



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

FOURTH SECTION

CASE OF WIERCISZEWSKA v. POLAND

(Application no. 41431/98)

JUDGMENT

STRASBOURG

25 November 2003

FINAL

25/02/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wierciszewska v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 November 2003,

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

PROCEDURE

1. The case originated in an application (no. 41431/98) against the Republic of Poland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms Maria Wierciszewska (“the applicant”), on 10 December 1997.

2. The applicant was represented by Ms Z. Daniszewska-Dek, a lawyer practising in Białystok, Poland. The Polish Government (“the Government”) were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs.

3. On 1 October 2002 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

4. The applicant was born in 1956 and lives in Wizna, Poland.

5. In 1991, in the course of court proceedings concerning child support maintenance the Łomża District Court (*sąd rejonowy*) imposed on the applicant an interim ban on leaving the territory of Poland. She was not notified of that decision until 16 July 1991, when she was stopped at an airport, on her way to the United States of America.

6. On 30 September 1991 the applicant filed with the Łomża Regional Court (*sąd wojewódzki*) an action in which she claimed damages from the

State Treasury. She argued that that ban was wrongful and not served on her, which had made it impossible for her to return to the United States of America and pursue her application for a residence permit there. The applicant submitted that judge X who had issued that order had known her former husband, who had been a party to those proceedings.

7. On 31 October 1991 the Białystok Court of Appeal (*sąd apelacyjny*) transferred the case to the Białystok Regional Court.

8. The latter court held hearings on 7 April, 24 September and 17 December 1992.

9. On 5 January 1993 it rejected a part of the applicant's claim.

10. At the hearing held on 13 May 1993 the court, at both parties' request, stayed the proceedings until the completion of disciplinary proceedings against judge X.

11. On 3 September 1993 the court resumed the proceedings.

12. It held further hearings on 7 October and 16 December 1993, as well as 20 January 1994.

13. On 3 February 1994 the Białystok Regional court gave judgment. It awarded the applicant damages in the amount of 145.820.500 old zlotys with interest. The defendant and judge X, who joined the proceedings as an intervener, appealed.

14. On 7 July 1994 the Białystok Court of Appeal quashed the Regional Court's judgment and remitted the case for re-examination.

15. On 1 August 1994 the applicant challenged the participation in the proceedings of all the judges from the Białystok Regional court.

16. On 15 December 1994 the Białystok Court of Appeal dismissed that petition.

17. The Regional Court held hearings on 26 April, 28 June and 6 September 1995. At the former the court decided to request the U.S. embassy to submit a certain piece of information. At the hearing of 26 June 1995 it imposed a fine on a witness for non-attendance before the court.

18. Hearings were held on 22 August, 19 September and 28 November 1996.

19. The hearing scheduled for 18 December 1996 was adjourned because of the presiding judge's illness.

20. The court held a hearing on 17 April 1997.

21. On 30 April 1997 it gave judgment. The court dismissed the applicant's action. She appealed.

22. On 7 November 1997 the Regional Court refused the applicant's request for exemption from the appellate court costs. On 2 December 1997 the Court of Appeal changed that decision and exempted her from part of those costs.

23. It held hearings on 5 February and 3 March 1998.

24. On 10 March 1998 the Białystok Court of Appeal amended the judgment of 30 April 1997 in that it awarded the applicant damages in the

amount of 23,864 zlotys (PLN) with interest. All the participants to the proceedings lodged cassation appeals against that judgment.

25. On 12 May 1998 the Court of Appeal rejected the applicant's cassation appeal. She appealed. On 27 August 1998 the Supreme Court quashed the Court of Appeal's decision.

26. On 28 June 2000 the Supreme Court quashed the judgment under appeal and remitted the case for re-examination.

27. On 30 November 2000 the Court of Appeal held a hearing.

28. On 7 December 2000 it gave judgment. The court dismissed the applicant's appeal against the judgment of 30 April 1997 given by the Białystok Regional Court. The applicant lodged a cassation appeal against that judgment.

29. On 14 June 2002 the Supreme Court rejected that cassation appeal on procedural grounds.

30. Subsequently, the applicant's lawyer requested the re-opening of the case, relying on a recent judgment of the Constitutional Court concerning the State's liability for damage caused by a State official while giving a decision or carrying out other official duties. The request was rejected.

31. On 4 November 2002 the applicant's lawyer lodged a constitutional complaint relating to the rejection of her request for re-opening. On 9 June 2003 the Constitutional Court gave judgment.

32. Relying on that judgment, the applicant again filed a request for re-opening. On 9 October 2003 she informed the Court that her request had not yet been examined.

THE LAW

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

33. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, provided in Article 6 § 1 of the Convention, which reads as follows:

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

34. The Government contested that argument.

35. The period to be taken into consideration began only on 1 May 1993, when the recognition by Poland of the right of individual petition took effect. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time (see, among other authorities, *Humen v. Poland* [GC], no. 26614/95, § 59, 15 October 1999). The Court notes that the proceedings were initiated on

30 September 1991 and therefore on 1 May 1993 they had already lasted 1 year, 7 months and 1 day. The period in question ended on 14 June 2002. It thus lasted 9 years, 1 month and 14 days, within the Court's jurisdiction *ratione temporis*. It is true that since the completion of the proceedings the applicant has sought to have them re-opened. Nonetheless, the Court reiterates that Article 6 of the Convention does not apply to proceedings which determine whether a civil case is to be reopened or not (see *Kuzmin v. Estonia*, no. 35648/97, Commission decision of 1 July 1998, unreported). Accordingly, the time that has elapsed since 14 June 2002 cannot be added to the period at issue.

A. Admissibility

36. The Government were of the opinion that the applicant had failed to exhaust all available domestic remedies. They made reference to a claim for compensation for the excessive length of judicial proceedings, allegedly available under Polish law since 18 December 2001, after the re-interpretation of a provision of the Civil Code by the Constitutional Court. The Government submitted that the applicant was aware of the availability of such a claim, which was shown by the fact that in the domestic proceedings she claimed damages from a State official, relying on that newly interpreted provision.

37. The applicant considered that the remedy referred to by the Government would be ineffective and inadequate. She observed that no established case-law existed relating to such claims. Nor was there any procedure set up for their examination. The applicant further noted that it was unclear whether compensation could be claimed for damage incurred before the entry into force of the Constitutional Court's judgment.

38. The Court reiterates that Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

39. According to the Government, the applicant should avail herself of a remedy, which has allegedly existed since the date of the entry into force of the above-mentioned judgment of the Polish Constitutional Court. The Court observes that the Government's objection is confined to the mere statement that a judgment of the Constitutional Court created a new remedy and the applicant must have been aware of its availability. No further information as to any juridical practice relating thereto was provided. In the

absence of such information and having regard to the above-mentioned principle, the Court finds that the Government failed to substantiate their contention that the remedy at issue is an effective one (see *Skawińska v. Poland* (dec.), no. 42096/98, 4 March 2003).

For these reasons, the Court finds that the application cannot be rejected for non-exhaustion of domestic remedies.

40. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. The Court will therefore declare it admissible.

B. Merits

1. The parties' submissions

41. The Government were of the view that the case was rather complex, which was shown by the fact that there had been two defendants and one intervener in the case. They mentioned the necessity to request information from the U. S. Embassy and to stay the proceedings pending the disciplinary procedure against judge X.

The Government stated that the domestic courts had displayed due diligence in the conduct of the proceedings by scheduling hearings at regular intervals. They pointed out that the courts had made efforts to expedite the examination of the case by imposing a fine on the witness who had failed to attend a hearing and setting out time-limits for the parties for the submission of their pleadings.

The Government observed that the applicant had contributed to the prolongation of the proceedings by challenging the participation of the Regional Court's judges, requesting exemption from the court costs and late submission of pleadings. They noted that the proceedings had been stayed for 3 months and 21 days at both parties' request.

42. The applicant did not agree that the case was complex. She was of the view that the proceedings had not been conducted with sufficient conscientiousness. The applicant emphasised that she had had to wait 1 year and 11 months for the examination of her first cassation appeal, and 1 year and 5 months for the second.

As regards her challenge to the participation of judges in the proceedings, the applicant observed that it had not prolonged the proceedings. Its examination lasted 4 months and 14 days, on which she had no influence. The applicant further noted that she had had to request exemption from the court costs because as a result of the unlawful ban on leaving the territory of Poland her livelihood had been threatened.

2. *The Court's assessment*

43. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

44. The Court considers that the case involved a degree of complexity.

45. It sees nothing to suggest that the applicant's activities referred to by the Government unduly contributed to the delay in the examination of her case. The Court observes that in the particular circumstances of the case the applicant can hardly be criticised for having challenged the participation of the judges in the proceedings.

46. It notes that in the relevant period seven court decisions were given and thus the domestic courts cannot be said to have been inactive. All the same, they examined the case for over nine years. The delay was caused mainly by the re-examination of the case. Although the Court is not in a position to analyse the juridical quality of the case-law of the domestic courts, it considers that, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system.

47. The Court takes note of the prolonged periods of inactivity on the part of the Supreme Court. It observes that the second examination of the case by that Court was carried out under the amended Code of Civil Procedure. The amendments, which came into force on 1 July 2000, were aimed at expediting the procedure before that Court (see *Zmaliński v. Poland* (dec.), no. 52039/99, 16 October 2001). Nonetheless, in the present case the Supreme Court did not take advantage of the new procedure, since it needed approximately one and a half years to reject the applicant's cassation appeal on procedural grounds.

48. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's case was not heard within a reasonable time. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant claimed PLN 50,000 in respect of pecuniary damage. She based her claim on the damage she had allegedly sustained as a result of the unlawful ban on leaving the territory of Poland. The applicant further claimed PLN 100,000 in respect of non-pecuniary damage.

51. The Government noted that there was no causal link between the alleged violation of the Convention and the applicant's claim for pecuniary damage. They regarded the claim for non-pecuniary damage as exorbitant. The Government considered that finding a violation in the case at issue would provide in itself just satisfaction. Alternatively, they requested the Court to award compensation on the basis of its case-law.

52. The Court discerns no connection between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it is of the view that the applicant can reasonably be considered to have suffered non-pecuniary damage on account of the length of the proceedings. Accordingly, it awards the applicant EUR 3,600.

B. Costs and expenses

53. The applicant also claimed PLN 23,000 for the costs and expenses incurred in the domestic proceedings and the Court. Out of this sum PLN 8,200 related to her legal representation before the Court.

54. The Government were of the view that only the costs incurred in the procedure before the Court could be taken into consideration.

55. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,000 for the proceedings before the Court.

C. Default interest

56. 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. *Declares* the application admissible;
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 according to Article 44 § 2 of the Convention
 - (i) EUR 3,600 (three thousand six hundred euros) in respect of non-pecuniary damage,
 - (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses,
 - to be converted into Polish zlotys at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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 25 November 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President