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

FOURTH SECTION

CASE OF ZYNGER v. POLAND

(Application no. 66096/01)

JUDGMENT

STRASBOURG

13 July 2004

FINAL

15/12/2004

In the case of Zynger v. Poland,

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

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

Having deliberated in private on 22 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 66096/01) 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 Mr Ryszard Zynger, who has a double Polish-Israeli nationality.

2. The applicant was represented by Mr M. Konieczyński, a lawyer practising in Katowice. The Polish Government ("the Government") were represented by their Agent, Mr Krzysztof Drzewicki, and subsequently by Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his right to "a hearing within a reasonable time" had not been respected and that he did not have an effective remedy to complain about unreasonable length of civil proceedings.

4. The application was allocated to the former Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

6. By a decision of 7 May 2002 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the length of the proceedings to the respondent Government. By a decision of 27 May 2003 the Court declared this complaint admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1922 and lives in Frankfurt am Main.

8. In 1948 the applicant and his family left Poland and settled in Israel. His father appointed a representative to deal with all legal and financial matters in Poland. Despite that representative's opposition, in 1965 the State authorities expropriated a part of the property belonging to the applicant's family. The applicant could not take part in the proceedings concerning the expropriation, because the Polish authorities refused to grant him a visa to enter the territory of Poland.

1. Civil proceedings concerning the estate located in Łódź

9. On 24 March 1998 the applicant filed with the Łódź Regional Court (*Sąd Wojewódzki*) an action in which he claimed compensation for the allegedly unlawful use of his estate by the State Treasury.

10. In December 1998 the Łódź District Office (*Urząd Rejonowy*) filed with the same court an action in which it sought a declaration that the State Treasury had acquired the ownership of that estate on the basis of the 1946 decree on abandoned property (*dekret o majątkach opuszczonych i poniemieckich*). The District Office submitted that the estate had been abandoned following the Second World War and in 1953 taken over by the State. It pointed out that until 1992 none of the previous owners had raised any claims in respect of that estate.

11. In the proceedings concerning the applicant's action the court held hearings on 19 February and 1 December 1999, as well as on 5 January 2000. According to the Government, the applicant failed to attend the hearing of 19 February 1999. The applicant submits that he attended it.

12. On 23 February 2000 the Łódź Town Office (*Urząd Miasta*) requested that the applicant's proceedings be stayed until the proceedings initiated in March 1998 had been completed, submitting that the outcome of those proceedings depended on the court's findings in the latter. On 6 March 2000 the court stayed these proceedings.

13. In his pleadings of 1 June 2000 the applicant's lawyer submitted that after the war the applicant's predecessor in title had resumed possession of the estate and in 1948 court proceedings concerning his title had been conducted.

14. On 7 August 2000 the court stayed also the proceedings instituted by the applicant, relying on the fact that inheritance proceedings concerning one of the heirs to the estate in question were pending. The applicant's lawyer unsuccessfully appealed against that decision, pointing out that the

applicant's share in the estate was 127/144 and thus the necessity to conduct those inheritance proceedings could not be reasonably invoked as the reason for staying the main proceedings.

15. On 31 January 2002 the court gave judgment in the proceedings instituted in December 1998 by the Łódź District Office. It dismissed the claim that the State Treasury had acquired the property of the applicant's late father by prescription.

16. On 8 April 2002 the Łódź Regional Court resumed the compensation proceedings instituted by the applicant in March 1998. On 17 April 2002 the applicant requested that an expert opinion be ordered concerning the value of the property under dispute.

17. On 14 May 2002 the court held a hearing.

18. On 3 July 2002 an expert held a viewing of the property.

19. The compensation proceedings are pending.

20. On an unspecified date in 2003 the applicant instituted a new set of proceedings against the Łódź municipality, in which he claimed release of the property concerned. On 19 April 2003 the court allowed the applicant's claim.

2. Civil proceedings concerning the estate located in Katowice

21. On 25 August 1995 the applicant filed with the Katowice District Court (*Sąd Rejonowy*) a request to reopen the proceedings concerning his estate which had terminated in 1965. In those proceedings the State Treasury had acquired the ownership of the estate through acquisitive prescription. The applicant submitted that the heirs to the estate had been deprived of the right to participate in those proceedings as the Polish authorities had refused to grant them the visa. He submitted that he had found out about that fact only in 1995.

22. On 12 October 1995 the court stayed the proceedings until the completion of the procedure for reconstruction of the case-file of the proceedings terminated in 1965.

23. On 30 April 1996 the court resumed the proceedings.

24. In September 1997 an expert submitted his opinion ordered by the court.

25. On 20 June 1998 the court fixed a court fee to be paid by the applicant. The applicant's lawyer challenged that decision. On 13 October 1998 the Katowice Court of Appeal (*Sąd Apelacyjny*) quashed it.

26. On 16 March 1999 the District Court refused the applicant's request for an interim measure. His appeal against that decision was dismissed.

27. On 12 January 2000 the court held a hearing.

28. On 10 February 2000 the court decided to transfer the case to a different department, considering that it should be dealt with by way of a

contentious procedure. On 17 May 2000 the Katowice Regional Court dismissed the applicant's appeal against that decision.

29. On 23 March 2000 the Katowice Town Office submitted its pleadings, in which it petitioned that the applicant's request be rejected. It noted that the applicant had been aware of the fact that the proceedings concerning the acquisition of the estate had been pending in 1965. The Office further observed that the applicant had corresponded with the representative appointed by his family and thus could not claim that he had found out about the expropriation proceedings only in 1995.

30. On 27 October 2000 the court stayed the proceedings until inheritance proceedings in respect of one of the parties to the proceedings at issue were completed. On 30 January 2001 the Katowice Regional Court upheld this decision.

31. On 9 April 2002 the final decision was given in the inheritance proceedings. On 24 June 2002 the District Court resumed the examination of the applicant's case.

32. On 31 July 2002 the court gave judgment, in which it refused the applicant's request for re-opening. In November 2002 the applicant lodged an appeal against that judgment.

33. On 8 April 2003 the Katowice Regional Court dismissed his appeal. The applicant subsequently submitted an appeal on points of law. By a decision of 30 July 2003 the Katowice Regional Court exempted the applicant from the obligation to pay a relevant court fee.

34. On 20 April 2004 the Supreme Court dismissed the appeal on points of law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

35. Article 45 of the Constitution provides that everyone shall have the right to a fair and public hearing of his or her case, without undue delay, before a competent impartial and independent court.

36. Under Article 77 § 1of the Constitution of Poland of 1997, everyone is entitled to compensation for damage caused by the unlawful acts of a public authority. Pursuant to § 2 of the same Article, a statute shall not bar access to court to persons seeking redress for any breach of their rights or freedoms.

37. Article 417 of the Civil Code provides that the State Treasury shall be liable for damage caused by an official of the State acting on the State's behalf.

38. Under the former Article 418 of the Code, if damage was caused by the State official as a result of his/her giving a decision or doing another official act, the State Treasury was to be liable only if the giving of the said decision amounted to an infringement of laws punishable under the criminal law or under any disciplinary regulations, and if the fault of the perpetrator

had been confirmed by a judgment of a criminal court or of a competent disciplinary authority, or was otherwise recognised by a superior authority.

39. According to the old case-law of the Polish Supreme Court, a plaintiff seeking damages under Section 417 of the Civil Code must show that the act in question is unlawful and that the State agent committed a fault (the Supreme Court judgments: No. I PR 468/70 of 29.12.1970, unpublished, No. I CR 24/71 of 19.4.1971, unpublished and No. I CR 152/74 of 11.4.1974, unpublished).

40. In its judgment of 4 December 2001 the Constitutional Court ruled on the compatibility of these provisions with the Constitution. It held that Article 417 was compatible with Article 77 of the Constitution, if it was construed so as to mean that the State Treasury was liable for damage caused by unlawful acts of public officials in carrying out their duties.

41. In the same judgment the Court held that Article 418 of the Code was incompatible with Article 77 of the Constitution in that it placed undue restrictions on access to a court in cases in which civil liability of the State was sought for acts carried out in the exercise of State powers, other than *de facto* acts, which were covered by the general principle of Article 417 of the Code.

THE LAW

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

42. The applicant complained that the length of both sets of proceedings in his case exceeded a "reasonable time" within the meaning of Article 6 § 1 of the Convention, which reads in so far as relevant:

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

A. Civil proceedings concerning the estate located in Katowice

a. Applicability of Article 6 § 1 of the Convention

43. The Court notes that the proceedings at issue concerned the applicant's request to reopen the civil proceedings which had terminated in the judgment given in 1995.

44. The Government did not dispute that these proceedings related to the "determination of his civil rights". In the light of this, and bearing in mind that the parties' arguments before it were focused on the issue of compliance

with Article 6 § 1, the Court will proceed on the basis that it is applicable to these proceedings (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 40, ECHR 2001-VIII; *The Fortum Corporation v. Finland*, no. 32559/96, §§ 36-40).

b. Compliance with Article 6 § 1 of the Convention

45. The Court reiterates that the reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular 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, *Biskupska v. Poland, no. 39597/98*, § 43, 11 July 2003).

46. The proceedings began on 25 August 1995 and came to end by the judgment of the Supreme Court of 20 April 2004. They therefore lasted for eight years and eight months.

47. The applicant argued that they exceeded a reasonable time.

The Government submitted that the proceedings were complex and that the courts showed diligence in dealing with the case. In conclusion the Government invited the Court to find that there had been no violation of Article 6 § 1 of the Convention.

48. The Court considers that even though the case involved a certain degree of complexity on account of the need to reconstruct case-files of proceedings terminated in 1965, it cannot be said that this in itself justified the overall length of the proceedings.

49. As regards the conduct of the applicant the Court observes that it does not appear that the way in which he exercised his procedural rights could have contributed to the length of the proceedings.

50. While assessing the conduct of the national authorities, the Court observes that the proceedings were first stayed on 12 October 1995 until the completion of procedures for reconstruction of the case-file of the proceedings terminated in 1965. They were later resumed on 30 April 1996 and a delay in the process of obtaining expert evidence ensued as the expert submitted his report in September 1997. On 10 February 2000, almost five years after the case had been lodged with the court, the court decided that it should be examined in contentious proceedings. In the Court's view, this was an excessively long period to determine the kind of proceedings in which the case should be examined.

51. Consequently, having regard to the overall duration of the proceedings, the Court finds that the reasonable time requirement laid down in Article 6 § 1 of the Convention was not complied with in the present case.

52. There has accordingly been a violation of Article 6 § 1 of the Convention.

B. Civil proceedings concerning the estate located in Łódź

53. The proceedings complained of began on 24 March 1998 and are still pending. They have therefore already lasted six years and two months.

54. According to the applicant, he had attended the hearing held 19 February 1999, contrary to the Government's submission. He argued that his presence at the viewing referred to by the Government was not necessary. He was of the opinion that the decision of 27 October 2000 to stay the proceedings was to his detriment and that it had been taken deliberately, in order to hinder any progress in his case.

55. The Government submitted that the case at issue was complex on account of the uncertainty of the legal status of the property in dispute, which had resulted in the necessity to institute separate proceedings concerning the State's rights with respect to the property. They were of the view that the applicant had not contributed to the delay in the proceedings, except for his failure to attend the hearing of 19 February 1999 and the viewing of the property held on 3 July 2002. The Government were of the view that the case did not require special diligence, since what was at stake for the applicant was of a pecuniary nature only.

Finally, the Government suggested that the period during which the proceedings had been stayed should be deducted from the total period to be taken into consideration by the Court.

56. In the Court's view, the case does not appear particularly complex. It also notes that in the period of two years before the date when the proceedings were stayed the court had held only three hearings. No substantial progress seems also to have been made after the case had been resumed on 8 April 2002.

57. The Court considers that, in the overall assessment of the case, regard must also be had to the applicant's age which supports the conclusion that the case required special diligence on the part of the domestic courts (see, *mutatis mutandis*, *Dewicka v. Poland*, no. 38670/97, § 55, 4 April 2000).

58. 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. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

59. The applicant complained that he did not have an effective remedy to complain about the excessive length of civil proceedings in his cases. He invoked Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

60. 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 Constitutional Court had given judgment by which it ruled that Article 418 of the Civil Code was incompatible with the Constitution. That Court considered that this provision placed undue restrictions on access to a civil court in cases in which civil liability was sought for acts carried out in the exercise of State powers. This, in the Government's submission, made it possible for the applicant to bring a compensation claim to a civil court in respect of the excessive length of civil proceedings.

61. The applicant did not address this issue.

62. 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, among other authorities, the *Vernillo v. France* judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27; *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).

63. According to the Government, the applicant should avail himself 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. They submitted that as a result of this judgment an obstacle to access to a court for compensation claims arising out of acts of State Treasury, provided for in the former Article 418 of the Civil Code, had ceased to exist. This was so, in the Government's submission, because a requirement that the fault of the agent of the Treasury had to be confirmed by an official decision had been abolished by the judgment of the Constitutional Court. However, the Court notes that no information as to any judicial practice relating thereto has been provided. In the absence of such information and having regard to the above-mentioned principle, the Court finds that the Government have 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).

64. Furthermore, the Court refers to its case-law to the effect that no specific remedy in respect of the excessive length of proceedings exists under Polish law (see, in respect of criminal proceedings, *Kudla v. Poland* [GC], no. 30210/96, § 159, ECHR 2000-XI, in respect of civil proceedings *Gibas v. Poland*, no. 24559/94, Commission decision of 6 September 1995,

Decisions and Reports 82-A, p. 76 and *Witczak v. Poland* (dec.), no. 47404/99, 23 October 2001).

65. Accordingly, the Court holds that in the present case there has been a violation of Article 13 of the Convention in that the applicant had no domestic remedy whereby he could enforce his right to a "hearing within a reasonable time" guaranteed by Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed EUR 10,000 for pecuniary damage which he contends he suffered as a result of the protracted proceedings. He further claimed EUR 10,000 for non-pecuniary damage which he suffered as a result of unreasonable length of proceedings.

68. The Government submitted that there was no causal link between the alleged pecuniary damage and the applicant's complaint. They further submitted that the applicant's claim for non-pecuniary damage was excessive.

69. The Court does not discern any causal link between the violation found and the pecuniary damage alleged, it therefore rejects this claim. On the other hand the Court is of the view that the applicant suffered damage of a non-pecuniary nature such as distress and frustration resulting from the protracted length of the proceedings. Accordingly, the Court considers that, in the particular circumstances of the instant case and deciding on equitable basis, the applicant should be awarded EUR 7,200 under the head of non-pecuniary damage.

B. Costs and expenses

70. The applicant also claimed EUR 5,000 by way of legal costs incurred in the preparation and defence of his case before the Court.

71. The Government requested the Court to make an award, if any, only in so far as the costs and expenses claimed were actually and necessarily incurred and were reasonable as to quantum. They relied on the *Zimmerman and Steiner v. Switzerland* judgment of 13 July 1983 (Series A no. 66, p. 35, § 36).

72. The Court, having regard to the nature of the issues before the Court, considers that EUR 2,000 constitutes a reasonable award.

C. Default interest

73. 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

1. *Holds* unanimously that there has been a violation of Article 6 of the Convention as regards civil proceedings concerning the property located in Łódź;

2. *Holds* by 4 votes to 3 that Article 6 § 1 of the Convention does apply to the set of proceedings concerning the property located in Katowice;

3. *Holds* by 4 votes to 3 that there has been a violation of Article 6 of the Convention as regards civil proceedings concerning the property located in Katowice;

4. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

5. *Holds* unanimously
   (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, the following amounts:
      (i) EUR 7200 (seven thousand two hundred euros) in respect of non-pecuniary damage;
      (ii) EUR 2000 (two thousand euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr L. Garlicki, Ms L. Mijović and Mr R. Maruste is annexed to this judgment.

N.B.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES MARUSTE, GARLICKI AND MIJOVIĆ

The Court has held that the application is admissible in respect of the civil proceedings concerning the estate located in Katowice. We wish to indicate our disagreement with this finding.

The proceedings in question related to the applicant's request for reopening of civil proceedings which had been terminated in 1965. While the Court did not dispute that, in principle, Article 6 of the Convention does not apply to such proceedings, it noted that the government, in their observations, had not challenged the competence of the Court in this case. In the light of this fact, and in reliance on its judgments in *Prince Hans-Adam II of Liechtenstein v. Germany* (§ 40) and *Fortum Corporation v. Finland* (§ 36-40), the Court decided the case on the merits.

We find it difficult to accept such an approach. First of all, the competence *ratione materiae* of this Court is delineated in the text of the Convention and the parties do not have the power to extend or to modify it by their declarations. It is true that the Government expressly declared that the case was admissible. But this only demonstrates that the Government, erroneously, chose not to follow the established case-law under which reopening proceedings remain outside the scope of Article 6. Such a declaration, which was rather generous towards the applicant, could not, however, modify the jurisdiction of the Court. The existence of jurisdiction constitutes an objective fact and if it does not have competence *ratione materiae* the Court is unable to continue its examination of the case.

Furthermore, we are not sure whether this case was really governed by the judgments cited by the majority. The *Prince Hans-Adam II of Liechtenstein v. Germany* judgment was related to very particular, truly unique, set of facts and it would be difficult to transpose its findings to "regular" reopening cases. The *Fortum Corporation v. Finland* judgment involved both the civil and criminal heads of Article 6 (see § 40) and that was one of the reasons why the Court confirmed that it had jurisdiction. No special circumstances of this kind were present in the applicant's case. Therefore, in our opinion, the outcome of this case should follow the Court's conclusion in the case of *Nylund v. Finland (*dec.), no. 27110/95, ECHR 1999-VI where the Court noted that "The parties have agreed that Article 6 of the Convention is applicable to the present case. However, the Court, which has to examine, *ex officio*, its competence *ratione materiae*, is unable to reach the same conclusion".

Finally, the approach of the majority that the competence of the Court depends on declarations by the respondent Governments seems hardly compatible with the principle of equality. Those applicants lucky enough not to have the Court's jurisdiction challenged by the Government, would have their cases heard and decided on the merits. Others, when confronted

with a more careful position of the Government, would see their applications dismissed as inadmissible. In effect, access to the Court would depend on discretionary (not to say – arbitrary) positions taken by the respondent parties.

It is true that the reopening proceedings in the applicant's case lasted much too long. This may be regrettable, but it cannot modify the scope of the jurisdiction of this Court.