia and it was suggested that he remain under psychiatric supervision. Nevertheless, the applicant was not admitted to the hospital as there was no room. As a result, he was taken back to Sosnowiec Remand Centre.

16. During his remaining time in Sosnowiec Remand Centre the applicant claimed that he had experienced hallucinations. He received regular pharmacological treatment, including psychotropic medicines. Between January and April 2006 he was examined nine times by a psychiatrist or a general practitioner.

17. On 22 May 2006 the applicant was transferred to Herby Stare Prison.

18. On his admission to Herby Stare Prison the applicant was examined by a neurologist. The examination did not confirm that the applicant suffered from the disorders which he had described, such as epilepsy, hallucinations and anxiety; nevertheless, the doctor prescribed pharmacological treatment and ordered a psychiatric consultation and observation.

19. On 25 May 2006 the applicant was examined by a psychiatrist. He complained that he was suffering from insomnia and auditory hallucinations. Moreover, he claimed to have been followed and spied on by his cellmates. The doctor prescribed a drug to treat the applicant's schizophrenia and ordered that he should remain under the supervision of a psychiatrist.

20. On 1 June 2006 the applicant missed his appointment with a psychiatrist but he was examined one week later. On 27 June 2006 he was examined by a general practitioner and on 10 July 2006 once more by a psychiatrist. During the latter visit, the applicant declared that he was well.

21. Subsequently, between July 2006 and August 2007 the applicant was examined thirty-five times by doctors with different specialities, including a psychiatrist and a neurosurgeon.

22. It appears that from 2 April until 4 June 2007 the applicant was hospitalised in a prison psychiatric ward.

23. From 4 June until 23 or 28 August 2007 he was again detained in Herby Stare Prison. On the day of his release the applicant declared that he was well and had not been experiencing any hallucinations lately.

24. On 7 September 2007 the applicant was again committed to Herby Stare Prison. He has been detained there to this day.

B. Conditions of the applicant's detention

25. The parties' statements relating to the conditions of the applicant's detention are, to a large extent, contradictory.

1. Zabrze Remand Centre

(a) Uncontested facts

26. In Zabrze Remand Centre, from 18 July until 20 October 2005, the applicant was detained in cell no. 41 and from 20 October 2005 until 4 January 2006 in cell no. 42. Both cells measured approximately 6.7 square metres.

(b) Facts in dispute

(i) The Government

27. The Government did not provide any information as to the number of detainees sharing cells with the applicant. They submitted, however, that Zabrze Remand Centre had faced the problem of overcrowding; indeed, its governor decided to reduce the statutory minimum standard of three square metres per person. On 14 June, 30 September and 29 November 2005 a penitentiary judge was informed about the Governor's decision.

28. The Government also submitted that in Zabrze Remand Centre each of the applicant's cells had had an annex with a toilet cubicle and a washbasin. That area was separated from the rest of the cell and offered privacy. Detainees were supplied with toiletries and bed linen was changed once every two weeks. The window surface in each of the applicant's cells was over one square metre. The applicant was allowed to take a shower once a week. The shower room had eight shower heads. Sixteen people were allowed inside and they showered in two groups on a rotation basis.

29. In the Government's submission the applicant had been allowed to have one hour of outdoor exercise in one of seven yards, two of which measured 150 and 120 square metres. The applicant could also participate in social activities two or three times per week for approximately two hours. In addition, he could stay in an entertainment room watching television, reading or playing board games. Finally, in the Government's submission the applicant had access to radio and television programmes through the prison internal broadcasting system and he could rent five books per week from a prison library.

30. The Government submitted that the applicant had not been given any disciplinary punishments while in Zabrze Remand Centre. On the contrary, he had twice been rewarded for good behaviour.

(ii) The applicant

31. The applicant submitted that he shared the cells in question with two other inmates.

32. Moreover, he maintained that his cells had been dirty and infested with bedbugs, cockroaches and fungus. Detainees had smoked cigarettes all day long inside the cells. The bed linen and towels were not properly washed and there was a stench in the air. The detainees had washed in cold water. The applicant also claimed that there had been no television set or board games in the entertainment room and that he had not been informed about any social activities available in the remand centre.

33. The applicant also complained of the practice of bullying detainees by the staff of Zabrze Remand Centre. He submitted that warders had ordered disciplinary punishment under any pretext, demolished cells during frequent and unjustified searches, made detainees undress and do squats and also deprived them of sleep.

2. Sosnowiec Remand Centre

(a) Uncontested facts

34. In Sosnowiec Remand Centre, between 4 January and 5 April 2006, the applicant was initially detained in cell no. 37, which measured almost sixteen square metres and was shared by four to five persons including the applicant. From 6 February until 30 March 2006 he was detained together with two other detainees in the medical wing's cell no. 58. That cell measured thirteen square metres. Finally, from 30 March until 5 April 2006 he was detained in cell no. 56, which measured ten square metres and a half and was shared by two people. When the number of new admissions increased as of January 2006, the governor of Sosnowiec Remand Centre decided to reduce the available cell space below the minimum statutory limit and to convey the necessary information to the competent penitentiary judge.

(b) Facts in dispute

(i) The Government

35. The Government submitted that the sanitary conditions in Sosnowiec Remand Centre had been decent. Each cell had a separate sanitary annex with a toilet cubicle and a washbasin. Detainees took a hot bath or shower once a week. During his detention in cell no. 58 the applicant could take one

bath per day. In that cell detainees had access to hot water. In all other cells they were allowed to use a water immersion heater or a wireless kettle. All cells were sufficiently lit and ventilated. Detainees had one hour of outdoor exercise per day and they were also allowed to spend time in an entertainment room. The entertainment room in Wing IV of Sosnowiec Remand Centre, where the applicant had been detained, was equipped with board games and tables to play table football and table tennis. In addition, in the remand centre detainees had access to a library and, in the spring and summertime, to a volleyball court.

(ii) The applicant

36. The applicant contested the above submissions by saying that sanitary conditions in Sosnowiec Remand Centre had been inadequate. The cells were damp and dirty, the towels and bed linen were not washed and the detainees washed in cold water.

3. Herby Stare Prison

(a) Uncontested facts

37. The applicant was detained in Herby Stare Prison during three separate periods: from 22 May 2006 and 2 April 2007, from 4 June and 28 August 2007, and from 7 September 2007 onwards.

(b) Facts in dispute

(i) The Government

38. The Government supplied the list of cells which the applicant had occupied at different periods. The surface area of these cells varied between ten and eighteen square metres. Their occupancy rate, however, had not been disclosed. On the other hand, the Government submitted that the prison's governor had made a decision to reduce the available cell space below the minimum statutory limit and that between May 2006 and October 2007 he had informed a penitentiary judge about that fact on nineteen occasions.

39. They claimed that in Herby Stare Prison the sanitary conditions had been decent. Each cell had a separate sanitary annex with a toilet cubicle and a washbasin. Detainees took a hot bath or shower once a week. The bath house was equipped with nineteen shower heads and four or five persons were allowed inside at a time.

(ii) The applicant

40. The applicant argued that all the cells in which he had been detained had been seriously overcrowded. For example, cell no. 32, which measured eighteen square metres, had been shared by nine or ten persons.

41. The applicant also submitted that sanitary conditions in Herby Stare Prison had been inadequate. Similarly to the other detention facilities where he had been held, the cells were damp and dirty, the towels and bed linen were not washed and the detainees washed in cold water. In addition in Herby Stare Prison the shower room was located in a separate building. In wintertime in particular, it had been difficult for detainees to walk back to the living quarters with wet hair and without proper clothing. Moreover the applicant complained of the lack of privacy because the showers had not been separated.

C. The applicant's complaints to domestic courts and authorities

42. The applicant did not lodge any formal complaints with the penitentiary authorities on the basis of the Code of Execution of Criminal Sentences. He complained, however, to various State authorities, i.e. to the Ombudsman (*Rzecznik Praw Obywatelskich*) about the inadequate medical care he had received and the conditions of his detention. He also filed several requests for release on health grounds.

43. In a letter of 6 July 2006 the Ombudsman informed the applicant that his allegations had been considered ill-founded. It was emphasised that the applicant had been under constant psychiatric supervision and that he had been hospitalised whenever necessary.

44. On 31 July 2006 the Myszków District Court refused to release the applicant from pre-trial detention on health grounds as requested by his lawyer. The court referred to unspecified medical reports which stated that the applicant was not suffering from any mental illness, but merely from an antisocial personality disorder.

45. On 23 November 2006 the Częstochowa Regional Court (*Sąd Okręgowy*) dismissed an interlocutory appeal by the applicant against a decision of 28 September 2006 by which the Myszków District Court had extended his pre-trial detention.

46. The applicant argued that, because of his mental illness, he should not be held in a detention centre but in a psychiatric hospital. He referred to a number of medical reports which had confirmed his schizophrenia diagnosis and in which it had been recommended that he should remain under psychiatric supervision.

47. The Częstochowa Regional Court held that there were no contraindications to the applicant's detention in a remand centre. The court stated that, admittedly, a number of psychiatrists from both State and prison hospitals had directed that the applicant should be placed under psychiatric

supervision. The court observed, however, that the diagnosis was not credible since the doctors had not had long-term contact with the applicant and had not had full access to his medical records. Instead, the court relied on an opinion delivered by experts in psychiatry from Rybnik Hospital, who were of the view that the applicant was not suffering from any psychotic disorder. The court stressed that, unlike the others, the latter expert opinion was thorough, as it had been drawn up further to the applicant's five-week period under psychiatric observation at Rybnik Hospital in 2005 and based on the medical records of his psychiatric treatment prior to his detention. On the other hand, the court took note of discrepancies between the medical reports before it and recommended that the report of the experts from Rybnik Psychiatric Hospital be updated. Nevertheless, the court did not agree to release the applicant from pre-trial detention in a remand centre.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant constitutional provisions[1]

48. Article 2 of the Constitution reads as follows:

> "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice."

Article 40 of the Constitution reads:

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

Article 41 of the Constitution, in its relevant part, provides:

> "4. Anyone deprived of liberty shall be treated in a humane manner."

B. General rules on conditions of detention

1. Code of Execution of Criminal Sentences

49. Article 110 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy* – "the Code") provides:

> "1. A sentenced person shall be placed in an individual cell or a cell shared with other inmates.
>
> 2. The area of the cell shall be no less than 3 square metres per detainee."

[1] The Court's translation is based on the text of the official translation made for the research department of the *Sejm* (lower house of the Polish Parliament) Chancellery.

Article 248 of the Code provides:

> "1. In particularly justified cases a governor of a prison or remand centre may decide to place detainees, for a specified period of time, in conditions where the area of the cell is less than 3 square metres per person. Any such decision shall be promptly communicated to a penitentiary judge.
>
> 2. The Minister of Justice shall determine, by means of an ordinance, the rules which are to be followed by the relevant authorities in a situation where the number of persons detained in prisons and remand centres exceeds on a nationwide scale the overall capacity of such establishments ..."

2. The 2000 and 2003 Ordinances

50. On the basis of Article 248 of the Code, the Minister of Justice issued the Ordinance of 26 October 2000 on the rules to be followed by the relevant authorities when the number of persons detained in prisons and remand centres exceeded on a nationwide scale the overall capacity of such establishments (*Rozporządzenie Ministra Sprawiedliwości w sprawie trybu postępowania właściwych organów w wypadku, gdy liczba osadzonych w zakładach karnych lub aresztach śledczych przekroczy w skali kraju ogólną pojemność tych zakładów* – "the 2000 Ordinance"). On 26 August 2003 the Minister of Justice issued a new ordinance with the same title ("the 2003 Ordinance"), which replaced the previous ordinance. It entered into force on 1 September 2003.

Paragraph 1.1 of this Ordinance provided:

> "In the event that the number of detainees placed in prisons and remand centres, as well as in subordinate detention facilities, hereinafter referred to as 'establishments', exceeds on a nationwide scale the overall capacity of such establishments, the Director General of the Prison Service, within seven days from the day the capacity is exceeded, shall convey the relevant information to the Minister of Justice, the regional directors of the Prison Service and the governors of the establishments ..."

Paragraph 2 of the Ordinance read:

> "1. Having received the relevant information, the regional director of the prison service and the governor of the establishment are under a duty, each within their own sphere of competence, to take action in order to adapt quarters not otherwise included in the establishment's [accommodation] capacity, to comply with the conditions required for a cell.
>
> ...
>
> 3. In the event that the establishment's capacity is exceeded, detainees shall be placed in supplementary cells for a specified period of time.
>
> 4. In the event that the additional accommodation in the supplementary cells is used up, detainees may be placed in conditions where the area of a cell is less than 3 square metres per person."

C. Medical and psychiatric care in detention facilities

51. The general duty of the State to protect persons with mental disabilities is derived from the Mental Health Protection Act of 19 August 1994 (*Ustawa o ochronie zdrowia psychicznego* – "the 1994 Act"), which entered into force on 21 January 1995. The 1994 Act recognises mental health as a fundamental personal right of every person.

Specific rules regarding detention in a medical institution, as well as psychiatric care in prisons and remand centres, are provided for in the Code of Criminal Procedure and the Code of Execution of Criminal Sentences, as well as in a number of ordinances issued by the Minister of Justice.

Article 259, paragraph 1, of the Code of Criminal Procedure provides that, unless there are particular reasons to the contrary, pre-trial detention should be waived if it could result in putting a detainee's life or health at risk.

Article 260 of the Code of Criminal Procedure, on the other hand, provides:

> "If required by the accused's health condition, [his] pre-trial detention may take the form of placement in a suitable medical establishment."

Article 213 of the Code of Execution of Criminal Sentences provides:

> "In cases described in the Code of Criminal Procedure, pre-trial detention shall take place outside a remand centre, in a medical establishment indicated by an authority responsible for the detainee. The same authority shall also provide directions as to the conditions of the detainee's placement in the indicated medical establishment."

On the basis of Article 115, paragraph 10, of the Code of Execution of Criminal Sentences, the Minister of Justice issued the Ordinance of 31 October 2003 on the detailed rules, scope and procedure relating to the provision of medical services to persons deprived of their liberty by health-care establishments for persons deprived of their liberty (*Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowych zasad, zakresu i trybu udzielania świadczeń zdrowotnych osobom pozbawionym wolności przez zakłady opieki zdrowotnej dla osób pozbawionych wolności* – "the October 2003 Ordinance"). It entered into force on 17 December 2003.

Under paragraph 1.1 of the October 2003 Ordinance, health-care establishments for persons deprived of their liberty provide, *inter alia*, medical and psychological examinations, medical and psychological treatment and preventive medical care to persons deprived of their liberty.

Paragraph 1 of this Ordinance further provides:

> "2. In justified cases, if the medical services as enumerated in sub-paragraph 1 cannot be provided to persons deprived of their liberty by the health-care establishments for persons deprived of their liberty, in particular owing to the lack of specialised medical equipment, such medical services may be provided by public health-care establishments.

3. In cases described in sub-paragraph 2, the head of a health-care establishment for persons deprived of their liberty shall decide whether or not such medical services [provided by public health-care establishments] are necessary...”

Paragraph 7 of the October 2003 Ordinance states:

“1. The decision to place a person deprived of his liberty in a prison medical centre shall be taken by a prison doctor or, in his absence, by a nurse ...

2. The decision as to whether or not it is necessary to place a person deprived of his liberty in a ... prison hospital shall be taken by the prison hospital's director or by a delegated prison doctor.”

Paragraph 11 of the October 2003 Ordinance provides:

“In the event of a suspicion that a person deprived of his liberty suffers from mental disorders, mental retardation ..., the prison doctor:

(1) shall give directions as to the placement of the person concerned in prison, the manner of observation and the mode of proceeding [with the person concerned];

(2) shall direct the person concerned to undergo a psychiatric examination.”

Paragraph 12.1 of the October 2003 Ordinance states:

“A person deprived of his liberty shall be placed in the psychiatric ward of a prison hospital:

(1) if a court has ordered the examination of such person together with psychiatric observation;

(2) [if this has been] directed – in compliance with the rules of the Mental Health Protection Act of 19 August 1994 – by a psychiatrist because of the diagnosis of mental disorders which require examination or treatment in hospital.”

Paragraph 13 of the October 2003 Ordinance further provides:

“In justified cases, if, as a result of a psychiatric examination together with psychiatric observation, a person deprived of his liberty has been diagnosed with mental illness, mental retardation or any other mental dysfunction ..., based on the decision of a chief doctor, [such person] shall remain in the psychiatric ward of a prison hospital until the relevant court's ruling.”

52. On the basis of Article 249 of the Code of Execution of Criminal Sentences, the Minister of Justice issued the Ordinance of 25 August 2003 on the code of practice for the organisation and arrangement of pre-trial detention (*Rozporządzenie Ministra Sprawiedliwości w sprawie regulaminu organizacyjno-porządkowego wykonywania tymczasowego aresztowania* - “the August 2003 Ordinance”). It entered into force on 1 September 2003.

The August 2003 Ordinance states that pre-trial detention takes place in remand centres. However, paragraph 28 of the Ordinance provides:

“1. With regard to detainees held in hospitals ..., as well as chronically ill [detainees], the governor [of a remand centre] may, at the request of or after

consultation with a doctor, make necessary exceptions to the arrangements for pre-trial detention as envisaged in the code of practice, in so far as this is justified by the health condition of the detainees concerned.

2. Sub-paragraph 1 shall be applied in respect of detainees who have been diagnosed with non-psychotic psychiatric disorders, mental retardation ... The governor [of a remand centre] may make [necessary] exceptions at the request of or after consultation with a doctor or a psychologist."

53. The rules governing cooperation between prison health-care establishments and public health-care facilities are set out in the Ordinance of the Minister of Justice issued on 10 September 2003 on the detailed rules, scope and procedure for the cooperation of health-care establishments with health services in prisons and remand centres in the provision of medical services to persons deprived of their liberty (*Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowych zasad, zakresu i trybu współdziałania zakładów opieki zdrowotnej ze służbą zdrowia w zakładach karnych i aresztach śledczych w zapewnianiu świadczeń zdrowotnych osobom pozbawionym wolności* – "the September 2003 Ordinance"). It entered into force on 17 October 2003.

D. Judicial review and complaints to administrative authorities

54. Detention and prison establishments in Poland are supervised by penitentiary judges who act under the authority of the Minister of Justice.

Under Article 6 of the Code of Execution of Criminal Sentences ("the Code") a convicted person is entitled to make applications, complaints and requests to the authorities enforcing the sentence.

Article 7, paragraphs 1 and 2, of the Code provides that a convicted person can challenge before a court any unlawful decision issued by a judge, a penitentiary judge, a governor of a prison or a remand centre, a regional director or the Director General of the Prison Service or a court probation officer. Applications relating to the execution of prison sentences are examined by a competent penitentiary court.

The remainder of Article 7 of the Code reads as follows:

"3. Appeals against decisions [mentioned in paragraph 1] shall be lodged within seven days of the date of the pronouncement or the service of the decision; the decision [in question] shall be pronounced or served with a reasoned opinion and an instruction as to the right, deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority which issued the contested decision. If [that] authority does not consider the appeal favourably, it shall refer it, together with the case file and without undue delay, to the competent court.

4. The Court competent for examining the appeal may suspend the enforcement of the contested decision ...

5. Having examined the appeal, the court shall decide either to uphold the contested decision, or to quash or vary it; the court's decision shall not be subject to an interlocutory appeal."

In addition, under Article 33 of the Code, a penitentiary judge is entitled to make unrestricted visits to detention facilities, to acquaint himself with documents and to be provided with explanations from the management of these establishments. A penitentiary judge also has the power to communicate with persons deprived of their liberty without the presence of third persons and to examine their applications and complaints.

Article 34 of the Code in its relevant part reads as follows:

"1. A penitentiary judge shall quash an unlawful decision [issued by, *inter alia*, the governor of a prison or remand centre, the Regional Director or the Director General of the Prison Service] concerning a person deprived of his liberty.

2. An appeal to the penitentiary court lies against the decision of a penitentiary judge...

4. In the event of finding that the deprivation of liberty is not in accordance with the law, a penitentiary judge shall, without undue delay, inform the authority [in charge of the person concerned] of that fact, and, if necessary, shall order the release of the person concerned."

Lastly, Article 102, paragraph 10, of the Code guarantees a convicted person a right to lodge applications, complaints and requests with other competent authorities, such as the management of a prison or remand centre, heads of units of the Prison Service, penitentiary judges, prosecutors and the Ombudsman. Detailed rules on the procedure are laid down in the Ordinance of the Minister of Justice issued on 13 August 2003 on dealing with applications, complaints and requests by persons detained in prisons and remand centres (*Rozporządzenie w sprawie sposobów załatwiania wniosków, skarg i próśb osób osadzonych w zakładach karnych i aresztach śledczych* – "the August 2003 Ordinance").

E. Civil remedies

1. Relevant legal provisions

55. Article 23 of the Civil Code contains a non-exhaustive list of so-called "personal rights" (*prawa 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."

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."

Article 445 § 1 of the Civil Code, applicable in the event 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:

> "... [T]he court may award to the injured person an adequate sum in pecuniary compensation for the damage suffered."

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 seeking 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 ..."

In addition, Articles 417 et seq. of the Polish Civil Code provide for the State's liability in tort.

Article 417 § 1 of the Civil Code formerly provided:

> "The State Treasury shall be liable for damage (*szkoda*) caused by an agent of the State in carrying out acts entrusted to him."

After being amended in 2004, Article 417 § 1 of the Civil Code provides:

> "The State Treasury, or [as the case may be] a self-government entity or other legal person responsible for exercising public authority, shall be liable for any damage (*szkoda*) caused by an unlawful act or omission [committed] in connection with the exercise of public authority."

2. Case-law of civil courts as submitted by the Government

56. In their submissions on the admissibility and the merits of the case the Government referred to the judgment of the Supreme Court of 28 February 2007 and to nine recent judgments in which domestic courts had examined claims for compensation brought by former detainees on account of the alleged infringement of their personal rights.

(a) Supreme Court's judgment of 28 February 2007

57. On 28 February 2007 the Supreme Court recognised for the first time the right of a detainee under Article 24, read in conjunction with Article 448 of the Civil Code, to lodge a civil claim against the State

Treasury for damage resulting from overcrowding and inadequate living and sanitary conditions in a detention establishment.

That judgment originated from the civil action brought by a certain A.D., who was remanded in custody shortly after he had suffered a complicated fracture of his leg and arm. The plaintiff argued that he had not received adequate medical care in detention and that he had been detained in overcrowded cells in poor sanitary conditions.

The Supreme Court quashed the second-instance judgment in which the applicant's claim had been dismissed. The Supreme Court held that the case should have been examined under Article 24, in conjunction with Article 448 of the Civil Code, and that it was the respondent who had the burden of proving that the conditions of detention had been in compliance with the statutory standards and that the plaintiff's personal rights had not been infringed. The case was remitted to the appeal court.

58. On 6 December 2007 the Wrocław Court of Appeal examined the case under Article 24 in conjunction with Article 448 of the Civil Code, as interpreted by the Supreme Court. The appeal court reiterated that overcrowding coupled with inadequate living and sanitary conditions in a detention facility could give rise to degrading treatment in breach of a detainee's personal rights. The court condemned the practice of maintaining high rates of occupation in detention facilities throughout the country and stressed that the minimum standard of three square metres per person was to be reduced only in exceptional circumstances and for a short period of time. On the other hand, the Wrocław Court of Appeal observed that in the light of the Supreme Court's established case-law, a trial court did not have a duty to award compensation for each personal right's infringement. One of the main criteria in assessing whether or not to award compensation for a breach of a personal right was the degree of fault on the part of a respondent party. The court held that in relation to the overcrowding, no fault could be attributed to the management of a particular detention facility since the management were not in a position to refuse new admissions even when the average capacity of a detention facility had already been exceeded. Considering the large scale of the problem in the country and the fact that the competent authorities had not acted with a particular intent to humiliate the plaintiff or in bad faith, the appeal court found that awarding compensation for a breach of personal rights on account of overcrowding and poor conditions of detention would contradict the universal sense of justice. Ultimately, the case was dismissed.

(b) Judgments of other civil courts

59. In five of the other cases cited by the Government the plaintiffs, non-smokers detained with smoking inmates, had been awarded compensation because it had been found that they were at risk of suffering or had actually suffered a health disorder.

Another one of the cases referred to concerned a prisoner who had suffered food poisoning in prison and another one concerned a detainee who had been beaten up by his fellow inmate.

In another case, of a certain J.K., who had been detained for seven days in an overcrowded and unsanitary cell, the Warsaw Court of Appeal had granted partial compensation on account of the fact that the prison's governor had failed to inform a competent penitentiary judge, in compliance with the applicable procedure, about the problem of overcrowding present at the time when the plaintiff was serving his sentence there.

Finally, in the case of a certain S.G. the Cracow Court of Appeal had held that there had been no legal basis to grant compensation for detaining the plaintiff in an overcrowded cell. The court observed that the protection of personal rights offered by Article 24 § 1 of the Civil Code was conditional on two elements: firstly, there must have been an infringement or a risk of infringement of the right protected; secondly, the infringement must have resulted from an unlawful act or omission. It was reiterated that an act or omission was not unlawful, even though it might breach personal rights, as long as it was based on a valid legal provision. The court further noted that the plaintiff had the burden of proving the infringement or the risk of infringement while the respondent had the burden of proving that his acts or omissions were not unlawful. The Cracow Court of Appeal held that detaining the plaintiff in conditions below the minimum standard established by Article 110 § 2 of the Code of Execution of Criminal Sentences was not unlawful, as it was regulated by the 2003 Ordinance.

F. Constitutional Court's practice

1. The Ombudsman's application

60. On 13 December 2005 the Ombudsman made an application under Article 191, read in conjunction with Article 188 of the Constitution, to the Constitutional Court, asking for the 2003 Ordinance to be declared unconstitutional. More specifically, the Ombudsman asked for it to be declared incompatible with Articles 40 and 41 of the Constitution and Article 3 of the European Convention on Human Rights. In particular, the Ombudsman challenged paragraph 2(4) of the 2003 Ordinance, which allowed the prison authorities to place a detainee in a cell where there was an area of less than 3 square metres per person, for an indefinite period of time. This, in his opinion, was contrary to the interim nature of Article 248 of the Code of Execution of Criminal Sentences and led to the legitimisation of the chronic overcrowding in detention facilities.

On 18 April 2006 the Ombudsman limited the scope of his initial application, asking the Constitutional Court (*skarga konstytucyjna*) to

declare paragraph 2(4) of the 2003 Ordinance to be in breach of Article 41 of the Polish Constitution.

On 19 April 2006, a day before the date set for the Constitutional Court's hearing, the Minister of Justice abrogated the impugned Ordinance in its entirety and issued a new one under the same title and with immediate effect ("the 2006 Ordinance"). The provisions of the new 2006 Ordinance remain the same as in the previous instrument, except for paragraph 2(4), which currently reads as follows:

> "In the event that the additional accommodation in the supplementary cells is used up, detainees may be placed, for a specified period of time, in conditions where the area of a cell is less than 3 square metres per person."

As a consequence of these changes, on 19 April 2006 the Ombudsman withdrew his application.

2. Judgment of 26 May 2008

61. On 22 May 2006 a certain J.G., who was at the time in prison, made a constitutional complaint (*skarga konstytucyjna*) under Article 191, read in conjunction with Article 79 of the Constitution, asking for Article 248 of the Code of Execution of Criminal Sentences to be declared unconstitutional. He alleged that the impugned provision infringed, *inter alia*, the prohibition of torture and inhuman or degrading treatment as derived from Articles 40 and 41 of the Constitution. He challenged Article 248 in particular in so far as it allowed for the placement of detainees for an indefinite period of time in cells below the statutory size.

On 26 May 2008 the Constitutional Court held, *inter alia,* that the impugned Article 248 of the Code of Execution of Criminal Sentences was in breach of Article 40 (prohibition of torture or cruel, inhuman, or degrading treatment or punishment), Article 41 § 4 (right of a detainee to be treated in a humane manner) and Article 2 (the principle of the rule of law) of the Constitution. The court stressed that the provision lacked clarity and precision, which allowed for a very broad interpretation.

The Constitutional Court found that, in effect, the provision in question allowed for an indefinite and arbitrary placement of detainees in cells below the statutory size of three square metres per person, thus causing chronic overcrowding in Polish prisons and exposing detainees to the risk of inhuman treatment. The court observed that the overcrowding of detention facilities had to be treated as a serious problem, posing a permanent threat to rehabilitation of prisoners. Moreover, in the court's view, the overcrowding in itself could be qualified as inhuman and degrading treatment. If combined with additional aggravating circumstances, it may even be considered as torture. In that connection the court noted that already the minimum statutory standards of three square metres per person was one of the lowest ones in Europe.

The Constitutional Court further stressed that the provision in question was meant to be applied only in particularly justified cases, for example an engineering or building disaster in prison. Such a provision should not leave any doubt as to the definition of those permissible circumstances, the minimum size of the cell and maximum time when the new standards would apply. It should also lay down clear principles on how many times a detainee could be placed in conditions below the standard requirements and the precise procedural rules to be followed in such cases. Conversely, in practice Article 248 of the Code of Execution of Criminal Sentences gave a wide discretion to prison governors to decide what constituted "particularly justified circumstances" and in consequence sanctioned the permanent state of overcrowding in detention facilities. It allowed for the placement of detainees in a cell where the area was below the statutory size for an indefinite period of time and it did not set a minimum permissible area.

The Constitutional Court, taking into consideration "the permanent overcrowding of the Polish detention facilities", ruled that the unconstitutional Article 248 of the Code of Execution of Criminal Sentences should lose its binding force within eighteen months from the date of the publication of the judgment. The Constitutional Court justified the delayed entry into force of its judgment by the need to undertake a series of actions to reorganise the whole penitentiary system in Poland, in order to, ultimately, eliminate the problem of overcrowding. It was also noted that, in parallel, a reform of criminal policy was desired with the aim of achieving a wider implementation of preventive measures other than deprivation of liberty. The court observed that an immediate entry into force of its judgment would only aggravate the already existing pathological situation where, because of the lack of room in Polish prisons, many convicted persons could not serve their prison sentences. At the time when the judgment was being passed, the problem concerned 40,000 persons.

In addition, the Constitutional Court under the principle of the so-called "right of privilege" (*przywilej korzyści*) ordered an individual measure, namely that with regard to the author of the constitutional complaint the judgment should enter into force immediately after its publication. The right of privilege is relied on by the Constitutional Court in the event the proceedings instituted by an individual terminate with a judgment with a delayed entry into force. This principle aims at rewarding the individual who brought the first constitutional complaint concerning a particular matter for his or her proactive attitude.

As regards the context of the case, all the State authorities involved in the proceedings before the Constitutional Court, namely the Prosecutor General, the Ombudsman and the Speaker of the *Sejm*, acknowledged the existence of the overcrowding in the Polish detention facilities. The Prosecutor General, in his pleadings of 6 December 2007, submitted that the problem of overcrowding in Polish detention facilities had continually

existed since 2000, arising from the flawed interpretation of the impugned provision by domestic courts and penitentiary authorities. He also pointed out that, with the rate of overcrowding peaking at 118.9% on 31 August 2007, the prison authorities estimated that 15,000 new places were needed in order to secure to detainees the statutory space of three square metres per person.

III. RELEVANT INTERNATIONAL DOCUMENTS

62. Recommendation No. R (98) 7 of the Committee of Ministers of the Council of Europe to the member States concerning the ethical and organisational aspects of health care in prison, in its relevant parts, reads as follows:

> "I. Main characteristics of the right to health care in prison
>
> A. Access to a doctor
>
> 1. When entering prison and later on while in custody, prisoners should be able at any time to have access to a doctor or a fully qualified nurse, irrespective of their detention regime and without undue delay, if required by their state of health. All detainees should benefit from appropriate medical examinations on admission. Special emphasis should be put on the screening of mental disorders, of psychological adaptation to prison, of withdrawal symptoms resulting from use of drugs, medication or alcohol, and of contagious and chronic conditions.
>
> ...
>
> 3. A prison's health care service should at least be able to provide outpatient consultations and emergency treatment. When the state of health of the inmates requires treatment which cannot be guaranteed in prison, everything possible should be done to ensure that treatment is given, in all security, in health establishments outside the prison.
>
> 4. Prisoners should have access to a doctor, when necessary, at any time during the day and the night. Someone competent to provide first aid should always be present on the prison premises. In case of serious emergencies, the doctor, a member of the nursing staff and the prison management should be warned; active participation and commitment of the custodial staff is essential.
>
> 5. Access to psychiatric consultation and counselling should be secured. There should be a psychiatric team in larger penal institutions. If this is not available as in the smaller establishments, consultations should be assured by a psychiatrist, practising in hospital or in private.
>
> ...
>
> III. The organisation of health care in prison with specific reference to the management of certain common problems

D. Psychiatric symptoms, mental disturbance and major personality disorders, risk of suicide

55. Prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. The decision to admit an inmate to a public hospital should be made by a psychiatrist, subject to authorisation by the competent authorities.

...

58. The risk of suicide should be constantly assessed both by medical and custodial staff. Physical methods designed to avoid self-harm, close and constant observation, dialogue and reassurance, as appropriate, should be used in moments of crisis."

63. Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules, in its relevant parts, reads as follows:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the European Convention on Human Rights and the case law of the European Court of Human Rights, ...

Recommends that governments of member states:

- be guided in their legislation, policies and practice by the rules contained in the appendix to this recommendation, which replaces Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules;

...

Appendix to Recommendation Rec(2006)2

...

12.1 Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose.

12.2 If such persons are nevertheless exceptionally held in prison there shall be special regulations that take account of their status and needs.

...

39. Prison authorities shall safeguard the health of all prisoners in their care.

...

40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.

40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

...

47.1 Specialised prisons or sections under medical control shall be available for the observation and treatment of prisoners suffering from mental disorder or abnormality who do not necessarily fall under the provisions of Rule 12.

47.2 The prison medical service shall provide for the psychiatric treatment of all prisoners who are in need of such treatment and pay special attention to suicide prevention."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

64. The applicant complained that the conditions of his detention were very poor and failed in particular to meet the standard required for persons in his state of health. He also alleged that the medical care provided to him within the penitentiary system was inadequate and his health condition had deteriorated. He argued that he should be detained in a proper psychiatric institution rather than a detention facility.

The applicant's complaints fall to be examined under Article 3 of the Convention, which reads as follows:

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

A. Admissibility

1. Government's preliminary objection

65. The Government raised a preliminary objection, arguing that the applicant had not exhausted the domestic remedies available to him.

(a) The Government

66. The Government acknowledged that the applicant had filed a number of complaints with various State authorities. Those complaints, however, had either not concerned the conditions of the applicant's

detention or had not been lodged in compliance with procedural requirements.

67. They argued that there were several effective remedies available to the applicant under the Code of Execution of Criminal Sentences, including an appeal against any unlawful decision of a penitentiary authority and a complaint to a penitentiary judge about detention conditions, even in the absence of any formal decision on that matter.

68. In addition the Government argued that the applicant could have, but had not, made use of the remedies of a compensatory nature governed by the provisions of Article 23 and 24 of the Civil Code, in conjunction with Article 445 or Article 448 of the Civil Code, in order to bring an action for compensation for the alleged health disorder sustained as a result of the inadequate conditions of his detention.

In that connection the Government referred to the judgment of the Supreme Court of 28 February 2007 which recognised for the first time the right of a detainee under Article 24, read in conjunction with Article 448 of the Civil Code, to lodge a civil claim against the State Treasury for damage resulting from overcrowding and inadequate living and sanitary conditions in a detention establishment (see paragraphs 56-58 above).They also submitted copies of nine recent judgments in which domestic courts had examined claims for compensation brought by former detainees on account of the alleged infringement of their personal rights (see paragraph 59 above).

69. Finally, the Government submitted that the applicant should have made an application to the Constitutional Court under Article 191, read in conjunction with Article 79 of the Constitution, asking for the 2006 Ordinance to be declared unconstitutional.

(b) The applicant

70. The applicant did not comment on the Government's preliminary objection.

2. General principles relating to exhaustion of domestic remedies

71. The Court observes that 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 in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

72. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government

claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (ibid., § 68).

In addition, Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (ibid., § 69).

3. Application of these principles to the present case

(a) As regards complaints to penitentiary authorities

73. In certain circumstances recourse to the administrative authorities could be considered an effective remedy in respect of complaints concerning the application or implementation of prison regulations (see, among other authorities, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 26, § 65). It is true that, in general, a detainee should be required to put his complaints about his situation in prison before a penitentiary judge. Nonetheless, regard being had to his limited capacities as a person with psychiatric problems, the applicant should not be expected or required to act with the utmost scrupulousness in availing himself of all the remedies available under the Code of Execution of Criminal Sentences.

74. Even though the applicant did not lodge formal complaints under the provisions of the Code of Execution of Criminal Sentences indicated by the Government, the penitentiary authorities were aware of his situation because he had complained of inadequate medical care and detention conditions in each of his numerous appeals to be released from pre-trial detention and in a separate application to the Ombudsman (see *Melnik v. Ukraine*, no. 72286/01, § 70, 28 March 2006). The complaint lodged with the Ombudsman was considered ill-founded and the applications for release were dismissed by the domestic courts for the same reason (see paragraphs 42-45 above). The detention measure was upheld despite the existence of discrepancies between different medical reports concerning the applicant's mental health (see paragraph 47 above).

75. Moreover, the Court notes that the Constitutional Court in its recent judgment in fact defined the overcrowding of Polish detention facilities as a

structural problem affecting a large part of the prison population and persisting since 2000 throughout the entire country (see paragraph 61 above). The Court is also mindful of the fact that at the relevant time the governors of detention facilities, in which the applicant was held, acknowledged officially the existence of overcrowding and made decisions to reduce the statutory minimum standard of three square metres per person (see paragraphs 27, 33 and 37 above).

In these circumstances, it cannot be said that any attempt by the applicant to seek with the penitentiary authorities an improvement of the conditions of his detention would give sufficient prospects of a successful outcome. By making the relevant appeals to the Ombudsman and the courts deciding on his pre-trial detention, the applicant sufficiently brought to light his situation as regards both the medical care and the overall conditions of his detention.

(b) As regards civil law remedies

76. Secondly, in the Court's view, the institution of civil proceedings could not have remedied the applicant's situation either.

The Court welcomes the new developments in domestic jurisprudence, in particular the new direction in the interpretation and application of the Civil Code provisions on availability of damages for a breach of personal rights, which was set by the 2007 Supreme Court's judgment. However, without prejudice to its assessment of the issue of exhaustion of domestic remedies in other cases pending before it, the Court observes that the judgments of domestic courts referred to by the Government arose from situations distinct from that of the applicant in the present case. They mainly concerned the practice of mixing smoking and non-smoking prisoners, a practice which was indisputably not in compliance with domestic law. Two cases concerned healthy prisoners held in overcrowded and unsanitary cells whose civil actions, contrary to the Government's submission, did not succeed. The judgments in those cases clearly illustrate that the domestic 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 prior to the judgment of the Constitutional Court of 26 May 2008 the policy of reducing the space for each individual in detention establishments was considered to be in accordance with domestic law and was widespread. The latter has been confirmed by the Constitutional Court, the Prosecutor General, the Ombudsman and the Speaker of the *Sejm*. All these authorities referred explicitly to the flawed interpretation of Article 248 of the Code of Execution of Criminal Sentences by the domestic courts and penitentiary authorities (see paragraph 61 above).

In that connection, the Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the

Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003). It must be noted that the applicant was detained on 19 April 2005 and that he lodged his application with the Court on 18 June 2006. By the time of the landmark Constitutional Court's ruling of 26 May 2008 the applicant had already spent over three years in detention and his case has been pending before the Court for nearly two years.

77. Lastly, the Court observes that the Government have not alluded to any decisions of the domestic courts indicating that individuals detained in inadequate conditions generally, or more particularly detainees with serious health problems, have succeeded in obtaining an improvement of the *status quo*, that is, a transfer to a non-smoking cell or, as would be desirable in the applicant's situation, a transfer from prison to an institution specialising in the treatment of the mentally ill. The civil remedies referred to by the Government have proved to be merely of a compensatory nature since no domestic court has so far imposed an injunction in order to change the situation which had given rise to the infringement of the prisoner's personal rights.

(c) As regards constitutional complaint

78. Thirdly, the Court notes that, as it has held in previous cases, procedures before constitutional courts to which individuals have direct access under domestic law constitute a remedy to be exhausted before lodging a complaint with the Court (see *X v. Germany*, no. 8499/99, Commission decision of 7 October 1980, Decisions and Reports 21, p. 176, and *Castells v. Spain*, no. 11798/85, judgment of 23 April 1992, Series A no. 236, §§ 24-32).

79. The Government provided an example of a constitutional complaint in which an individual had alleged essentially that Article 248 of the Code of Execution of Criminal Sentences Court was unconstitutional in so far as it allowed for the placement of detainees for an indefinite period of time in cells below the statutory size.

The Court has already taken note of the Constitutional Court's judgment of 26 May 2008 in which the impugned provision had been declared unconstitutional (see paragraph 61 above). It observes, however, that the subject matter of the above constitutional complaint and of the instant application is not identical.

80. In the case before the Court, the complaint under Article 3 of the Convention is neither focused on nor limited to the overcrowding and resultant poor living and sanitary conditions in the applicant's detention facilities. The applicant, who suffers from particular mental and neurological disorders, complained, above all, that the medical care provided to him within the penitentiary system was inadequate and that he

should be detained in a proper psychiatric institution rather than an ordinary detention facility. The situation in question has been caused by a flawed implementation of the relevant law and not by the law as such. The alleged facts that the applicant was detained in overcrowded and unsanitary cells together with smoking inmates constitute only additional elements of the case, possibly to be considered aggravating factors in the applicant's overall situation.

In this connection, the Court, mindful of the applicant's limited capacities as a person with psychiatric problems and held in custody, observes that only a remedy able to address his complaint in its integrity and not only its selected aspects, could realistically redress the applicant's situation.

81. It follows that an individual complaint to the Constitutional Court cannot be recognised as an effective remedy, within the meaning of the Convention, in the circumstances of the applicant in the instant case.

(d) Conclusion

82. The Court observes that, in the circumstances of the present case, the remedies referred to by the Government were not capable of providing redress in respect of the applicant's complaint. Having regard to the above considerations, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies.

The Court also considers that the instant application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

83. The applicant complained that the medical care provided to him within the penitentiary system was inadequate and his health condition had deteriorated. He also alleged that the conditions of his detention were very poor and failed in particular to meet the standard required for persons in his state of health. He argued that he should be detained in a proper psychiatric institution rather than a detention facility.

84. The Government disputed that the treatment complained of had attained the minimum level of severity required to fall within the scope of Article 3. They argued that the applicant had remained under constant medical supervision. He had regularly consulted general practitioners or doctors with various specialities according to his wishes and needs. Whenever necessary, the applicant had obtained emergency treatment at a specialist hospital. Overall, the relevant authorities had carefully and

frequently monitored the applicant's state of health and provided him with medical assistance appropriate to his condition. They also maintained that the living and sanitary conditions of the applicant's detention had been adequate.

2. The Court's assessment

(a) General principles

85. The Court reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III). Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers*, ibid., § 74).

86. Article 3 of the Convention cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to transfer him to a civil hospital, even if he is suffering from an illness that is particularly difficult to treat (see *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). However, this provision does require the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance (see, *Kudła* ibid., § 94, and *Mouisel*, ibid., § 40).

87. The Court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 of the Convention (see *Mouisel*, ibid., § 37) and that the lack of appropriate medical care may amount to treatment contrary to that provision (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII; *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004; and *Farbtuhs v. Latvia*, no. 4672/02, § 51, 2 December 2004). In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment (see, for

example, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82, and *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, p. 1966, § 66).

88. The Court observes that there are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant (see *Mouisel*, ibid., §§ 40-42; *Melnik v. Ukraine*, no. 72286/01, § 94, 28 March 2006; and *Rivière v. France*, no. 33834/03, § 63, 11 July 2006).

(b) Application of these principles to the present case

89. The Court observes that the applicant's medical condition, namely his chronic and severe mental disorders including schizophrenia, is undisputed. The applicant suffers from hallucinations, has suicidal thoughts and in January 2006 he attempted to hang himself (see paragraphs 6, 9, 13, 14, 16, 19 and 23 above).

The case therefore raises the issue of the compatibility of the applicant's state of health with his detention in a facility designed for healthy detainees where he is not treated or monitored on a daily basis by specialist medical personnel. The Court must also answer the question of whether that situation attained the minimum level of severity to fall within the ambit of Article 3 of the Convention.

90. The Court notes that the applicant has been detained since April 2005, with a short break between 28 August and 7 September 2007 when he was released home. During his nearly three and a half years of detention the applicant, for the most part, has been detained with healthy inmates in ordinary detention facilities (see paragraphs 8, 10, 11, 12, 15-17, 23 and 24 above).

91. As regards the applicant's medical treatment, the Court observes that between April and July 2005 and between April and June 2007 he received in-patient medical treatment in a psychiatric hospital (see paragraphs 10 and 22 above). On three occasions he received short-term emergency treatment in a psychiatric hospital (see paragraphs 9, 13 and 15 above). Medical evidence furnished by the parties revealed that the applicant was under regular pharmacological treatment, comprising psychotropic drugs. He had access to prison in-house medical staff and, upon appointment, to specialist doctors, including psychiatrists.

92. On the other hand, the Court observes that, except for the two periods in 2005 and 2007 when the applicant was an in-patient in a prison psychiatric hospital, he shared his cell with inmates who were in good health and, except in cases of medical emergency, he received the same attention as them, notwithstanding his particular condition. As transpires

from the documents, almost all doctors who examined the applicant during the different stages of his detention suggested that he should remain under regular psychiatric supervision. It is therefore clear that the applicant has been in need of constant and specialised medical supervision, in the absence of which he faces major health risks. Nonetheless, although he has had more or less regular access to prison in-house medical staff, he does not remain under psychiatric supervision and his access to a psychiatrist has been restricted to emergencies or to the dates when he has made an appointment.

93. The Court notes with concern that after the applicant attempted to commit suicide in Sosnowiec Remand Centre on 23 January 2006 he was examined only by an in-house doctor. It was not until the following day that he was seen by a psychiatrist, albeit only as an outpatient. On the very same day he was transferred back to the remand centre because two psychiatric hospitals had refused to admit him owing to the lack of places.

94. Mindful of the above considerations, the Court finds that while maintaining the detention measure is not, in itself, incompatible with the applicant's state of health, detaining him in establishments not suitable for incarceration of the mentally-ill, raises a serious issue under the Convention.

95. In addition the Court has concerns about the living and sanitary conditions of the applicant's detention. In this regard the parties' submissions are contradictory; however, it is undisputed that all of those establishments, at the relevant time, faced the problem of overcrowding (see paragraphs 27, 33 and 37 above). The Government did not contest the applicant's submissions that in Zabrze Remand Centre he had shared his cell of 6.7 square metres with two other inmates, that in Sosnowiec Remand Centre he had initially been detained in a cell of sixteen square metres together with four to five other persons, and finally, that in Herby Stare Prison his cell no. 32 measured eighteen square metres and had been occupied by nine or ten detainees. The Court also notes that in the detention facilities concerned the applicant was entitled to merely one hour of outdoor exercise per day and in reality had a very limited access to a library and an entertainment room (see paragraphs 29 and 34 above). Lastly, in the light of the conflicting statements the Court is not convinced that the hygienic and sanitary conditions in the detention facilities concerned met the minimum required standards (see paragraphs 28, 31, 34, 35, 38 and 40 above).

The Court finds that those conditions would not be considered appropriate for any person deprived of his liberty, still less for someone like the applicant with a history of mental disorder and in need of a specialised treatment. In this connection the Court refers to the judgment of the Constitutional Court which held that the overcrowding in itself could be qualified as inhuman and degrading treatment and, if combined with additional aggravating circumstances, as torture (see paragraph 61 above).

96. Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of

that an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3.

The Court accepts that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention in the conditions described above, with the exception of the two short periods in 2005 and 2007 when the applicant was an in-patient in a prison hospital, may have exacerbated to a certain extent his feelings of distress, anguish and fear. In this connection, the Court considers that the failure of the authorities to hold the applicant during most of his detention in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety.

Moreover, the Court finds that the fact that for the most part the applicant has received the same attention as the other inmates, notwithstanding his particular state of health, shows the failure of the authorities' commitment to improving the conditions of detention in compliance with the recommendations of the Council of Europe. In particular, the Court notes that the recommendations of the Committee of Ministers to the member States, namely Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison and Recommendation on the European Prison Rules provide that prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff (see paragraphs 62 and 63 above). In recent judgments the Court has drawn the authorities' attention to the importance of this recommendation, notwithstanding its non-binding nature for the member States (see *Dybeku v. Albania*, no. 41153/06, § 48, 18 December 2007; *Rivière*, cited above, § 72; and *Naumenko*, cited above, § 94).

(c) Conclusion

97. Assessing the facts of the case as a whole, having regard in particular to the cumulative effects of the inadequate medical care and inappropriate conditions in which the applicant was held throughout his pre-trial detention, which clearly had a detrimental effect on his health and well-being (see *Kalashnikov v. Russia*, no. 47095/99, § 98, ECHR 2002-VI), the Court considers that the nature, duration and severity of the ill-treatment to which the applicant was subjected are sufficient to be qualified as inhuman and degrading (see *Egmez v. Cyprus*, no. 30873/96,

§ 77, ECHR 2000-XII; *Labzov v. Russia*, no. 62208/00, § 45, 16 June 2005; and *Mayzit v. Russia*, no. 63378/00, § 42, 20 January 2005).

98. There has accordingly been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

99. With regard to the issue of overcrowding *vis-à-vis* the applicant's right to respect for his physical and mental integrity or his right to privacy and the protection of his private space, the Court considered it appropriate to raise of its own motion the issue of Poland's compliance with the requirements of Article 8 of the Convention, which in its relevant part reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 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."

100. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

101. However, having found a violation of Article 3, the Court considers that no separate issue arises under Article 8 of the Convention with regard to the conditions of the applicant's detention and the medical treatment he received.

III. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

102. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

103. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

104. The applicant complained that from 2005 onwards he had been detained in conditions which failed to meet the standard required for persons in his state of health. He also alleged that the medical care provided

to him within the penitentiary system was inadequate. He claimed that he should be detained in a proper psychiatric institution rather than a detention facility. The applicant also claimed 250,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

105. The Government contested the applicant's claims as unsubstantiated and exorbitant.

A. Article 46

106. The Court reiterates that, in accordance with Article 46 of the Convention, a finding of a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V, and *Dybeku*, cited above, § 63).

107. Mindful of the fact that the seriousness and the structural nature of the problem of overcrowding and resultant inadequate living and sanitary conditions in Polish detention facilities has been acknowledged by the Constitutional Court in its judgment of 28 May 2008 and by other State authorities (see paragraphs 27, 33, 37 and 61 above), the Court considers that necessary legislative and administrative measures should be taken rapidly in order to secure appropriate conditions of detention of detained persons, in particular, adequate conditions and medical treatment for prisoners, who, like the applicant, need special care owing to their state of health.

As regards the measures which the Polish State must take, subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, the Court reiterates that it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). However, by its very nature, the violation found in the instant case does not leave any real choice as to the individual measures required to remedy it (see, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 201-203, ECHR 2004-II).

108. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 3 of the Convention (see paragraph 96 above), the Court considers that the

respondent State must secure, at the earliest possible date, the adequate conditions of the applicant's detention in an establishment capable of providing him with the necessary psychiatric treatment and constant medical supervision.

B. Article 41

1. Damage

109. As to the pecuniary damage allegedly sustained (see paragraph 102 above), the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see *Barberà, Messegué and Jabardo v. Spain*, judgment of 13 June 1994 (former Article 50), Series A no. 285-C, §§ 16-20; see also *Berktay v. Turkey*, no. 22493/93, § 215, 1 March 2001; and *Khudobin v. Russia*, no. 59696/00, § 142, ECHR 2006-XII).

110. The Court, having regard to its findings concerning the applicant's complaint under Article 3 of the Convention, considers that no causal link has been established between the damage alleged and the violation it has found (see *Kalashnikov*, cited above, § 139). It therefore dismisses the applicant's claim for pecuniary damage.

111. On the other hand, the Court considers that the applicant suffered damage of a non-pecuniary nature as a result of his detention in inhuman and degrading conditions, inappropriate to his state of health (see paragraphs 82-83 above), which is not sufficiently redressed by the finding of a violation of his rights under the Convention.

112. For the foregoing reasons, having regard to the specific circumstances of the present case and its case-law in similar cases (see, *mutatis mutandis*, *Melnik*, cited above, § 121, and *Kotsaftis v. Greece*, no. 39780/06, § 65, 12 June 2008) and deciding on an equitable basis, the Court awards EUR 10,000 under this head, plus any tax that may be chargeable on that amount.

2. Costs and expenses

113. The applicant claimed no costs and expenses, either for the Convention proceedings or for the proceedings before the domestic courts.

3. Default interest

114. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

3. *Holds* that no separate issue arises under Article 8 of the Convention;

4. *Holds*
   (a) that the respondent State is to secure at the earliest possible date adequate conditions of the applicant's detention in a specialised institution capable of providing him with necessary psychiatric treatment and constant medical supervision (paragraph 106);
   (b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;
   (c) 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;

5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President