



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

FOURTH SECTION

CASE OF KORGUL v. POLAND

(Application no. 35916/08)

JUDGMENT

STRASBOURG

17 April 2012

FINAL

17/07/2012

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

In the case of Korgul v. Poland,

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

David Thór Björgvinsson, *President*,

Lech Garlicki,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 27 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 35916/08) 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 Grzegorz Korgul (“the applicant”), on 15 July 2008.

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 23 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 1962 and lives in Lublin.

8. On 6 June 2007 the Lublin District Court convicted the applicant of several robberies and sentenced him to 3 years and 6 months' imprisonment. By a judgment of 28 December 2007 the Lublin Regional Court upheld the first-instance judgment.

9. On 4 January 2008 the applicant requested the Lublin Regional Court to grant him a legal-aid lawyer for the purpose of lodging a cassation appeal with the Supreme Court.

10. On 7 February 2008 a legal-aid lawyer was assigned.

11. By a letter of 14 March 2008 the lawyer informed the court in a one sentence-long opinion that he had not found any grounds on which to prepare a cassation appeal. This statement did not include any reasons for the refusal to lodge a cassation appeal.

12. By a letter of 17 March 2008 the court forwarded the lawyer's statement to the applicant. The letter read as follows:

"...The Lublin Regional Court informs you that your legal-aid lawyer, advocate Mr W.W., informed the court in writing that he had not found any grounds to prepare a cassation appeal. In consequence, the time-limit for lodging a cassation appeal by a lawyer of your own choice expires on 7 April 2008."

13. The letter as well as the opinion were served on the applicant on an unspecified date.

14. On 27 March 2008 the Lublin Regional Court refused to assign a new legal-aid lawyer to the applicant. The court stated that because the previous legal-aid lawyer had not found any grounds on which to draw up a cassation appeal, the mere fact that the applicant disagreed with this decision could not require the verification of this opinion by successive lawyers.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. 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.

16. 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).

17. On 26 February 2002 the Supreme Court examined a case 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.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO A COURT

18. 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

19. 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.

20. The applicant disagreed.

21. The Court notes that legal representation is 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 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 represent him with a view to preparing a cassation appeal, the Court observes that on 27 March 2008 the domestic court refused to assign a new legal-aid lawyer to the applicant. In so far as the Government argued that the applicant should have requested 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.

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

23. 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 in his case and he was left in uncertainty as to his legal position. Besides, the court refused to assign a new legal-aid lawyer to him.

24. 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 or false 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).

25. 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 a 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.

26. The Court notes that the complaint falls to be examined solely under Article 6 § 1 of the Convention. 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.

27. In the present case the court informed the applicant about the legal-aid lawyer's refusal by a letter of 17 March 2008 (the letter was served on the applicant on an unspecified date). In the letter the court did not inform the applicant 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 (see, *Dombrowski v. Poland*, no. 9566/10, § 25, 18 October 2011). On the contrary, the court informed the applicant that the time-limit for lodging a cassation appeal was to expire on 7 April 2008. Given that at that time the applicant was not represented by a lawyer, he would have had no reason not to rely on this erroneous information about the time-limit for lodging a cassation appeal. Furthermore, the one sentence-long opinion of the legal-aid lawyer did not include any information as to the reasons for his refusal, thus leaving the applicant in a state of uncertainty as to the prospects of success of a cassation appeal.

28. 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, on 27 March 2008 the Lublin Regional Court refused to assign a new legal-aid lawyer to the applicant.

29. 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, because the applicant was given erroneous information about the above mentioned procedural options. As a result, the applicant's right of access to the Supreme Court was not secured in a "concrete and effective manner".

30. The Court finally notes that the refusal of a legal aid lawyer should meet certain quality requirements. In particular, the refusal must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds (see *Staroszczyk v. Poland*, no. 59519/00, § 135, 22 March 2007). Consequently, the unreasoned refusal left the applicant without necessary information as to his legal situation and the chances of his cassation appeal being accepted by the Supreme Court.

31. Accordingly, having regard to the above deficiencies, the Court concludes that there has been a violation of Article 6 § 1 of the Convention and the Government's objection based on non-exhaustion of domestic remedies (see paragraphs 19–21 above) must be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE PROCEEDINGS

32. The applicant complained, relying on Article 6 of the Convention, that the proceedings had been unfair in that the courts had wrongly assessed evidence and erred in establishing the facts of the case.

33. 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).

34. 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

35. 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

36. The applicant sought compensation for pecuniary and non-pecuniary damage in the amount of 5,000 euros (EUR). He also claimed the amount of 1,250 euros (EUR) for reimbursement of costs and expenses.

37. The Government contested these claims.

38. The Court accepts that the applicant 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.

39. Regarding costs and expenses, the Court observes that the applicant submitted only one invoice for translation of the Court letter of 21 October 2010, amounting to 60 PLN (15 EUR). As to the remainder of the claim, the applicant did not submit any specifications of fees or other expenses. The Court observes that for an award to be made it has to be satisfied that the costs and expenses were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, among other authorities, *the Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, § 36). Accordingly, the Court dismisses this claim.

B. Default interest

40. 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 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 17 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President