



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

FOURTH SECTION

CASE OF DOMBROWSKI v. POLAND

(Application no. 9566/10)

JUDGMENT

STRASBOURG

18 October 2011

FINAL

18/01/2012

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

In the case of Dombrowski v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

George Nicolaou,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 27 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 9566/10) 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 Jarosław Dombrowski (“the applicant”), on 22 January 2010.

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

3. The applicant complained, in particular, that he had been deprived of access to the Supreme Court.

4. On 7 July 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. In accordance with Protocol No. 14, the application was allocated to a Committee.

6. The Government objected to the examination of the application by a Committee. After having considered the Government’s objection, the Court decided that the case should be examined by a Chamber.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1970.

8. On 25 September 2008 the Łódź Regional Court convicted the applicant of attempted murder and sentenced him to 9 years' imprisonment. On 11 December 2008 the Łódź Court of Appeal quashed the first-instance judgment and remitted the case. On 3 March 2009 the Łódź Regional Court found the applicant guilty of causing grievous bodily harm and sentenced him to 5 years' imprisonment. The applicant's lawyer appealed. By a judgment of 4 June 2009 the Łódź Court of Appeal upheld the first-instance judgment.

9. Throughout the judicial proceeding the applicant was represented by a legalaid lawyer.

10. By a letter of 3 August 2009 the lawyer informed the court that he had not found any grounds on which to prepare a cassation appeal.

11. By a letter of 7 August 2009 the court forwarded the lawyer's statement to the applicant. The letter read as follows:

"The Registry of the Łódź Court of Appeal forwards [...] a copy of a statement of your legal-aid lawyer, advocate Mr P.K., submitted in accordance with Article 84 § 3 of the Code of Criminal Procedure, for your information."

12. The letter as well as the opinion were served on the applicant on 12 August 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. The relevant domestic law and practice concerning the procedure for lodging cassation appeals with the Supreme Court against judgments of the appellate courts are stated in the Court's judgments in the cases of *Kulikowski v. Poland*, no. 18353/03, §§ 19-27, ECHR 2009-... (extracts) and *Antonicelli v. Poland*, no. 2815/05, §§ 14-22, 19 May 2009).

14. In particular, on 26 February 2002 the Supreme Court examined a situation where a legal-aid lawyer had refused to represent a convicted person for the purposes of cassation proceedings, finding that a cassation appeal would offer no prospects of success. It held that in such a situation the appellate court was obliged to instruct the defendant that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the lawyer's refusal and not on the earlier date when the judgment of the appellate court was served on the defendant himself. It stated that it was not open to doubt that a defendant faced with a legal-aid lawyer's refusal had the right to take other measures to seek legal

assistance necessary for effective lodging of a cassation appeal (III KZ 87/01). The Supreme Court reiterated its position in a decision of 6 May 2008 (II KZ 16/08) and in a number of similar decisions given in 2008.

15. In its decision of 25 March 1998 the Supreme Court stated that the refusal of a legal-aid lawyer to lodge a cassation appeal did not constitute a valid ground for granting retrospective leave to lodge such an appeal by another lawyer out of time (V KZ 12/98). It confirmed this ruling in a further decision of 1 December 1999. The Supreme Court observed that the court could only assign a new legal-aid lawyer to the case if it were shown that the first lawyer had been negligent in his or her task of assessing whether a cassation appeal had any prospects of success. If this were not the case, a court was not obliged to assign a new legal-aid lawyer to represent the convicted person and its refusal was not subject to appeal (III KZ 139/99). The Supreme Court reiterated its position in a number of other decisions (e.g. II KZ 11/02, II KZ 36/02).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained that as a result of the legal-aid lawyer's refusal to draft a cassation appeal he had been denied effective access to the Supreme Court. He relied on Article 6 § 1 taken together with Article 6 §3 (c) of the Convention. Those provisions, in so far as relevant, read:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”

A. Admissibility

17. The Government argued that the applicant had failed to avail himself of the applicable domestic remedies.

He should have hired a lawyer of his own choice with a view to submitting a cassation appeal on his behalf. It was also open to him to request that another legal-aid lawyer be assigned to the case. Had the

time-limit for lodging the appeal already expired by the time the request had been granted, it would have been open to the applicant to request retrospective leave to appeal out of time.

18. The applicant disagreed.

19. The Court notes that legal representation was mandatory for the purposes of preparing a cassation appeal. However, in the applicant's case the courts, by granting the applicant legal aid, acknowledged his lack of financial resources. In such circumstances, the Court considers that the applicant should not therefore have been required to embark on further attempts to obtain legal assistance with a view to lodging a cassation appeal for the purposes of exhaustion of domestic remedies (see *Seliwiak v. Poland*, no. 3818/04, § 47, 21 July 2009). In so far as the Government argued that the applicant should have requested that another legal-aid lawyer be assigned to him, the Court observes, having regard to the case-law of the Supreme Court (see paragraph 15 above), that a refusal of a legal-aid lawyer to prepare a cassation appeal was not a valid ground on which the courts would assign another lawyer to the case. As regards the Government's argument concerning retrospective leave to appeal out of time, the Court considers that the Government's preliminary objection under this head is closely linked to the merits of the applicant's complaint. Accordingly, it decides to join its examination to the merits of the case.

20. The Court notes that this complaint 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

21. The applicant submitted that he had been granted legal aid for the purposes of lodging a cassation appeal. However, he had been ultimately deprived of access to the Supreme Court because that lawyer refused to prepare a cassation appeal and he was left in uncertainty as to his legal position.

22. The Government argued that the applicant should have requested retrospective leave to appeal out of time. Such leave can only be granted if the non-compliance with a time-limit occurred "outside the applicant's power" within the meaning of Article 126 § 1 of the Code of Criminal Proceedings ("the Code"). The Government submitted that there was well-established case-law of the domestic courts, regarding a failure to comply with a time-limit which was due to the lack of instruction from the trial court as being "outside the applicant's power". The Government referred, in particular, to two decisions of the Supreme Court, of 26 February 2009 (IV KZ 5/09) and 16 July 2009 (III KZ 58/09).

23. The Government concluded their submissions by arguing that given the possibility of seeking a renewal of the time-limit for lodging a cassation appeal after a legal-aid lawyer's refusal and leave to appeal out of time, a refusal by the legal-aid lawyer does not deprive a party of access to the Supreme Court. Even if a court failed to inform the applicant of the two above-mentioned procedural mechanisms, a party would receive all the necessary information from a lawyer, and the applicant would certainly seek another lawyer's assistance given that a cassation appeal could only be lodged by a professional lawyer.

24. The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same Article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 755, § 52, and *Bobek v. Poland*, no. 68761/01, § 55, 17 July 2007).

Furthermore, the Court has already had occasion to set out at length the relevant principles derived from its case-law in this area (*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). It adopts those principles for the purposes of the instant case.

25. In the present case the court informed the applicant about the legal-aid lawyer's refusal by a letter of 7 August 2009. The court's letter accompanying that refusal did not contain any information concerning his procedural rights. In particular, the court did not inform him that under the case-law of the Supreme Court, adopted in 2002, the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the legal-aid lawyer's refusal. The failure to clarify the applicant's legal situation, given that at that time he was not represented by a lawyer, meant that he had no way of knowing when the time-limit for lodging a cassation appeal started to run and what steps, if any, he had at his disposal to pursue the cassation proceedings, for instance by trying to find another lawyer who might be persuaded to file a cassation appeal on his behalf.

26. In so far as the Government argued that the applicant should have requested retrospective leave to appeal out of time, the Court notes, firstly, that the time-limit for lodging the cassation appeal started to run again and thus there was no need to seek retrospective leave. Secondly, as to the possibility of requesting another legal-aid lawyer, the Government admitted that this remedy could only be effective if the first lawyer appointed in the case was negligent. Thirdly, the courts informed the applicant of the legal-aid lawyer's refusal, but failed to inform him of his procedural rights.

27. The Court further observes that the procedural framework governing the making available of legal aid for a cassation appeal in criminal cases, as

described above, is within the control of the appellate courts. When notified of a legal-aid lawyer's refusal to prepare a cassation appeal, it is entirely appropriate and consistent with fairness requirements, that an appeal court indicate to an appellant what further procedural options are available to him or her (see *Kulikowski v. Poland*, cited above, § 70; *Antonicelli v. Poland*, cited above, § 45; *Jan Zawadzki v. Poland*, no. 648/02, § 16, 6 July 2010). However, in the instant case this requirement was not complied with, with the result that the applicant's right of access to the Supreme Court was not secured in a "concrete and effective manner".

28. Accordingly, having regard to the above deficiency, the Court concludes that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention and the Government's objection based on non-exhaustion of domestic remedies (see paragraph 19 above) must accordingly be rejected.

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

29. The applicant complained, relying on Article 6 of the Convention, that the proceedings had been unfair in that the courts had wrongly assessed evidence, erred in establishing the facts of the case and incorrectly applied applicable domestic law.

30. However, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

31. In the present case, even assuming that the requirement of exhaustion of domestic remedies was satisfied, the Court notes that the applicant did not allege any particular failure to respect his right to a fair hearing on the part of the relevant courts. Indeed, his complaints are limited to a challenge to the result of the proceedings. Assessing the circumstances of the case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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, costs and expenses

33. The applicant sought compensation for pecuniary and non-pecuniary damage in the amount of 5,000 euros (EUR). He did not make any claims for reimbursement of costs and expenses.

34. The Government contested these claims.

35. The Court accepts that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 2,000 under this head. The Court does not discern any causal link between the violation of Article 6 and any financial loss which the applicant might have suffered. Thus, there is no need to award compensation for pecuniary damage.

B. Default interest

36. 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. *Joins* to the merits the Government’s preliminary objection based on non-exhaustion of domestic remedies and *declares* admissible the applicant’s complaint concerning lack of access to a court and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c) and *dismisses* in consequence the Government’s above-mentioned objection;
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 2,000 (two 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 18 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 following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Mijović;
- (b) separate opinion of Judge De Gaetano.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE MIJOVIĆ

As emphasised in my previous concurring/dissenting opinions in ten 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 and *Kowalczyk Teresa v. Poland*, no. 23987/05, 11 October 2011.

SEPARATE OPINION OF JUDGE DE GAETANO

1. I voted in favour of a violation of Article 6 § 1 when read in conjunction with Article 6 § 3 (c) only because of the particular facts of the case set within the context of a peculiar domestic case-law.

2. After the applicant – who was represented throughout the proceedings by a legal-aid lawyer – was convicted of grievous bodily harm and sentenced to imprisonment for five years, and after the Court of Appeal had upheld the first instance judgment, his legal-aid lawyer informed the latter court that he had not found any grounds on which to prepare a cassation appeal. The Court of Appeal informed the applicant, who was already in prison, of this fact but failed to inform him of his “procedural rights”, namely that the time-limit for filing a cassation appeal in the (unlikely) event of his managing to obtain the services of *another* lawyer at his own expense or of a lawyer acting *pro bono*, commenced to run (or, more precisely, commenced to run again) from the date on which that same court had notified him of the legal-aid lawyer’s refusal. This is the crux of the issue, set out in §§ 25 and 27 of the judgment.

3. How does this requirement to inform about “procedural rights” square with – if at all – the cardinal rule that everyone is presumed to know the law, whether substantive or procedural, and regardless of whether the law is statutory, judge made (or *common law* in some jurisdictions) or customary as the case may be? Because of the fact that this rule is so basic and fundamental, one finds only cursory references to it in the jurisprudence of the Commission and the Court, and only in a handful of cases (*e.g. Dello Preite v. Italy* (no. 15488/89) Commission decision 25 February 1995; *E.E. v. Austria* (no. 31697/96) 7 September 1999; *Polednová v. the Czech Republic* (no. 2615/10) 21 June 2011).

4. In order to obviate some of the difficulties inherent in, and criticisms of, the Polish system of cassation appeals¹, particularly when convicted prisoners who were represented by legal-aid lawyers were involved, the Polish Supreme Court, in a decision handed down on 26 February 2002, changed its previous position concerning the date from which the time for

1. See, for such criticism, the concurring opinions of Judges Bonello and Mijovic in *Kulikowsky v. Poland* (no. 18353/03) and *Antonicelli v. Poland* (no. 2815/05), both decided on 19 May 2009. The difficulties which legally-aided parties experience in connection with the lodging of cassation appeals in *administrative* cases seem to have been also acknowledged by the Supreme Administrative Court in Poland – see *Subicka v. Poland* (no. 29342/06) 14 September 2010 § 18. This case also distinguishes between administrative, civil and criminal cassation appeals.

lodging a cassation appeal commences to run, and held (i) that when a legal-aid lawyer refused to file a cassation appeal on behalf of a convicted prisoner because in the lawyer's view the appeal would offer no prospects of success, the time-limit for lodging the appeal would start to run only from the date on which the prisoner was informed by the Court of Appeal of the legal-aid lawyer's opinion and not from the earlier date when the judgment of the appellate court was served on the prisoner; moreover (ii) it also held that the Court of Appeal was also specifically to instruct the prisoner of this fact so that if he wanted to he could take other measures to seek the legal assistance necessary for the lodging of a cassation appeal (see, *Kulikowsky v. Poland* 19 May 2009, § 27). It is against the backdrop of this *specific domestic decision* that the instant case (as well as other similar ones where a violation has been found on account of the appellate court not having advised the prisoner about his "procedural rights" in respect of the cassation appeal, e.g. *Jan Zawadzki v. Poland* (no. 648/02) 6 July 2010, § 16)) has to be viewed².

5. We are now in the last quarter of the year of Our Lord 2011. More than nine years have passed since the decision of the Supreme Court of Poland which established the "new" procedure as to the running of the time-limit. In the instant case, the facts mentioned in paragraph 2, *supra*, occurred between September 2008 and August 2009. Has not enough time passed so that this Court could say that the issue of the time-limit for the filing of a cassation appeal pursuant to the legal-aid lawyer's refusal to file the same, is now well established judge-made law which must be presumed to be known by one and all? Apparently not. It is important to recall in this connection that not every or any procedural failing – in the sense of the non-observance of domestic procedure – will necessarily amount to a breach of Article 6. One possible justification for finding – notwithstanding the passage of time – a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) is that a person who is in detention is hardly at liberty to rush headlong into a lawyer's office to seek his advice upon receipt of the Court of Appeal's letter, and that therefore this person's "vulnerable" position makes the requirement that he should be informed of his "procedural rights" necessary in order to give substance to the said articles. To my mind this argument is not very convincing, since the time-limit is not just a matter of a few days or of a couple of weeks, but of thirty running (calendar) days.

2. See also *Słowik v. Poland* (no. 31477/05) 12 April 2011 where *no violation* was found because in the note of the appellate court accompanying the legal-aid lawyer's refusal to file a cassation appeal that court had "...informed the applicant, in compliance with the case-law of the Supreme Court...that on the date of the service of that refusal the thirty-day time-limit for lodging a cassation appeal started to run anew. Hence, the Court is of the view that the court took appropriate steps to inform the applicant of his procedural situation." (§ 22).

What the Court is possibly trying to say in the instant judgment is that the legal-aid lawyer's refusal to file the appeal somehow engages the State's additional obligation to provide, free of charge, advice as to the applicant's "procedural rights".

6. Be that as it may, what is to be avoided is the development of phrases, like those used in §§ 25 and 27 of the present judgment, into mantras which, often inadvertently, are then extrapolated to other situations thereby undermining the principle that everyone is presumed to know the law.