



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

FOURTH SECTION

CASE OF TERESA KOWALCZYK v. POLAND

(Application no. 23987/05)

JUDGMENT

STRASBOURG

11 October 2011

FINAL

11/01/2012

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

In the case of Teresa Kowalczyk v. Poland,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 23987/05) 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, Ms Teresa Kowalczyk (“the applicant”), on 8 March 2005.

2. The applicant was represented by Mr K. Dobrowolski, a lawyer practising in Zdunska Wola. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. On 25 March 2008 the President of the Fourth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1960 and lives in Zduńska Wola.

5. The applicant was made redundant and was dismissed by her employer, a State-owned company, in January 2001, together with a number of other persons.

6. By a decision of 4 January 2001, the Zduńska Wola Municipality granted her a pre-retirement benefit in an amount equivalent to 120 per cent of a basic unemployment benefit as applicable at that time. Other persons made redundant at the same time received identical benefits.

7. Before the applicant had been made redundant, a number of meetings were organised by the local labour administration in Zduńska Wola to address the situation of the employees who had been dismissed, all of whom had worked in the same factory. There has been uncertainty at that time as to how the legal provisions of the 1994 Employment and Combating Unemployment Act (*ustawa o zatrudnieniu i przeciwdziałaniu bezrobociu*) concerning the determination of the amount of the pre-retirement benefit for persons living in municipalities with structural unemployment should be interpreted. The applicant maintains that she and other dismissed persons were repeatedly told by various officials that in their situation it was useless to appeal to the administrative courts regarding the amount of the benefit. Subsequently, six of the applicant's former co-workers appealed, but the applicant did not. In August and September 2002 the Supreme Administrative Court quashed decisions awarding 120 per cent to those employees and remitted the cases.

8. Shortly afterwards, on 21 October 2002, the Supreme Administrative Court sitting as a full bench of seven judges and having regard to serious difficulties arising in connection with the determination of the amounts of pre-retirement benefit due to persons dismissed within the framework of large-scale redundancies in municipalities affected by structural unemployment, issued a resolution aimed at clarifying these difficulties and resolving the jurisprudential conflicts. The court held that the dismissed persons were entitled to 160 per cent of the basic benefit only when they had been made redundant by the same employer in the context of redundancies exceeding 100 persons; not when the number of dismissed persons exceeded 100 in a given municipality as a whole, as the competent authorities had tended to interpret this provision previously.

9. Subsequently, decisions were given by the local administration that the six appellants were entitled to 160 per cent of the basic unemployment benefit.

10. On 3 June 2003 the applicant requested the competent municipal authority to amend the decision given in her case on 4 January 2001 (see paragraph 6 above). She complained that she had obtained much lower unemployment benefit than her colleagues who had been dismissed from the same factory and who had been in an identical factual and legal situation.

11. On 25 June 2003 the Zduńska Wola Starosta refused to amend the contested decision. It held that in the light of the 2002 resolution of the Supreme Administrative Court the relevant provisions gave the applicant a right to obtain only 120 per cent of the basic benefit. The second-instance authority upheld this decision. The applicant appealed to the Łódź Regional Administrative Court. She reiterated her complaint that she had been denied a pre-retirement benefit in the amount obtained by her colleagues who had been in an identical legal and factual situation.

12. The Łódź Regional Administrative Court, in its judgment of 7 July 2004, dismissed the applicant's appeal, finding that the impugned decision of the appellate authority was in compliance with the applicable laws. It referred to the Supreme Administrative Court's resolution given in October 2002. It held that under that resolution it had become clear that a higher pre-retirement benefit was available only to persons who had lost their employment as a result of dismissals of over one hundred persons by one employer during a period of three months preceding the party's dismissal; not when the number of persons dismissed by all employers in a given municipality throughout the same period had exceeded one hundred.

13. On 27 July 2004 the applicant requested legal aid for the purposes of lodging a cassation appeal with the Supreme Administrative Court. On 24 August 2004 the court granted her request. On 17 September 2004 the Regional Bar assigned an advocate to the applicant's case. On 29 September the applicant gave him a power of attorney.

14. The judgment with its written grounds was served on the applicant on 14 September 2004. It was on that date that the thirty-day time-limit for lodging a cassation appeal with the Supreme Administrative Court started to run.

15. By a letter of 6 October 2004 the assigned lawyer informed the applicant that he had found no grounds on which a cassation appeal could be filed in her case and he refused to prepare such an appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic law and practice concerning the procedure for lodging cassation appeals with the Supreme Administrative Court against judgments of the Regional Administrative Courts are stated in the Court's judgment in the case of *Subicka v. Poland*, no. 29342/06, §§ 12-21, 14 September 2010.

17. In particular, in its decision no. II FZ 651/07 of 18 January 2008 the Supreme Administrative Court held that a request for leave to appeal out of time was the only method by which a cassation appeal submitted after the expiry of the time-limit by a legally-aided applicant could be admitted for examination.

18. When legal aid has been granted and the time-limit for the submission of a cassation appeal has already expired, it is open to the legally-aided party to submit the appeal together with a request for leave to appeal out of time under sections 86 and 87 of the Law on the Procedure before Administrative Courts (e.g. NSA FZ 754/04 of 31 January 2005 and NSA, I OZ 160/08 of 14 March 2008). In certain cases the courts stated that such a request should be submitted within seven days from the date on which the lawyer obtained a power of attorney from the party, which date is considered as the date on which the impediment to lodging an appeal ceased

to exist (e.g. the Białystok Regional Administrative Court, II SAB Bk 27/07 of 10 April 2008), or from the date when the lawyer could obtain effective access to the case file (e.g. the Poznań Regional Administrative Court, IV SA/Po 865/06 of 13 November 2007).

19. In a number of its recent decisions the Supreme Administrative Court acknowledged the difficulties which legally-aided parties experienced in connection with lodging their cassation appeals against judgments of the first-instance administrative courts. It expressed the view that they should not be penalised for the fact that their requests for legal aid were not processed speedily enough. It analysed relevant case-law of the administrative courts and noted that the manner in which the beginning of the time-limit for lodging cassation appeals was determined had led to divergent results. It held that it was necessary to determine the relevant time in a manner compatible with effective access to the highest administrative court and which ensured equal treatment for parties represented by lawyers appointed under the legal-aid scheme and by privately hired lawyers. The court held that the time-limit for a legally-aided party started to run only on the day when a legal-aid lawyer had a genuine possibility of lodging the cassation appeal and not when he or she was informed of having been assigned to the case. The court was of the view that the latter approach was far too rigorous and rendered the effective enjoyment of legal assistance granted under the legal-aid system illusory. In any event, the cassation appeal had to be lodged within thirty days from the day on which the party was informed of the appointment of the legal-aid lawyer (I FZ 569/06 of 8 December 2006; I FZ 667/06 of 15 January 2007; I FZ 30/09 of 2 March 2007; II FZ 177/08 of 25 June 2008; II OZ 513/08 of 27 May 2008; I OZ 376/08 of 13 June 2008; I FZ 30/09 of 2 March 2009; II OZ 1093/09 of 9 December 2009; I FZ 30/09 of 2 March 2009).

THE LAW

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

20. The applicant complained that as a result of the legal-aid lawyer's refusal to prepare and lodge a cassation appeal with the Supreme Administrative Court she had been denied access to that court. She referred to Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Admissibility

21. The Government submitted that the applicant had failed to exhaust relevant domestic remedies. She could have complained to the local Bar Association under section 28 of the Bar Act about the lawyer's alleged negligence. She should also have brought a civil action for compensation against the lawyer concerned. The Government were of the view that such an action was an effective remedy where the lawyer, either appointed under the legal-aid scheme or privately hired, was negligent in carrying out his or her duties regarding legal representation. It had also been open to the applicant to request leave to lodge a cassation appeal with the Supreme Administrative Court out of time.

22. The applicant did not submit her comments on the admissibility of the case.

23. In so far as the Government referred to the compensatory remedies and argued that the application was incompatible *ratione personae* with the provisions of the Convention, the Court reiterates that it has already examined and rejected such arguments in previous cases (e.g. *Siałkowska v. Poland*, no. 8932/05, § 59, 22 March 2007; *Subicka v. Poland*, referred to above, § 28, 14 September 2010). It accordingly dismisses these objections.

24. In so far as the Government argued that it had been open to the applicant to request leave to appeal out of time, the Court considers that such objection is closely linked to the substance of the applicant's complaint under Article 6 § 1. Its examination should therefore be joined to the merits of the case.

25. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

26. The applicant submitted that she had never been informed about her procedural rights in connection with the lodging of a cassation appeal with the Supreme Administrative Court.

27. The Government argued that the fact that the legal-aid lawyer had refused to prepare the cassation appeal in the applicant's case had not had any negative impact on her situation. She had been informed thereof early enough to be able to take steps to have her case examined by the Supreme Administrative Court. The applicant had never argued that she had been informed of the refusal after the expiry of the time-limit for doing so. There had been no indication of any negligence on the part of the legal-aid lawyer in the applicant's case. His legal opinion had been duly and extensively reasoned. By allowing the applicant's request for legal aid the State had

complied with its obligations to ensure the applicant's access to court in the present case.

28. The Court has already had occasion to set out at length the relevant principles derived from its case-law in this area (*Siałkowska v. Poland*, cited above; *Smyk v. Poland*, no. 8958/04, §§ 54-59, 28 July 2009; *Zapadka v. Poland*, no. 2619/05, §§ 57-61, 15 December 2009, and *Subicka v. Poland*, referred to above, § 40). It adopts those principles for the purposes of the instant case.

29. The same question arises in the context of the present case as that examined by the Court in the cases referred to above, namely whether as a result of the refusal of a legal-aid lawyer to prepare a cassation appeal against the judgment of the Regional Administrative Court the applicant was deprived of access to the Supreme Administrative Court in a manner contrary to the Convention.

30. The Court observes that it has already dealt with this question in the context of criminal as well as civil procedure before the Polish courts.

31. As far as criminal procedure is concerned, it was established that – under the established case-law of the Supreme Court – the time-limit for lodging a cassation appeal should run *de novo* from the day when the applicant was informed of the legal-aid lawyer's refusal to lodge a cassation appeal (the Supreme Court, decision II KZ 16/08 of 20 February 2002). This approach was found to satisfy Convention standards, provided that the applicant has been properly informed about his/her procedural rights at the time when the lawyer's refusal was communicated to him or her (*Kulikowski v. Poland*, no. 18353/03, § 69-71, ECHR 2009-... (extracts); *Antonicelli v. Poland*, no. 2815/05, § 44-45, 19 May 2009). Subsequently, in 2008 the Supreme Court also stated that the strand of the case-law based on that approach was correct as providing adequate guarantees to the defendant by indicating in an unequivocal way the date on which the time-limit started to run.

32. In the context of civil procedure the Court has found that the civil courts' approach to the calculation of the time-limit for submitting a cassation appeal was stricter. Thus, a legal-aid lawyer's refusal to prepare an appeal did not trigger the running of the time-limit *de novo*. That approach was regarded by the Court as being incompatible with Convention standards, save for rather rare situations where the refusal of the legal-aid lawyer was notified to the applicant well before the deadline was due to expire (see *Smyk v. Poland*, referred to above, §§ 63-65).

33. In so far as procedure before the administrative courts is concerned, the Court first observes that where a party to proceedings is represented by a lawyer, the procedural time-limits set by the Act on Procedure before Administrative Courts start to run on the date of the service of judicial decisions on the lawyer. In such situations no difficulties arise in connection

with establishing the date on which the thirty-day time-limit for lodging a cassation appeal, applicable at the material time, would expire.

34. The situation is significantly different where a party does not have legal representation before the Regional Administrative Court, as in the present case, and is granted legal aid only after the second-instance judgment has been given.

35. The case-law of the Supreme Administrative Court provides that the time-limit for lodging a cassation appeal starts to run from the date on which the judgment of the Regional Administrative Court has been served on the non-represented party. The administrative courts have repeatedly held that his or her request for legal aid does not affect the running of the time-limit (see relevant domestic law and practice above). However, they have acknowledged that a party who was subsequently granted legal aid was put in a difficult position, because at the time of service the time-limit had already started to run. A lawyer subsequently assigned to the case had therefore less time to examine the case and decide, still within the time-limit, whether a cassation appeal offered prospects of success and to prepare an appeal. This may lead to a situation where lawyers subsequently assigned to the case only learned about their appointments after the time-limit for lodging the cassation appeal had expired.

36. The Supreme Administrative Court has, on numerous occasions, addressed this problem. As a result, a body of case-law has developed to the effect that in situations where a legal-aid lawyer has been appointed after the time-limit for lodging a cassation appeal had expired and he or she is willing to prepare an appeal, the administrative courts could grant leave to submit a cassation appeal out of time. Under the case-law of the Supreme Administrative Court the day on which the impediment to lodging the cassation appeal ceased to exist is defined as the day on which the lawyer has had a genuine possibility to prepare an appeal. Thus, the seven-day time-limit begins to run only after the legal-aid lawyer has had sufficient time to study the file.

37. The Court further observes that a cassation appeal must, in any event be lodged, together with a request for retrospective leave to appeal out of time, within thirty days from the day on which the party was informed of a legal-aid lawyer's assignment to the case (see relevant domestic law and practice above). The Court is of the opinion that this jurisprudential approach resulted from the administrative courts' concern about the difficulties encountered by legally-aided parties and can be said to be compatible with Convention standards as regards ensuring fair access to the cassation procedure. However, this approach does not address situations where a lawyer refuses to seek retrospective leave to lodge a cassation appeal after the expiry of the time-limit (see *Subicka v. Poland*, referred to above, §§ 47-48).

38. Turning to the circumstances of the present case, the Court observes that the judgment of 7 July 2004 with its written grounds was served on the applicant on 14 September 2004. Accordingly, the thirty-day time-limit for lodging a cassation appeal was to expire on 15 October 2004. The legal-aid lawyer was assigned to the applicant's case on 17 September 2004. On 29 September 2004 the applicant gave him a power of attorney. Subsequently, he informed the applicant of his refusal to prepare a cassation appeal by a letter of 6 October 2004.

39. The Court is of the view that, in order for the legal framework regulating the lodging of cassation appeals to be compatible with the Convention standards, the case-law of the Supreme Administrative Court summarised above should also be applicable to situations where after a legal-aid lawyer's refusal to prepare a cassation appeal the party wishes to have recourse to the services of another lawyer. In this connection, the Court notes that on 6 October 2004 the applicant still had nine days within which to avail herself of the possibility of seeking leave to appeal out of time by way of a privately hired lawyer. It cannot therefore be said that she was put in a position where her effective access to a court was restricted in breach of Article 6 § 1 of the Convention (see *Smyk v. Poland*, referred to above, § 63-64).

40. The Court accordingly finds that it is not required to examine the Government's preliminary objection since the issue whether or not the applicant could seek leave to appeal out of time does not arise in the circumstances as set out.

41. There has therefore been no breach of this provision.

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

42. The applicant complained of a violation of Article 6 § 1 of the Convention, referring to the fact that her former co-workers had received higher pre-retirement benefits than hers and that the administrative courts had approved this difference in treatment.

43. The Court has already held, in the context of Article 6 § 1 of the Convention, that the Contracting States have an obligation to organise their legal system so as to avoid the adoption of discordant judgments (see *Vrioni and Others v. Albania*, no. 2141/03, § 58, 24 March 2009, and *Mullai and Others v. Albania*, no. 9074/07, § 86, 23 March 2010) and that conflicting decisions in similar cases stemming from the same court which, in addition, is the court of last resort in the matter, may, in the absence of a mechanism which ensures consistency, breach the principle of legal certainty inherent in that Article (see, for example, *Beian v. Romania (no. 1)*, no. 30658/05, §§ 36-39, ECHR 2007-XIII; *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009; and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, §§ 47-53, 2 July 2009).

44. In particular, the Court has held that once a solution has been adopted by a State to regulate the collective dismissal of hundreds of persons from State-owned companies, it must be implemented with reasonable clarity and coherence in order to avoid, in so far as possible, uncertainty and ambiguity for the persons concerned by the measures of implementation (see *Ștefănică and Others v. Romania*, no. 38155/02, § 32, 2 November 2010).

45. In the present case the Court notes, firstly, that the applicant, who had been dismissed within the framework of large-scale redundancies, failed to follow the example of her work colleagues who appealed to the administrative court against the decisions granting them lower amounts of pre-retirement benefit. They ultimately won their cases. Hence, the applicant failed to have recourse to the normal remedy available against the administrative decisions for the purposes of judicial review of their lawfulness. It was only after decisions in her colleagues' cases had been given in their favour that she requested that her case be re-examined.

It is further noted that the applicant did not lodge a cassation appeal with the Supreme Administrative Court against the judgment of the Łódź Regional Administrative Court of 7 July 2004 (see paragraph 12 above).

However, even assuming that the applicant exhausted domestic remedies, the Court is of the view that this part of the application is in any event inadmissible for the following reasons.

46. Prior to October 2002 the provisions of the Employment and Combating Unemployment Act concerning entitlement to special pre-retirement benefit due to persons made redundant by employers situated in municipalities affected by structural unemployment had given rise to difficulties in its application. The Supreme Administrative Court, sitting as a bench of seven judges, acknowledged these difficulties and considered that it was necessary to adopt a resolution of that court, aimed at resolving the difficulties and indicating to the administrative authorities, to the administrative courts, and to the same court sitting in its usual three-judge formation, the manner in which that provision should be applied. Such a resolution was given on 21 October 2002. Hence, the Supreme Administrative Court discharged the task expected of higher courts in a judicial system, by resolving conflicts of jurisprudence and ensuring uniform application of domestic law.

47. Subsequently, the applicant's case was re-examined by the administrative authorities and ultimately by the Łódź Regional Administrative Court. In its judgment of 4 July 2004 that court referred to the difficulties concerning the interpretation of the relevant provisions of the 1994 Act and to the above-mentioned resolution of the Supreme Administrative Court. It held that under that resolution it had become clear that a higher pre-retirement benefit was available only to persons who had lost their employment as a result of dismissals of over one hundred persons by one employer during a period of three months prior to the applicant's dismissal, not by all employers in a given municipality. That court further observed that the more advantageous decisions obtained by the applicant's colleagues had been given by the Supreme Administrative court prior to the resolution of the full bench of that court.

48. In these circumstances, the Court is satisfied that the domestic courts had acknowledged the existence of the difficulties arising in connection with the interpretation of the statute applied in the applicant's case and took necessary and sufficient measures to address these difficulties (see *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008). The Supreme Administrative Court adopted a resolution and the Regional Administrative Court in its later judgment followed the solution recommended by the former.

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

FOR THESE REASONS, THE COURT

1. *Joins* unanimously to the merits the Government's objection regarding the applicant's failure to seek leave to appeal out of time;
2. *Declares* unanimously admissible the applicant's complaint concerning lack of access to a court and the remainder of the application inadmissible;
3. *Holds* by six votes to one that there has been no violation of Article 6 § 1 of the Convention;
4. *Holds unanimously* that in the circumstances of the case it is not required to examine the Government's above-mentioned objection.

Done in English, and notified in writing on 11 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Mijović is annexed to this judgment.

N.B.
T.L.E.

DISSENTING OPINION OF JUDGE MIJOVIĆ

As emphasised in my previous concurring/dissenting opinions in nine recent cases,¹ and in the joint dissenting opinion in *Smyk v. Poland*, no. 8954/04, 28 July 2009, I see the problem of the refusal of lawyers appointed under legal-aid schemes to represent legally-aided persons on the ground that the claim has no reasonable prospects of success as the general one, related not only to criminal, but also to civil and administrative proceedings. To avoid repetition, I refer to the detailed reasoning of those opinions.

1. *Kulikowski v. Poland*, no. 18353/03, ECHR 2009-... (extracts); *Antonicelli v. Poland*, no. 2815/05, 19 May 2009, *Arciński v. Poland*, no. 41373/04, 15 September 2009, *Zapadka v. Poland*, no. 2619/05, 15 December 2009; *Jan Zawadzki v. Poland*, no. 648/02, 6 July 2010, *Subicka v. Poland*, no. 29342/06, 14 September 2010, *Bąkowska v. Poland*, no. 33539/02, 12 January 2010, *Słowik v. Poland*, no. 31477/05, 12 April 2011, *Subicka v. Poland* (n° 2) nos. 34043/05 and 15792/06, 21 June 2011.