



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

FOURTH SECTION

CASE OF TOZICZKA v. POLAND

(Application no. 29995/08)

JUDGMENT

STRASBOURG

24 July 2012

FINAL

24/10/2012

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

In the case of Toziczka 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,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 29995/08) 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, Ms Bożenna Toziczka (“the applicant”), on 2 June 2008.

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

3. The applicant alleged, in particular, that her civil case had not been determined by an impartial court.

4. On 26 September 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Civil proceedings concerning compulsory sale

5. The applicant was born in 1943 and lives in Opole.

6. “Zgoda” Housing Cooperative in Brzeg brought a civil case against the applicant before the Opole Regional Court. It sought a judgment obliging her to sell to the co-operative a number of plots of land which had been *de facto* occupied by the co-operative for a long period of time.

7. By a judgment of 16 June 2003 the Opole Regional Court dismissed the claim. It held that the applicable provisions of the Housing Co-operatives Act provided for an obligatory sale of land occupied *de facto* by housing co-operatives only where a co-operative had erected buildings thereon. In the present case, the plaintiff co-operative had built roads and parking areas on the land concerned.

8. The plaintiff co-operative appealed.

9. By a judgment of 26 November 2003 the Wrocław Court of Appeal allowed the appeal, quashed the first-instance judgment and remitted the case. It was of the view that the first-instance court had erred in the application of section 35 of the Co-operatives Act. It had wrongly held that an obligatory sale could be ordered to the benefit of a housing co-operative only with respect to land owned by third parties on which a co-operative had had houses built. The court was of the opinion that such a sale could also be ordered when a co-operative had built infrastructures other than houses.

10. Judge D.Z. sat on the bench of the Supreme Court as judge rapporteur.

11. The applicant’s case was subsequently examined again. The Opole Regional Court allowed the plaintiff’s claim and ordered the applicant to sell 2,000 sq. metres of land to the co-operative. It found that the plaintiff co-operative had built a housing estate in the vicinity of the applicant’s land and also partly on her land. Parking areas and roads had been built on the land belonging to the applicant. Section 35 of the Housing Co-operatives Act provided for the compulsory sale of privately owned land occupied *de facto* by co-operatives.

12. The applicant appealed. She argued that the court had erred in applying the substantive law in her case. Section 35 of the Housing Co-operatives Act provided for a claim for compulsory sale only where co-operatives had built houses on privately owned land. The legal interpretation of this provision by the court breached the principle that exceptions had to be interpreted narrowly. She further argued that the judgment ordering her to sell her land was in breach of Article 1 of Protocol No. 1 to the Convention.

13. On 14 March 2007 the Wrocław Court of Appeal dismissed the appeal, endorsing the legal view expressed in the judgment of 26 November 2003.

14. The applicant lodged a cassation appeal against this judgment with the Supreme Court. She reiterated the same argument which she had already raised in her appeal and emphasised that the courts had erroneously

interpreted substantive law in her case. She submitted that section 35 of the Housing Co-operatives Act allowed for a compulsory sale of privately owned land only where a co-operative had built houses on it. The court had erred in that it held that this provision should, by analogy, also be applied to roads, parking areas and similar infrastructure. This interpretation resulted from the functional interpretation of this provision according to which its purpose was to make it possible for housing co-operatives to acquire ownership of land owned by third parties. Thus, the courts had held that it would be inconsistent with that object and purpose to allow a claim for a compulsory sale order against the owner only with respect to the land on which houses had been built. The applicant argued that this approach, which disregarded the literal and clear text of the provision concerned and resorted instead to a functional interpretation, was unlawful.

15. She also invoked Article 1 of Protocol No. 1 to the Convention and submitted that her property rights had been excessively and unlawfully restricted by the compulsory sale order.

16. The cassation appeal was examined by the Supreme Court sitting *in camera* on 18 January 2008. Judge D.Z. (see paragraph 10 above), who had in the meantime been promoted to the Supreme Court, sat on the bench. The court was of the view that the gist of the cassation appeal concerned the interpretation of section 35 of the Housing Co-operatives Act and that the case turned on the interpretation to be given to this provision. It agreed with the legal view expressed on both occasions by the Wrocław Court of Appeal and dismissed the applicant's cassation appeal.

B. Civil proceedings concerning use of the applicant's land by the electricity company

17. By a judgment of 1 February 2007 the Opole Regional Court awarded the applicant compensation in the amount of PLN 388,000 for the use of her land by the local energy company which had in the past built installations (a pipeline) on her land. The company appealed.

18. By a judgment of 25 April 2007 the Wrocław Court of Appeal quashed the first-instance judgment and dismissed the applicant's claim.

19. The applicant lodged a cassation appeal with the Supreme Court, complaining that the electricity company had been using her property for years without paying any compensation.

20. By a decision of 14 December 2007, served on the applicant's lawyer on 14 March 2008, the Supreme Court refused to accept her cassation appeal for examination.

II. RELEVANT DOMESTIC LAW

21. Article 398³ of the Code of Civil Procedure lists the grounds on which a cassation appeal (*skarga kasacyjna*) can be lodged. It reads, in so far as relevant, as follows:

“1. The cassation appeal may be based on the following grounds:

1) a breach of substantive law as a result of its erroneous interpretation or wrongful application;

2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case.”

22. Article 401 of the Code of Civil Procedure provides that a request for re-opening of civil proceedings can be based on invalidity of proceedings caused, *inter alia*, by an improper composition of the court or on the participation of a judge who was disqualified by law from sitting on the bench.

THE LAW

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

23. The applicant complained that her first civil case had not been determined by an impartial court as provided in 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 an ... impartial tribunal ...”

A. Admissibility

24. The Government submitted that the applicant had not exhausted domestic remedies. She should have lodged a petition to have the proceedings re-opened, alleging the invalidity of the proceedings, in accordance with Article 401 of the Code of Civil Procedure. In the circumstances of the present case, where the applicant claimed that the judge who sat on the bench examining her cassation appeal had lacked impartiality because of his earlier involvement in the examination of the merits of her case, such a petition should be considered as an adequate remedy. The applicant could not have requested that judge's withdrawal earlier than after the Supreme Court's judgment had been given essentially

because she had learned that he sat on the bench of that court only after she had been served with its final judgment of 18 January 2008.

25. The applicant disagreed.

26. The Court reiterates that Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Lakatos v. Czech Republic* (dec.), no. 42052/98, 23 October 2001).

The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Orchowski v. Poland*, no. 17885/04, § 105, 22 October 2009; *Norbert Sikorski v. Poland*, no. 17599/05, § 108, 22 October 2009). The development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (*Mikolajová v. Slovakia*, no. 4479/03, § 34, 18 January 2011). A Government's arguments clearly carry more weight if relevant examples from national case-law are provided (*Sakhnovskiy v. Russia* [GC], §§ 43-44).

27. Turning to the circumstances of the present case, the Court notes that the decision in the applicant's case became *res iudicata* on the strength of the judgment of the Supreme Court. In such circumstances, the applicant's recourse to the Supreme Court by way of a request for re-opening was an extraordinary remedy. Normally applicants are not required to avail themselves of such an extraordinary remedy for the purposes of the exhaustion rule under Article 35 § 1 (see *Kiiskinen v. Finland* (dec.) no. 26323/95, ECHR 1999-V). Moreover, the Court notes that the Government failed to support their argument by referring to any examples of domestic case-law showing that the courts had allowed petitions to re-open civil proceedings which had already come to an end on account of successive involvement of the same judge, first in the appellate proceedings and subsequently, after that judge's promotion, in the examination of the merits of the cassation appeal. It has not therefore been shown that in the circumstances of the case the remedy relied on by the Government offered any prospects of success.

28. The Court accordingly finds that the Government have failed to show, with reference to demonstrably established case-law in cases similar to the applicant's, that the petition for re-opening of the civil proceedings was sufficiently certain not only in theory but also in practice.

29. 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

30. The applicant submitted that her case had not been determined by an impartial court.

She argued that in the circumstances of the case the involvement of Judge D.Z. in the examination of the merits of her cassation appeal, taken together with the fact that, as a judge rapporteur of the court of appeal, he had previously expressed a legal view which was subsequently followed by the first- and second-instance court, meant that the Supreme Court lacked impartiality.

31. The Government abstained from making submissions on the merits of that complaint.

1. General principles

32. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public. To that end, Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach – that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case – and an objective approach – that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53, and *Grievs v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII (extracts)).

33. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86). The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43).

34. Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III). In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has, in the vast majority of cases raising impartiality issues, focused on the objective test. However, there is no watertight division between the two notions, since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (the objective test) but may also go to the issue of his or her personal conviction (the subjective test).

35. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect, even appearances may be of some importance (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII, and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III, and *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII).

36. The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined at various stages of the proceedings is so close as to cast doubt on the impartiality of the judge participating in the decision-making at these stages (see *Warsicka v. Poland*, no. 2065/03, § 40, 16 January 2007, *mutatis mutandis*; *Indra v. Slovakia*, no. 46845/99, § 51054, 1 February 2005).

2. Application of the above principles to the present case

37. Turning to the circumstances of the present case, the Court observes that the applicant's concerns regarding the Supreme Court's impartiality originated in the fact that the same judge, D.Z., who had previously examined the merits of the applicant's appeal, sat on its bench. It can be accepted that this situation could raise doubts in the applicant's mind about the impartiality of that court.

38. However, the Court has to decide whether those doubts were objectively justified. The answer to this question depends on the circumstances of the case.

39. As in the case of *Indra v. Slovakia*, cited above, the Court considers it appropriate to examine whether there was a close link between the issues examined by the Wrocław Court of Appeal dealing with the appeals against the first-instance judgments given in the case and subsequently by the Supreme Court.

40. The Court observes that on 26 November 2003 the Wrocław Court of Appeal quashed the first-instance judgment. It found that the first-instance court had erred in the application of the substantive law. It was of the view that the first-instance court had wrongly held that under section 35 of the Housing Co-operatives Act an obligatory sale could be ordered only with respect to plots of land owned by third parties on which a housing co-operative had had houses built. It expressed the opinion that a compulsory sale could be ordered also in respect of roads and other constructions. Subsequently, both the first- and second-instance judgments in the case followed the interpretation given by the Court of Appeal.

41. The applicant lodged a cassation appeal against the second-instance judgment given by the Wrocław Court of Appeal on 14 March 2007. She argued that that judgment was flawed because of a substantive law error. She submitted that section 35 of the Housing Co-operatives Act allowed for the compulsory sale of privately owned land only where a co-operative had built houses on it. The courts had erred in law in holding that this provision could, by analogy, be applied also to roads, parking areas and similar infrastructure. The applicant argued that this approach, which disregarded the literal and clear text of that provision and resorted instead to a functional interpretation, was unlawful.

42. The Court notes that the task of the Supreme Court was to examine whether the lower courts had correctly interpreted applicable substantive law (see paragraph 21 above). In its judgment of 18 January 2008 that court opined that the gist of the applicant's cassation appeal concerned the interpretation of section 35 of the Housing Co-operatives Act. It shared the view on the meaning to be given to this provision expressed on both occasions by the Wrocław Court of Appeal. Consequently, it dismissed the applicant's cassation appeal.

43. The Court observes that Judge D.Z. sat on the panel of the Supreme Court. The Supreme Court was called upon to determine whether the judgment by which the Wrocław Court of Appeal had followed the legal view previously expressed by the judgment of that court in which Judge D.Z. sat as judge rapporteur. The Court is of the opinion that this legal view was decisive for the outcome of the case and the Supreme Court acknowledged it in its judgment (see paragraph 16 above). Thus, the same judge sitting on the bench of the Supreme Court was called upon to decide

whether or not his legal interpretation or application of substantive law made in the previous decision given in the same case was to be upheld or not.

44. The Court is of the view that this situation is akin to that in the case of *San Leonard Band Club v. Malta*, no. 77562/01, §§ 63-64, ECHR 2004-IX, where the same judges had been called upon to decide whether or not they themselves had committed an error of legal interpretation or application.

45. These circumstances are sufficient to hold that the applicant's fears as to the lack of impartiality of the Supreme Court can be considered to be objectively justified.

46. There has accordingly been a breach of Article 6 § 1 of the Convention.

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

47. The applicant further complained under Article 6 of the Convention that the judgments given in her civil cases had been erroneous, that the courts had wrongly applied substantive law and that, as a result, her rights had been breached. She further argued that the courts had committed errors in the assessment of evidence and that their reasoning had been illogical and contradictory.

48. The Court reiterates that, 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 in which it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, ECHR 1999-I, § 28).

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

50. Lastly, the applicant further relied on Article 1 of Protocol No. 1 to the Convention and submitted that as a result of the judgment given in both cases her ownership rights had been significantly and unlawfully restricted.

51. The Court observes that Article 1 of Protocol No. 1 does not concern the regulation of civil law rights between parties under private law. In the instant case, therefore, the courts' decisions against the applicant, according to the rules of private law, cannot be seen as an unjustified State interference with the property rights of the losing party. Indeed, it is the very function of the courts to determine such disputes, the regulation of which falls within the province of domestic law and outside the scope of the

Convention (see, Eur. Comm. HR, *Kuchar and Stis v. Czech Republic* (dec.), no. 37527/97, 21 October 1998; *mutatis mutandis*, see also *S.Ö., A.K., Ar.K. and Y.S.P.E.H.V. v. Turkey* (dec.), no. 31138/96, 14 September 1999; *Trela v. Poland* (dec.), no. 28853/02, 6 February 2007; *Garzičić v. Montenegro*, no. 17931/07, § 37, 21 September 2010).

52. Therefore, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 thereof.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 150,000 euros (EUR) in respect of pecuniary damage and 50,000 euros in respect of non-pecuniary damage.

55. The Government contested these claims.

56. 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 3,300 under this head.

57. 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. Costs and expenses

58. The applicant also claimed 39,723 Polish zlotys (PLN) for the costs and expenses incurred before the domestic courts. This amount was broken down as follows: PLN 6,600 in legal fees and PLN 33,123 in judicial costs which she had been obliged to pay under the judgments given in her civil case.

59. The Government contested the applicant's claims.

60. 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, *Zimmermann and Steiner v. Switzerland*, 13 July 1983, § 36,

Series A no. 66). The Court observes that the applicant did not submit any invoices in respect of the legal fees. On the other hand, having regard to the documents in its possession, the Court is satisfied that the judicial costs had actually been incurred. It therefore awards the applicant EUR 7,540 in this respect.

C. Default interest

61. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application partly admissible as regards the issue of impartiality and inadmissible as to the remainder;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 3,300 (three thousand three hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 7,540 (seven thousand five hundred and forty euros), plus any tax that may be chargeable, 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President