



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

FOURTH SECTION

CASE OF GAJEWSKI v. POLAND

(Application no. 27225/05)

JUDGMENT

STRASBOURG

21 December 2010

FINAL

21/03/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gajewski 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,

Ledi Bianku,

Mihai Poalelungi,

Vincent A. de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 27225/05) 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 Władysław Gajewski (“the applicant”), on 15 July 2005.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wolasiewicz of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that the civil proceedings in his case had been unfair and that his claim had not been heard by an impartial tribunal.

4. On 21 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (former Article 29 § 3 of the Convention, now Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Rudnik.

6. On 6 July 1995 the Zamość District Court declared the company “*Wojewódzkie Przedsiębiorstwo Przemysłu Mięsnego*” insolvent and appointed the applicant (a practising lawyer) as an insolvency trustee. Judge M.B was appointed as an insolvency judge.

7. On 9 August 2000, the court discharged M.B. from his position and appointed M.S. as the new insolvency judge.

8. On 6 September 2000 the applicant asked the insolvency judge to determine the amount of his remuneration.

9. At the hearing held on 9 October 2000 the question of payment of the applicant's expenses was examined. The hearing was adjourned since the court decided to wait for an opinion from an expert accountant.

10. On 11 September 2001 the applicant asked to be granted an advance payment on his remuneration. The insolvency judge – M.S. – submitted that the applicant had already been granted an advance payment of 6,000 Polish zlotys (PLN) and he had already obtained PLN 8,650. In addition, he had obtained, for his alleged expenses, a total of PLN 45,668.32.

11. At the hearing held on 5 October 2001 the Zamość District Court sitting as a panel composed of three judges, including judge M.S., granted the applicant an advance payment of PLN 6,000.

12. On 8 April 2002 the applicant applied to the District Court in Zamość and requested the sum of PLN 577,292 as payment for his eight years of trustee duties.

13. M.S., the insolvency judge, in her submissions to the court (*przedstawienie*), asked it to grant the applicant remuneration in a lower amount, namely PLN 317,989. She submitted that the applicant had been responsible for a lengthy and expensive liquidation proceedings. She also requested the offsetting of the sum of PLN 200,600 that had already been paid to the applicant in the form of advance payments.

14. At the hearing held on 28 September 2004 the court heard evidence from the applicant. On 30 September 2004 the Zamość District Court at a session held *in camera* granted the applicant's request in part, and awarded him 317,989. The sum of PLN 266,318.82 already paid to the applicant was offset from the amount. The bench that gave this decision was composed of three professional judges including both M.B. and M.S.

15. On 18 October 2004 the applicant appealed against this decision. He disagreed with the court's decision in general terms. He further argued that the proceedings had been invalid since the insolvency judge, M.S., had acted both as a claimant and as a member of the court, which called into question the court's impartiality.

16. On 5 January 2005 the Lublin Regional Court at a session held *in camera* dismissed the applicant's appeal. The court considered that the first-instance court had correctly calculated the trustee's remuneration, in particular because the applicant was responsible for delays in the proceedings. It referred to the fact that the applicant was heard at the hearing held on 28 September 2004 and he was able to present his arguments. In the court's opinion, judge M.S. was entitled to sit on the bench of the commercial court deciding on the applicant's remuneration,

given that the Insolvency Act did not provide for any limitations in this respect.

17. The applicant filed a cassation appeal with the Supreme Court.

18. On 3 March 2005 the Lublin Regional Court rejected his cassation appeal as inadmissible in law.

19. On 16 March 2005 the applicant appealed against this decision. On 14 September 2005 the Supreme Court dismissed his appeal confirming that a second-instance court's decision on trustee's remuneration could not be the subject of an appeal.

20. Meanwhile, on 10 February 2005 the applicant asked to be paid further partial remuneration in the amount of PLN 66,945 for the period between 7 June 2003 and 6 February 2005.

21. On 20 December 2005 the Zamość District Court held a hearing in that case. The panel of judges was composed of three professional judges, including judge M.S. The applicant challenged judge M.S. In reply, on 24 March 2006 the Lublin Regional Court ordered judge M.S. to withdraw from the panel. The court noted that the insolvency judge, who had already made her submission regarding the applicant's remuneration, would have pre-conceived notions about the issues in the case.

22. On 27 April 2006 the Zamość District Court granted the applicant partial remuneration in the amount of PLN 22,000.

23. On 9 October 2007 the Zamość District Court declared the liquidation procedure to be terminated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. The Ordinance of the President of the Republic of Poland of 24 October 1934, the Insolvency Act, as applicable at the material time, set out the rules governing insolvency proceedings.

25. Under section 8 of the Insolvency Act, proceedings relating to an insolvency petition were to be instituted before the District Commercial Court, sitting as a bench of three professional judges, in whose jurisdiction the insolvent debtor had its registered office.

26. Under section 67 § 4 the insolvency judge was not to be on the bench of the court that heard a complaint against a decision given by that judge.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicant complained that the proceedings were unfair, the judges had been biased and his claim had not been heard by an impartial tribunal. He invoked Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

28. The Government contested that argument.

A. Admissibility

29. The Government firstly submitted that the applicant had failed to exhaust the available domestic remedies. They argued that in the proceedings concerning the applicant's claim for remuneration, he had failed to lodge a motion to challenge the judges from the Commercial Section of the Zamość District Court. The applicant had complained that the judges had been biased and in particular judge M.S. had acted both as a claimant and as a member of the court. However, he had never requested the removal of judge M.S. from the court's panel dealing with his case.

30. The Government further stressed that as it had been proved by subsequent proceedings for remuneration (instituted on 10 February 2005) there had been an effective and accessible legal way to challenge the insolvency judge. They referred to the fact that on 24 March 2006 the Lublin Regional Court admitted that the participation of an insolvency judge in the court's panel could have resulted in the fact that the judge would not be free from preconceived ideas.

31. The applicant replied that judge M.S.'s submission (*przedstawienie*) had been filed with the court after 28 September 2004 and he had not been aware of it. Since the decision was given on 30 September 2004 at a session held *in camera* he had no real opportunity to comment on M.S.'s submission. He had further no possibility to challenge her, since he had not been aware of the composition of the panel. The applicant argued that in the subsequent proceedings for remuneration, the situation had been different since the insolvency judge M.S. had submitted her opinion to the court before the hearing held on 20 December 2005. Accordingly, at the moment when she had been nominated to sit in the panel he had become aware that she would be deciding in her own case and accordingly he could challenge her.

32. The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, 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, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The Court observes that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule of exhaustion of domestic remedies contained in that provision 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. (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

33. In so far as the Government rely on the possibility of challenging the judges of the Commercial Section of the Zamość District Court, the Court observes that the applicant was not aware that judge M.S. had earlier filed her submission with the court. He had therefore no possibility to respond and could not have effectively challenged her.

34. Consequently, the Government's objection should be dismissed.

35. The Court notes that the application 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.

36. The Government agreed that the judge M.S. had sat as a member of the Zamość District Court when the applicant's request of 15 June 2004 was examined. They further confirmed that in the course of the proceedings judge M.S. had filed with the court her submission under section 122 § 1 of the Insolvency Act in which she presented her own calculation of the amount due to the applicant. However, the Government stressed that unlike in the case of *Werner v. Poland* (see, *Werner v. Poland*, no. 26760/95, 15 November 2001) in the present case the applicant had a possibility to appeal against the first instance's decision. In addition, the applicant's request for partial remuneration was examined in the so-called incidental procedure (*postępowanie wpadkowe*). In such a procedure, the court only assessed in a preliminary way the trustees' future remuneration, to which he would be entitled after termination of the liquidation proceedings.

37. The Government further stressed that the applicant made use of the possibility to appeal to a second-instance court. His appeal was subsequently examined by a panel of three professional judges of the Lublin Regional Court, none of who could have been considered partial.

38. They concluded that the applicant's right to a fair hearing was not violated. Even if the participation of judge M.S. was not compatible with the guarantees of Article 6 of the Convention, the appellate procedure before the Lublin Regional Court “made reparation” for that breach.

39. The applicant replied that his appeal against the decision of 30 September 2004 had been examined by the Lublin Regional Court at a session held *in camera*. Therefore he could not have effectively presented his case. In his opinion the appellate procedure had not remedied the lack of impartiality of the first-instance court.

2. The Court's assessment

40. The Court recalls that there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the *Gautrin and Others v. France* judgment of 20 May 1998, Reports 1998-III, pp. 1030-1031, § 58).

41. As regards the subjective test, the Court first notes that the personal impartiality of a judge must be presumed until there is proof to the contrary (*Wettstein v. Switzerland*, no. 33958/96, § 43, ECHR 2000-XII). In the instant case, the Court is not convinced that there are sufficient elements to establish that any personal bias was shown by judge M.S., when she sat as a member of the Zamość District Court when the applicant's request of 15 June 2004 for his partial remuneration was heard.

42. As regards the objective test, the Court observes that in the present case the criteria applicable for this test overlap with those which are relevant for the subjective test, as it is the stand taken by the insolvency judge which is examined in both tests.

43. It is true that the mere fact that a judge had already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his or her impartiality. What matters is the scope and nature of the measures taken by the judge before the trial (see, *Werner* cited above § 43). However, in the present case the same issue, i.e. the amount of the applicant's remuneration, was addressed by the judge in her motion and later by the court in its decision. In her submissions filed under section 122 § 1 of the Insolvency Act, judge M.S. had presented her own calculation of the amount due to the applicant which in her view should have been substantially lower.

44. In this respect the Court notes that in the second set of the proceedings the Lublin Regional Court confirmed that an insolvency judge who had already made a submission as regards for example the amount of the applicant's remuneration would not be free from a “prior attitude towards the case” (see, paragraph 21 above).

45. Consequently, the fact that the judge who submitted to the court a motion concerning calculation of the applicant's remuneration could be regarded as giving objective grounds for believing that the court deciding on this motion lacked impartiality.

46. The Court must now determine whether the Regional Court made reparation for the violation of the applicant's right to an impartial tribunal (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86).

47. The Government submitted that, even if the participation of the insolvency judge on the panel of the Zamość District Court was not compatible with Article 6 of the Convention, this procedural defect had been rectified since the relevant appeal procedure provided him with the necessary guarantees (see, paragraph 33 above).

48. In this respect the Court observes that the applicant raised the issue of the alleged lack of impartiality in his appeal against the first instance decision (see, paragraph 15 above). It further observes that, despite the fact that the Lublin Regional Court had all the powers to remedy the situation, it had failed to do so and the procedural defect had not been rectified (see, *Dorozhko and Pozhaskiy v. Estonia*, nos. 14659/04 and 16855/04, § 58, 24 April 2008).

49. In the light of the above, the Court considers that there had been a violation of Article 6 § 1 of the Convention on the grounds of the lack of impartiality of the tribunal that determined the applicant's claim.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 200,000 Polish zlotys (PLN) in respect of pecuniary damage and PLN 75,000 non-pecuniary damage.

52. The Government contested this claim.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant did not make any claims for costs and expenses.

C. Default interest

55. 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 6 § 1 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 21 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President