



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

FOURTH SECTION

**CASE OF ROSENZWEIG AND BONDED WAREHOUSES LTD.
v. POLAND**

(Application no. 51728/99)

JUDGMENT
(Just satisfaction)

STRASBOURG

5 June 2012

FINAL

22/10/2012

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

In the case of Rosenzweig and Bonded Warehouses Ltd. 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,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 15 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 51728/99) 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”). The first applicant, Bronisław Rosenzweig, is a German national who was born in 1941 and lives in Berlin. The second applicant is Bonded Warehouses Ltd, a public company he owns. The applicants were represented before the Court by Mr K.H. Schmidt and subsequently by Mr B. Murawo, lawyers practising in Berlin, and by Mr W. Szaj, a lawyer practising in Poznań. The Polish Government (“the Government”) were represented by their Agents, Mr Krzysztof Drzewicki, and subsequently by Mr Jakub Wołosiewicz of the Ministry of Foreign Affairs.

2. In a judgment delivered on 28 July 2005 (“the principal judgment”), the Court held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. It held that the applicants’ right to the peaceful enjoyment of their property had been breached, since the authorities had revoked licences and permits authorising the applicants to operate their business.

3. Under Article 41 of the Convention the applicants sought just satisfaction for pecuniary and non-pecuniary damage in the amount of 11,501,435 euros (EUR). They further claimed EUR 89,000 as reimbursement of costs incurred before the domestic authorities and in the proceedings before the Court.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it.

5. The Court invited the Government and the applicants to submit, within six months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (*ibid.*, p. 12, § 70 and point 2 (b) of the operative provisions).

6. Friendly-settlement negotiations between the parties failed to yield a result.

7. In December 2008 the parties were again contacted by the Registry of the Court with a view to concluding a friendly settlement or, failing that, agreeing on an independent expert to assess the pecuniary damage. The applicants declined the proposal and stated that the documents which they had already submitted during the proceedings were sufficient for the purposes of an Article 41 judgment. The Government disagreed with the latter statement.

8. Subsequently, the Government declared their willingness to pay the costs of an independent expert, to be appointed by the Court, with a view to preparing a report on the pecuniary damage sustained by the applicants. The applicants declined that offer.

9. The applicants and the Government each submitted observations.

10. In July 2009 the Court gave the parties an eight-week time-limit within which they were to submit their own expert estimates of the damage.

11. In September 2009 the Government submitted an expert report.

12. The applicants reiterated that the documents they had already submitted in the proceedings leading to the adoption of the principal judgment were sufficient for the purposes of establishing the extent of the damage they had suffered. They challenged the conclusions contained in the report (see paragraph 21 below).

THE LAW

13. 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. Preliminary issues

14. In their submissions prior to the adoption of the principal judgment the applicants sought compensation in the amount of EUR 11,501,435. They later reduced their claim to EUR 8,000,000.

15. After the principal judgment had been adopted, the applicants expressed their willingness to settle the case. The Government were unable

to accept a settlement on the basis proposed by the applicants. They were of the view that the applicants had not suffered any pecuniary damage and that the proposed amount should be understood as referring merely to non-pecuniary damage.

16. The Government submitted, *inter alia*, that the applicants had failed to pursue their just satisfaction claims before the domestic courts. In fact, they had instituted such proceedings in 1996. They had subsequently been stayed as the applicants had failed to comply with the court summonses. They had also challenged the Court's decision to resume the proceedings. Subsequently, the civil court had resumed the proceedings. The applicants had failed to comply with three summonses to hearings scheduled by the court. Ultimately, by a judgment of 31 December 2007 the court dismissed their compensation claim on the ground that the applicants had failed to submit evidence that they had suffered damage as a result of the decisions concerned in the principal case.

17. The Government were of the view that the applicants had chosen to pursue their compensation case before the Court instead of pursuing it before the domestic civil courts, in which they would have to comply with a high standard of evidence as to the amount of the damage and the causal link between the acts of the public authorities and the alleged damage. They had therefore failed to comply with the requirement of exhaustion of relevant domestic remedies stipulated by Article 35 § 1 of the Convention.

18. The Court reiterates its established case-law according to which objections based on non-exhaustion of domestic remedies raised after an application has been declared admissible cannot be taken into account at the merits stage (see *Demades v. Turkey* (merits), no. 16219/90, § 20, 31 July 2003; *Alexandrou v. Turkey* (merits), no. 16162/90, § 21, 20 January 2009; *Anthousa Iordanou v. Turkey* (just satisfaction), no. 46755/99, § 11, 11 January 2011; *Solomonides v. Turkey* (just satisfaction), no. 16161/90, § 17, 27 July 2010) or at a later stage. The Court observes that the Government never raised this objection prior to the adoption of the admissibility decision. However, in the circumstances of the present case the Court is of the view that it is not necessary for it to decide whether the Government are estopped from raising this objection at this stage of the proceedings, since in any event the applicants' efforts to have the damages compensated at the domestic level failed.

B. Pecuniary and non-pecuniary damage

1. The parties' submissions

19. The applicants submitted that in the principal judgment the Court had found that the withdrawal of the licence granted to the applicants in June 1995 and the ensuing proceedings in which the validity of that permit

had been re-examined several times had made it impossible for the applicants to continue their business operation. Furthermore, later on the licence granted to the applicants in 1994 had also been revoked (paragraph 50 of the principal judgment). It had therefore already been accepted that the applicants had been prevented from running the company and generating profit from it.

20. The applicants submitted that because the bonded warehouse run by the applicant company was locked and sealed by the customs authorities on 27 November 1995 (see paragraph 14 of the principal judgment) they had lost access to all documents pertaining to the applicant company's financial situation. They had therefore been obliged to submit only an estimate of the loss they had sustained. In this connection they referred, in particular, to the following documents, which had served as a basis for their submissions: an opinion prepared by the expert company auditor, Mr R. S. and a statement made by Ms M.B., an expert in bookkeeping. They were further of the view that an expert opinion submitted by the Government could not be regarded as credible, if only because the expert who had been prepared it had been paid by the respondent Government.

21. The applicants claimed that as a result of the company's closing down they had lost profits which they could have derived from its operation in the years 1996-98. They estimated these profits, with reference to the above-listed documents, at EUR 1,040,000. Furthermore, the lost profits for years 1999-2000 amounted, in their submission, to EUR 1,497,186.90, and for the period 2001-04 to EUR 2,495,311.44.

22. The applicants further argued that the customs authorities had locked the warehouse. The merchandise in the warehouse had never been given back to them. They assessed its value at EUR 780,000.

23. The applicants submitted that they had incurred significant expenditure in connection with renovation works they had carried out to a building they had rented in Słubice. That expenditure amounted to EUR 50,000. Furthermore, they had bought equipment necessary to run the warehouse for EUR 40,000, such as office equipment, furniture, computers, and so on. This equipment had never been given back to them by the authorities.

24. The applicants averred that as a result of the company closing down they could not pay the rent required by the rent contract. They could not submit a copy of that contract, as it had been lost as a result of the warehouse being sealed by the customs authorities. They were subsequently obliged to pay EUR 54,000 in rent to a third party on the basis of a judgment given by the Poznań Regional Court on 19 February 1999.

25. The applicants maintained that as a result of the violation found in the principal judgment they had sustained further losses, in that they could not recover the insurance premiums which they had paid in the amount of EUR 10,000. They had also had to pay severance pay to their employees

and cover costs arising in respect of the relevant proceedings. They estimated these costs at EUR 120,000.

26. The first applicant argued that as a result of stress caused by the decisions given by the Polish authorities he had had serious health problems which had made it impossible for him to continue in paid employment. He assessed the damage caused him to be the equivalent of the income he would have been able to receive for a period of seventy-two months, until he reached the age of 65, and estimated it at EUR 1,440,000.

27. The applicants further submitted that as a result of the circumstances of the case seen as a whole the first applicant had suffered considerable stress, anxiety and distress.

28. The Government argued that the applicants had not sustained any damage as a result of the acts in respect of which the Court had found a breach of the Convention in the principal judgment. Neither the revoking of the 1994 permit nor of the licence granted in 1995 had prevented the applicants from continuing their business activity. The applicants had stopped their business operation of their own free will, as they realised that in the absence of permission to conduct a retail sale business they would not be able to make the profits they had expected.

29. The Government further submitted that the estimates of damage submitted by the applicants were based on the assumption that they would have been running a retail business for people travelling via the border crossing designated for movement of people. However, under the applicable provisions of Polish law, running a retail business as a duty-free shop was not allowed in bonded warehouses. The latter could only store and keep safe goods which had entered the territory of Poland without customs duties having been paid on them and which were designated to leave it. The Government submitted that they could not be held responsible for any alleged damage resulting from the fact that the applicants had invested money in order to conduct a business operation which was contrary to Polish law.

30. The Government further averred that the amounts claimed in respect of allegedly lost profits had been calculated in respect of a duty-free shop. They were therefore not linked with the scope of the lawful operation of the applicants' bonded warehouse. The claims submitted by the applicants did not have any causal link with the violations established by the Court. They were of a highly speculative character and, in part, they concerned alleged lost profits which, the applicants argued, would result from a business operation which had only been planned, but never actually initiated. Such claims were not covered by any decisions given by the domestic authorities, and should therefore be regarded as irrelevant to the present case.

31. As to the first applicant's claim for compensation for his inability to work in his profession, the Government argued that Article 1 of Protocol No. 1 did not guarantee a right to work, and that in any event, after the

applicant company had ceased to operate nothing prevented the applicant from continuing to work, in Poland or elsewhere.

32. In so far as the first applicant had claimed just satisfaction in respect of non-pecuniary damage arising in respect of his health problems, the Government averred that there had been no causal link between the applicant's declining health and the violation found by the Court in the principal judgment.

33. In so far as the applicants claimed that they had suffered non-pecuniary damage arising in respect of the circumstances of the case seen as a whole, the Government requested the Court to make an award in this respect, if any, commensurate with awards for non-pecuniary damage made in other cases against Poland in which it had found that Article 1 of Protocol No. 1 of the Convention had been violated. They considered that the appropriate amount in this respect should not exceed EUR 5,000.

34. In so far as the applicants claimed default interest on the just satisfaction claims, the Government were of the view that these claims were excessive and had therefore to be rejected.

35. The Government contested the expert reports submitted by the applicant company. They challenged the methods used in respect of the soundness of the basic premises on which the reports were based, and their conclusions. They presented a report prepared by another expert appointed by them (see paragraph 11 above). The expert concluded that it had not been shown that the applicants had suffered any damage as a result of the authorities' acts complained of in the principal judgment.

36. The Government submitted that the customs authorities had locked the applicant company's headquarters on 17 November 1995, but that nothing prevented the applicants from taking measures to obtain access to the company's documents or recover its equipment. They further challenged the soundness of the methods used by the experts appointed by the applicants, and contested their conclusion as based on conjecture and speculation. In particular, they argued that their conclusions that the profit in years 1997-2000 would increase by 20% a year was unrealistic and bore no reasonable relation to the general growth rate of the national economy at that time, which did not exceed 3 per cent.

2. The Court's assessment

37. The Court first notes that the Government challenged the applicants' argument that they had lost access to all the documents of the applicant company and could never obtain access to them.

38. It notes that the applicants never submitted any arguments to show that they had made any efforts to have these documents returned or at least to be granted access to them for the purposes of the determination of the damage occasioned by the revocation of the permits granted to the applicant company. Furthermore, the Court accepts that in the absence of these

documents the declarations of various persons and the expert reports which the applicants had submitted as evidence of damage cannot be regarded as conclusive proof that the applicants had indeed sustained damage in the exact amounts specified in these documents.

39. The Court is of the view that in the assessment of the pecuniary damage it should have regard to the applicants' conduct in the proceedings leading to the adoption of the present judgment. In this connection, it notes, firstly, that notwithstanding its request to the parties to agree on the appointment of an independent expert who would submit a report to the Court, the applicants did not comply with that suggestion. They limited themselves to referring to opinions which they had already submitted in the proceedings prior to the adoption of the principal judgment. However, the Court already found in the principal judgment that these documents were insufficient for the purposes of the determination of the question of the application of Article 41 of the Convention (see paragraph 70 of the principal judgment). Hence, the Court considers that the estimates submitted by the applicants, not being based on the actual documents of the applicant company, and in the absence of the applicants' consent to have an expert agreed on by both parties prepare a report on the pecuniary damage caused by the violation of Article 1 of Protocol No. 1, cannot be regarded as conclusive as to the pecuniary damage resulting from that violation.

40. Secondly, the Court has had regard to the fact that the applicants declined the Government's offer to pay the costs of an independent expert with a view to preparing a report on the pecuniary damage suffered by the applicants (see paragraph 8 above). No cogent reasons for this refusal were advanced. The Court is of the view that this refusal did not lend credibility to the applicants' position as regards the amount of pecuniary damage. The Court further notes that the estimates furnished by the applicants involve a significant degree of speculation. In particular, the calculation of profits which the applicants could have earned by running their business seems to be based on an assumption that the annual profit increase would be equal to 20% (see paragraph 34 above), which does not appear to be based on sufficient foundations.

41. Thirdly, the Court observes that the applicants were given another opportunity to submit their own expert estimates of the pecuniary damage. In July 2009 the Court gave the parties an eight-week time-limit within which they were to submit their own expert estimates. The Government responded to that request by submitting an expert report with the conclusion that the applicants had failed to prove that they had suffered pecuniary damage (see paragraphs 11 and 20-30 above). However, the applicants merely reiterated their refusal to submit such an estimate.

42. Having regard thereto, the Court is of the view that the applicants' claims concerning the pecuniary damage have not been duly documented,

despite the Court's efforts to assist the applicants in submitting their claims as to the pecuniary damage.

43. Having regard to the above considerations, the Court dismisses the applicants' claims in respect of pecuniary damage.

44. The Court further accepts that the first applicant must have experienced frustration in connection with the curtailment of his efforts to run a business operation. The Court accordingly awards him EUR 5,000 in respect of non-pecuniary damage.

C. Costs and expenses

45. The applicants argued that the legal fees incurred in the proceedings before the domestic authorities amounted to EUR 149,718. The administrative costs incurred in connection with these proceedings were equivalent to EUR 22,757. The legal fees concerning the proceedings before the Court amounted to EUR 108,000. They referred to an invoice submitted by Mr W. Szaj. They further argued that they had borne additional costs in connection with the representation in the proceedings before the Court by another lawyer, Mr K.-H. Schmidt, in the amount of EUR 4,872.

46. The Government asserted that the applicants had failed to submit documents to show that the costs and expenses borne in connection with the domestic proceedings and the proceedings before the Court had actually been paid. The Government submitted that the documents submitted by the applicants were insufficient for a finding that the applicants had actually borne costs linked to the legal fees charged by Mr Szaj. They further averred that only the legal fees incurred in connection with legal representation by Mr Schmidt demonstrated that that expenditure had actually been incurred.

47. They further asserted that the applicants' claims in respect of costs and expenses were exorbitant and bore no relation to economic realities or to the violation found in the principal judgment.

48. According to the Court's case-law, an applicant is entitled to 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 (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

49. The Court reiterates that the principal judgment raised complex factual issues. It further acknowledges that the just satisfaction case required a considerable degree of research and preparation.

50. However, the Court considers the amount claimed for the costs and expenses relating to the proceedings before it excessive. It further notes that the documents submitted in respect of the domestic proceedings do not allow the Court to conclude that the sums claimed by the applicants were

actually paid in the amounts claimed. It awards the applicants the total sum of EUR 10,000.

D. Default interest

51. 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. Holds

(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage sustained by the first applicant;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

2. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President