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

FOURTH SECTION

CASE OF KAPRYKOWSKI v. POLAND

(Application no. 23052/05)

JUDGMENT

STRASBOURG

3 February 2009

FINAL

03/05/2009

This judgment may be subject to editorial revision.

In the case of Kaprykowski 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 13 January 2009,

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

PROCEDURE

1. The case originated in an application (no. 23052/05) 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 Robert Kaprykowski ("the applicant"), on 4 June 2005.

2. The applicant, who had been granted legal aid, was represented by Ms J. Jędrzejak, a lawyer practising in Poznań. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that medical treatment and assistance offered to him during his detention in Poznań Remand Centre had been inadequate in view of his severe epilepsy and other neurological disorders.

4. The application was allocated to the Fourth Section of the Court. On 7 December 2006 the President of the Chamber of that Section decided to communicate 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 1966 and lives in Poznań.

6. He is a recidivist offender. He served a number prison sentences in various detention establishments in Poland.

A. The applicant's medical history prior to 5 August 2003

7. Since 1996 the applicant has been suffering from epilepsy marked by frequent (daily) seizures and encephalopathy accompanied by dementia. He also suffers from ulcers and syphilis. He has been classified by the social security authorities as a person with a "first-degree disability making him completely unfit to work" *(pierwszy stopień inwalidztwa całkowicie niezdolny do pracy)*.

8. On 7 November 2000 the Białystok District Court *(Sąd Rejonowy)* appointed neurology and forensic medicine experts to produce a report on the applicant's health in connection with a criminal case pending at that time against him. The experts examined the applicant's medical records and the preceding psychological and forensic medicine reports. The extracts from these documents revealed that since 1996 the applicant had been suffering from epilepsy accompanied by very frequent seizures and from a personality disorder. He had made several suicide attempts. During one medical interview, the applicant had stated that he could not obtain the necessary medical treatment in prison and that his cellmates ignored his epileptic fits. The doctors, who had examined the applicant in the past, agreed that he could remain in prison provided that he received specialised psychiatric treatment on a permanent basis.

9. On 11 July 2001 the Białystok District Court appointed new medical experts to draft a report on the applicant's health. The experts found that the penitentiary medical care system could no longer offer the applicant the necessary treatment. They emphasised that his continuous incarceration might put his health and life at risk. It was further indicated that the applicant should obtain a more detailed diagnosis from a specialised clinic and, perhaps, undergo brain surgery.

B. The applicant's detention and medical assistance provided to him prior to 5 August 2003

10. It appears that the applicant was first remanded in custody on 30 May 1998.

11. From 13 April 1999 until 23 June 1999 and from 20 July 1999 until 4 January 2000 he was detained in Poznań Remand Centre.

12. It appears that in 2000 he was admitted for several days to an unspecified prison hospital.

13. On 10 January 2001 the applicant was committed to Gdańsk Remand Centre where he received medical treatment in the neurology ward. Doctors emphasised the need to provide the applicant with permanent specialised medical care and to ensure his constant supervision by another person.

14. On 5 April 2001 he was transferred to Białystok Remand Centre.

15. On 3 August 2001 the applicant was released home.

16. On 17 September 2001 he was again remanded in custody in connection with a new criminal case against him. From that day until 30 October 2001 he was detained in Poznań Remand Centre.

17. On 28 February 2002 he was granted conditional release from prison.

18. On 5 September 2002 the applicant was once more remanded in custody. He was committed to an unspecified detention facility.

19. From 28 April until 5 August 2003 the applicant was at liberty.

C. The applicant's detention after 5 August 2003

20. On 5 August 2003 the applicant was again remanded in custody. From that day until 30 November 2007 he was in continuous detention either in ordinary detention facilities or in prison hospitals.

21. During that time he was detained in Poznań Remand Centre during four separate periods: (1) from 5 until 27 August 2003; (2) from 18 May until 12 July 2005; (3) from 5 January 2006 until an unspecified date, presumably 20 March 2006; and (4) from 9 May until 30 November 2007.

22. It appears that apart from Poznań Remand Centre the applicant was detained in the following facilities: from 28 August 2003 until 21 April 2004 in Wrocław Prison; from 22 April 2004 until an unspecified date in Białystok Remand Centre; subsequently in Śrem, Białołęka, Radom and Jelenia Góra Remand Centres; from 19 September until 19 October 2004 in the Szczecin Remand Centre hospital and immediately afterwards in Stargard Szczeciński Prison; from an unspecified date in January 2005 in Bydgoszcz Remand Centre; from 10 January until 4 April 2005 in the Gdańsk Remand Centre hospital; from 12 July until 4 October 2005 in Wronki Prison; from 4 October 2005 until 5 January 2006 in the Gdańsk Remand Centre hospital; from 20 March until 19 April 2006 in the Bydgoszcz Remand Centre hospital; from 29 June 2006 until 9 May 2007 in the Czarne Prison hospital.

23. The applicant submitted that in Poznań Remand Centre he was committed to a general and not medical wing. He had shared his cells with healthy prisoners, who, as he submitted, had ignored his epileptic fits and

had not offered him any help in his daily routines. The applicant also submitted that he had been humiliated in front of his fellow inmates because, as a result of his seizures, he had often lost consciousness and had wet himself.

24. On 1 December 2007 the applicant was released and he is currently at liberty.

D. Medical assistance provided to the applicant after 5 August 2003

25. From 19 September until 19 October 2004 the applicant was detained at the internal disease ward of the Szczecin Prison hospital. He was administered Gabitril as a main drug in his treatment.

26. From 10 January until 4 April 2005 he was detained in the neurology ward of the Gdańsk Remand Centre hospital. He was prescribed Gabitril and Neurotrop as the main drugs in his treatment and it was suggested that he should regularly undergo neurological examinations.

27. From 18 May until 12 July 2005, during his detention in Poznań Remand Centre, the applicant was examined twice by a neurologist and sixteen times by the remand centre's in-house doctor.

In addition, from 24 June until 12 July 2005 he was placed under medical observation in the Poznań Remand Centre hospital. At the hospital new generic drugs were administered to the applicant in place of Gabitril, which was an expensive medicine.

28. From 4 October 2005 until 5 January 2006 the applicant was once more admitted to the neurology ward of the Gdańsk Remand Centre hospital, where he resumed taking Gabitril.

29. From 20 March until 19 April 2006 he was detained in the surgery ward of the Bydgoszcz Remand Centre hospital because he had developed gallstones.

30. From 29 June 2006 until 9 May 2007 the applicant was detained in Czarne Prison hospital, where he was admitted to the ward for the chronically ill. Gabitril was administered to him during this time.

On his release from the hospital, the doctors considered the applicant to be in a good overall shape and self-sufficient. It was recommended that he be assigned a bottom bunk bed, be put on a diet and continue the pharmacological treatment prescribed, comprising Gabitril. It was also stressed that the applicant be placed under 24-hour medical supervision.

31. Between 9 May and 30 November 2007, when the applicant was detained in Poznań Remand Centre, he continued taking Gabitril. It appears that he was examined eighteen times by the remand centre's in-house doctors.

32. Copies of medical records furnished by the applicant reveal that towards the end of 2007 his epilepsy was still severe, although, his epileptic seizures were less frequent. Moreover, his personality disorder

continued to manifest itself in that the applicant sometimes experienced hallucinations. Most of the time, however, he was suffering from serious dementia.

The Government did not submit any medical documents or information regarding the applicant's health condition or his treatment.

E. Medical report drawn up after 5 August 2003

33. On 27 February 2004 a new report was drafted by experts in psychology, psychiatry and neurology, who had been appointed by the Poznań Regional Court *(Sąd Okręgowy)* in the course of social security proceedings for a disability benefit. The experts found that the applicant was suffering from epileptic seizures a number of times per week, sometimes even several times per day. He had also been diagnosed with encephalopathy accompanied by dementia, and also with ulcers and syphilis. The experts concluded that, even though the applicant could at that time perform basic daily activities such as washing, dressing, eating and the toilet without help, he was nevertheless too handicapped to act autonomously in making decisions or in undertaking more demanding daily routines. The experts were of the opinion that the applicant was incapable of being self-reliant and that he required, at least for the time being, direct and permanent care from another person.

F. The applicant's complaints to the prison authorities

34. On 31 May, 28 June and 6 July 2005 the applicant lodged with the penitentiary administration complaints about his medical treatment in prison. He claimed that he had only received information stating that his complaints had been referred to the "competent authorities" (*do właściwych organów*). In the Government's submission, all three complaints had been examined by competent authorities, including the Chief Doctor of the Regional Inspectorate of the Prison Service *(Naczelny Lekarz Okręgowego Inspektoratu Służby Więziennej)* and considered ill-founded.

35. On 11 August 2005 the applicant complained to the Regional Inspectorate of the Prison Service that he had been prescribed Polish generic medicine in place of Gabitril, a more effective drug. That complaint was considered ill-founded because at the time when his medicines had been changed the applicant had been under close medical supervision at the prison hospital and his health had not deteriorated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Medical care in detention facilities

36. Article 68 of the Constitution, in its relevant part, reads:

> "1. Everyone shall have a right to have his health protected.
>
> 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation..."

37. Article 115 of the Code of Execution of Criminal Sentences *(Kodeks karny wykonawczy)* ("the Code") provides:

> "1. A sentenced person shall receive medical care, medicines and sanitary articles free of charge.
>
> ...
>
> 4. Medical care is provided, above all, by health care establishments for persons serving a prison sentence.
>
> 5. Health care establishments outside of the prison system shall cooperate with the prison medical services in providing medical care to sentenced persons if necessary, in particular
>
> 1) to provide immediate medical care because of a danger to the life or health of a sentenced person;
>
> 2) to carry out specialist medical examinations, treatment or rehabilitation of sentenced person;
>
> 3) to provide medical services to a sentenced person who has been granted prison leave or a temporary break in the execution of the sentence..."

38. On the basis of Article 115, paragraph 10 of the Code, 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 in confinement by health care establishments for persons deprived of 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 liberty provide, *inter alia*, medical examinations, treatment, preventive medical care, rehabilitation and nursing services to persons deprived of liberty.

Paragraph 1 of this Ordinance further provides:

> "2. In a justified case, if the medical services as enumerated in sub-paragraph 1 cannot be provided to persons deprived of liberty by the health care establishments for persons deprived of liberty, in particular due to the lack of specialised medical equipment, such medical services may be provided by public health care establishments.
>
> 3. In a case as described in sub-paragraph 2, the head of a health care establishment for persons deprived of liberty shall decide whether or not such medical services [provided by the public healthcare establishments] are necessary..."

Paragraph 7 of the October 2003 Ordinance states:

> "1. The decision to place a person deprived of liberty in a prison medical centre shall be taken by a prison doctor or, in his absence, by a nurse...
>
> 2. The decision whether or not it is necessary to place a person deprived of liberty in a ... prison hospital shall be taken by the prison hospital's director or by a delegated prison doctor.
>
> ...
>
> 6. In case of emergency the decision whether or not it is necessary to transfer a person deprived of liberty to a hospital may be taken by a doctor other than a prison doctor..."

39. The rules of 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 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.

B. Judicial review and complaints to administrative authorities

40. 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 related to 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 publication or the service of the decision; decision [in question] shall be published or served with a reasoned opinion and instruction as to the right, deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority who had issued the contested decision. If [that] authority does not consider the appeal favourably, it shall transfer it together with the case file and without undue delay to the competent court.
>
> 4. The Court competent for examining the appeal can cease the enforcement of the contested decision...
>
> 5. Having examined the appeal the court shall rule on upholding the contested decision, [its] quashing or changing; the court's decision shall not be a subject of an interlocutory appeal."

In addition, under Article 33 of the Code of the Execution of Criminal Sentences ("the Code") a penitentiary judge is entitled to make unrestricted visits to detention facilities, to be acquainted with documents and provided with explanations from the management of these establishments. A penitentiary judge also has the power to communicate with persons deprived of 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 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 a person concerned] of that fact, and, if necessary, shall order the release of the person concerned."

Finally, 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. The detailed rules on the procedure are laid down in the Ordinance of the Minister of Justice issued on 13 August 2003 on the manner of proceeding with applications, complaints and requests of 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").

C. Civil remedies

41. Article 23 of the Civil Code contains a non-exhaustive list of the 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 steps necessary 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."

42. 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 ..."

43. 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 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 2004 amendments 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."

D. Practice of civil courts as submitted by the Government

44. In their submissions on the admissibility and the merits of the case the Government referred to the judgment of the Koszalin Regional Court (*Sąd Okręgowy*) of 30 May 2006 and the Supreme Court (*Sąd Najwyższy)* of 28 February 2007 in which domestic courts had examined claims for compensation brought by former detainees on account of the alleged infringement of their personal rights.

1. Koszalin Regional Court's judgment of 30 May 2006

45. On 30 May 2006 the Koszalin Regional Court awarded compensation for non-pecuniary damage in a case which had been brought by a certain N.S., a non-smoker detained with smoking inmates (IC 650/04). The plaintiff alleged that by forcing him to be a passive smoker the authorities had breached his right to an environment free from cigarette smoke and had caused him mental suffering. He also alleged that as a result of passive smoking his allergies had increased and his overall immune system had been weakened.

46. The domestic court examined the case under Articles 444 and 445 of the Civil Code. It was observed that the notion of damage under those provisions was linked with the liability *ex delicto* based on the fault *(wina*) of the person who had caused the damage. The provisions relied on concerned both material and non-material damage. The former was defined as a physical injury or health disorder resulting from an unlawful act or omission. The latter could be manifested by negative mental experiences suffered by the plaintiff as a result of his physical injury or health disorder. In both cases the burden of proof rested on the plaintiff.

The Koszalin Regional Court observed that according to the Ordinance of 26 November 1996 on the principles for the permitted use of tobacco in closed establishments under the Minister of Justice (*Rozporządzenie w sprawie określenia zasad dopuszczalności używania wyrobów tytoniowych w obiektach zamkniętych podległych Ministrowi Sprawiedliwości*) ("1996 Ordinance") persons detained in remand centres and prisons could smoke only inside the selected cells designated for smokers.

It was held that the administration of the remand centre where the applicant had been detained with smokers had acted in breach of the 1996 Ordinance and Article 68 of the Constitution. The court found that the plaintiff had not proved any material damage, namely the physical injury or health disorder. He had however suffered non-material damage resulting from an unlawful interference with his right to protect himself from passive smoking. The court awarded the plaintiff PLN 5,000.

2. Supreme Court's judgment of 28 February 2007

47. 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 dismissed the cassation appeal in so far as it related to the allegation of inadequate medical care. In this connection the Supreme Court upheld the judgments of the first and second-instance courts which had found no causal link between the deterioration of the plaintiff's health and the quality of medical care provided to him in detention.

In so far as the cassation appeal related to the allegation of overcrowding and inadequate conditions of the plaintiff's detention 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.

48. On 6 December 2007 the Wrocław Court of Appeal held 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. On the other hand, the court 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. Ultimately, the case was dismissed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

49. The applicant complained that he required specialised medical care and direct and constant assistance from another person in his daily activities, which had not been provided to him during his detention in Poznań Remand Centre. Considering his particular health condition, namely severe epilepsy and other neurological disorders, the lack of adequate medical treatment and assistance, constituted, in the applicant's opinion, a breach of the prohibition of inhuman and degrading treatment as provided in 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 on non-exhaustion of domestic remedies

(a) The Government

50. The Government argued that the applicant did not exhaust all the domestic remedies available to him. In particular he could have, but did not, make use of the provisions of Articles 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. In this connection they relied on the Koszalin Regional Court's judgment of 30 May 2006 (see paragraphs 45-46 above) and the Supreme Court's judgment of 28 February 2007 (see paragraphs 47-48 above).

(b) The applicant

51. The applicant submitted that he had lodged formal complaints with penitentiary authorities on the basis of the Code of Execution of Criminal Sentences, including the Regional Inspectorate of the Prison Service, and that each claim had been rejected. He also claimed that the civil remedy in question was not capable of providing immediate relief to people in detention, because proceedings before civil courts were lengthy and costly.

(i) General principles relating to exhaustion of domestic remedies

52. 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).

53. 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).

(ii) Application of these principles to the present case

54. The Court notes that in the present proceedings the Government provided an example of a domestic case in which Article 445 of the Civil Code had been successfully relied on with the effect of granting the plaintiff compensation for non-material damage which had been caused by unlawful interference with his right to protect himself from passive smoking. The Government also relied on the Supreme Court judgment recognising for the first time the right of a detainee under Article 448 of the Civil Code to lodge a civil claim against the State Treasury for damage caused by overcrowding and resultant inadequate living and sanitary conditions in a detention establishment.

55. The Court welcomes these new developments in domestic jurisprudence in the field of personal rights. It is not persuaded, however, that the relevant judgments can have any parallel effect in the area of claims arising from inadequate medical care in detention and whether they can be considered examples of a common practice well-established as of today and

even less so at the time when the applicant introduced his application with the Court.

In that context 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 lodged his application with the Court on 4 June 2005. By that time he had already spent nearly two years in continuous detention (see paragraphs 1 and 20 et seq. above).

56. It cannot be said that the two examples from domestic case-law supplied by the Government show that, in the circumstances of the case and, more particularly, at the time when the applicant brought his application under the Convention, an action under Article 445 or Article 448 of the Civil Code could have offered him reasonable prospects of securing better medical care in an ordinary detention facility or his transfer to a prison neurological hospital.

(c) The Court's conclusion

57. In view of the above, the Court is not satisfied that the remedies relied on by the Government would have been adequate and effective in connection with the applicant's complaint concerning his medical treatment in detention. Nor does it consider that the Government have demonstrated the effectiveness of any other remedy in the domestic law system which the applicant should have used to obtain the requisite relief in parallel to his administrative complaints.

Accordingly, the Government's objection on exhaustion of domestic remedies must be rejected.

2. Government's preliminary objection on non-compliance with the six-month rule

(a) The Government

58. The Government submitted that from April 1999 until July 2005 the applicant was detained in Poznań Remand Centre for five different terms (see paragraphs 8, 15, 19 and 21 above). Meanwhile, he was detained in other establishments and he was also twice released from prison. The applicant was at liberty from 28 February until 5 September 2002 and from 28 April until 5 August 2003. As a consequence, the Court's examination of the application should be limited to the applicant's detention in Poznań Remand Centre between 18 May and 12 July 2005, the remainder being inadmissible for non-compliance with the six-month rule.

(b) The applicant

59. The applicant did not contest this view in so far as it related to his detention prior to 18 May 2005. However, he submitted that he had been detained in Poznań Remand Centre also in 2006 and 2007.

(c) The Court's conclusion

60. Given that the applicant lodged his application with the Court on 4 June 2005 (see paragraph 1 above), the Court finds that the complaints concerning four terms of the applicant's detention in Poznań Remand Centre, namely from 13 April until 23 June 1999, 20 July 1999 until 4 January 2000, 17 September until 30 October 2001, and 5 until 27 August 2003, do not comply with the six-month rule.

3. Conclusion on admissibility

61. Having regard to the above considerations, the Court dismisses the Government's preliminary objection on non-exhaustion of domestic remedies.

The Court upholds the Government's objection on non-compliance with the six-month rule and finds that the application, in so far as related to the applicant's detention in Poznań Remand Centre during the four terms specified above (see paragraph 60 above), has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

Consequently, the Court holds that the remainder of the application, as far as it concerns the applicant's detention in Poznań Remand Centre from 18 May 2005 until 12 July 2005, from 5 January 2006 until an unspecified date, presumably 20 March 2006, and from 9 May 2007 until 30 November 2007, is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

62. The applicant complained that he required specialised medical care and direct and constant assistance from another person in his daily activities, which had not been provided during his detention in Poznań Remand Centre. He further submitted that the management of Poznań Remand Centre refused to supply him with Gabitril, which was a foreign medicine prescribed in the past by a doctor whom he had consulted outside

that remand centre. Instead, the in-house doctors of Poznań Remand Centre prescribed cheaper Polish generics and provided inadequate medical care.

63. The applicant submitted that his state of health had been serious enough to be incompatible with protracted detention in the remand centre, which did not have medical personnel qualified to treat neurological disorders. The authorities were fully aware of his medical condition and medical recommendations of court-appointed experts and a neurology specialist from the hospital of Gdańsk Remand Centre. Regardless of that, the applicant was detained most of the time in Poznań Remand Centre, either in its general ward or in its hospital. There were a few short intervals when he was hospitalised in, as he claimed, the only adequate facility in Poland, the neurology ward of the Gdańsk Remand Centre hospital.

64. Moreover the applicant argued that the change of his pharmacological treatment had been ordered by doctors specialising in internal medicine, not in neurology. The alternative treatment had no medical grounds but it was rather dictated by the wish to reduce medical expenses. Taking the applicant off the drug Gabitril resulted in more frequent and serious epileptic seizures accompanied by loss of consciousness and urinary incontinence.

65. The applicant complained that in Poznań Remand Centre he was constantly in a position of inferiority vis-à-vis his cellmates because he depended on first aid from them when he had his epileptic seizures and on their assistance in his daily routines. The applicant also claimed to have been humiliated in front of his fellow inmates because, as a result of his seizures, he often lost consciousness and wet himself.

(b) The Government

66. The Government submitted that the applicant's complaint was manifestly ill-founded because he had received adequate medical care and medicines which had been prescribed by doctors. The Government emphasised the fact that the applicant had been detained together with other persons who knew how to act in the event of his epileptic seizures. It was also noted that whenever the applicant's state of health had raised concerns, a report had been obtained from independent experts. When necessary the applicant had been transferred to Gdańsk Remand Centre hospital to receive better medical care. Finally the Government submitted that the applicant had been fit to perform the necessary daily routines without any help from third persons.

67. On the issue of replacing the drug Gabitril with alternative generic medicines, the Government stated that at the relevant time the applicant had remained under close medical supervision at the Poznań Remand Centre hospital, where he had been examined by doctors almost every day.

2. The Court's assessment

(a) General principles

68. 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*, cited above, § 74).

69. Moreover, it cannot be ruled out that the detention of a person who is ill may raise issues under Article 3 of the Convention (see *Mouisel v. France* no. 67263/01, § 37, ECHR 2002-IX). 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*, cited above, § 40). 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 *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79, and *Mouisel*, cited above, § 40).

(b) Application of these principles to the present case

70. The Court must determine whether during his detention in Poznań Remand Centre from 18 May until 12 July 2005, from 5 January 2006 until an unspecified date, presumably 20 March 2006, and from 9 May until 30 November 2007 the applicant needed regular medical assistance, whether he was deprived of it as he claims and, if so, whether this amounted to inhuman or degrading treatment contrary to Article 3 of the Convention (see *Farbtuhs v. Latvia*, no. 4672/02, § 53, 2 December 2004, and *Sarban v. Moldova*, no. 3456/05, § 78, 4 October 2005).

In this connection the Court reiterates that the scope of the instant application has been limited by the applicant only to Poznań Remand Centre

and the complaints concerning four terms of his detention in this facility did not comply with the six-month rule. Notwithstanding, the question of whether or not the applicant has suffered inhuman and degrading treatment during his detention in Poznań Remand Centre in the above mentioned periods must be determined against the entire background of the case. The Court must thus examine this case bearing in mind that the applicant was in continuous detention from 5 August 2003 until 30 November 2007.

71. The evidence from various medical sources submitted by both parties confirms that the applicant had at least three serious medical conditions which required regular medical care, namely epilepsy, encephalopathy and dementia. He suffered from frequent epileptic seizures, sometimes as often as several times a day (see paragraphs 7, 8, 32 and 33 above).

72. The applicant clearly suffered from the effects of his medical condition. Throughout his incarceration several doctors stressed that he should receive specialised psychiatric and neurological treatment and should be under constant medical supervision (see paragraphs 8, 13, 26 and 33 above). Already in 2001 the medical experts appointed by the Białystok District Court were of the opinion that the penitentiary system could no longer offer the applicant the necessary treatment and they recommended that he should undergo brain surgery (see paragraph 9 above). On 9 May 2007 when the applicant was being released from Czarne Prison hospital, the doctors clearly recommended that he should be placed under 24-hour medical supervision (see paragraph 30 above). In the light of the above the Court is convinced that the applicant was in need of constant medical supervision, in the absence of which he faced major health risks.

73. The applicant must have known that he risked at any moment a medical emergency with very serious results and that most of the time no immediate medical assistance was available. The Court takes note of the Government's submission that, at the relevant time, the applicant had been examined twice by a neurologist and sixteen times by a prison in-house doctor. On the other hand, it must be noted that the applicant had frequent epileptic seizures and, when he was detained in the general wing of Poznań Remand Centre, he could count only on the immediate assistance of his fellow inmates and, possibly, on being only later examined by an in-house doctor who did not specialise in neurology. In addition, due to his personality disorder and dementia, the applicant could not act autonomously in making decisions or in undertaking more demanding daily routines. That must have given rise to considerable anxiety on his part and must have placed him in a position of inferiority *vis-à-vis* other prisoners.

74. The fact that from 24 June until 12 July 2005 the applicant was in the Poznań Remand Centre hospital does not affect this finding, since

the establishment did not specialise in treating neurological disorders and since the period of the applicant's hospitalisation was anyway very short.

Moreover, placing the applicant, from 9 May until 30 November 2007, in an ordinary cell of a general wing of Poznań Remand Centre, without providing him with a 24-hour medical supervision, was clearly in contradiction to the recommendations of the doctors who had treated the applicant in the Czarne Prison hospital in the preceding months. The fact that during that time the applicant was attended eighteen times by the remand centre's medical staff has no bearing since the medical care provided to him was of a general character, none of the doctors being a neurologist.

Finally, the Court is struck by the Government's argument that the conditions of the applicant's detention were adequate, because he was sharing his cell with other inmates who knew how to react in the event of his medical emergency. The Court wishes to stress its disapproval of a situation in which the staff of a remand centre feels relieved of its duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or, if necessary, with first aid.

75. Lastly, the Court must also be mindful of three important factors comprising the background of the case.

Firstly, the time when the applicant could rely solely on the prison health care system amounted to more than four years, from 5 August 2003 until 30 November 2007. In that connection, the Court is concerned about the fact that the applicant was detained most of the time in ordinary detention facilities or, at best, in an internal disease ward of a prison hospital. He was detained in the specialised neurological hospital of Gdańsk Remand Centre on only two occasions.

Secondly, the applicant was often transported long distances and transferred about eighteen times between different detention facilities. In this connection, the Court considers that such a frequent change of environment must have produced unnecessary negative effects on the applicant who was, at the relevant time, a person of a fragile mental state.

Thirdly, the Court takes note of the facts that for a considerable time the applicant was taking certain non-generic drugs which had been prescribed by the neurology specialists of the Gdańsk Remand Centre hospital and that in June 2005 his treatment was changed to generic drugs upon the decision of the doctors practising in the Poznań Remand Centre hospital, who were not neurologists. The Court also notes that when in October 2005 the applicant was finally transferred to the neurology ward of the Gdańsk Remand Centre hospital, he immediately resumed taking previously prescribed medicines.

The Court reiterates that the Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population generally (see *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002). Nevertheless, it takes note of the applicant's submission, which was not contested by the Government, that the change to generic drugs resulted in an increase in the number of his daily seizures and made their effects more severe (see paragraph 64 above) and as such contributed to the applicant's increased feeling of anguish and physical suffering.

76. In the Court's opinion the lack of adequate medical treatment in Poznań Remand Centre and the placing of the applicant in a position of dependency and inferiority *vis-à-vis* his healthy cellmates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty.

77. In conclusion, the Court considers that the applicant's continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, amounting to a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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."

A. Damage

79. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and did not allege any pecuniary damage.

80. The Government did not make any comment on the claim.

81. The Court considers that the applicant must have been caused a certain amount of anxiety and suffering, notably because of the disregard of his medical needs by the authorities and awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. The applicant, who was granted legal aid, also claimed that the costs and expenses incurred before the Court be covered.

However, he did not specify the amount and did not furnish any documents in that respect.

83. The Government did not make any comment on the claim.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the fact that the applicant is represented before the Court by a legal-aid lawyer, the Court rejects the claim for costs and expenses in the domestic proceedings.

C. Default interest

85. 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 complaint concerning four terms of the applicant's detention in Poznań Remand Centre in 1999, 2001 and 2003, inadmissible and the remainder of the application admissible;

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

3. *Holds*
   (a) 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 3,000 (three 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;
   (b) 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Lawrence Early Registrar	Nicolas Bratza President