CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF KUŚMIEREK v. POLAND

(Application no. 10675/02)

JUDGMENT

STRASBOURG

21 September 2004

FINAL

21/12/2004

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 Kuśmierek v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 31 August 2004,

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

PROCEDURE

1. The case originated in an application (no. 10675/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Józef Kuśmierek ("the applicant"), on 28 February 2002.

2. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his right to a "hearing within a reasonable time", guaranteed by Article 6 § 1 of the Convention, had not been respected.

4. On 26 November 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

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1943 and lives in Bielawa, Poland.

A. Facts before 1 May 1993

6. Between 18 and 21 February 1992 “Ekspres Sudecki”, a local newspaper, published letters of certain M.W. and A.P. The authors accused the applicant, at the time the Deputy Mayor of Bielawa, of fraud and called him a “liar”.

7. On 6 March 1992 the applicant brought a private prosecution on charges of libel against M.W. and A.P. to the Dzierżoniów District Court (*Sąd Rejonowy*).

8. The trial began on 18 May 1992. The court adjourned the hearing due to the absence of one of the defendants.

9. Further hearings were listed for 8 and 30 June, 20 July, 20 August and 22 September 1992, 11 February and 28 April 1993, but most of them were adjourned because of the parties' or their lawyers' absence.

B. Facts after 1 May 1993

10. On 20 May 1993 the Court adjourned the trial because the defendants had failed to appear.

11. The next hearing, set down for 24 June 1993, was cancelled because of the absence of the lay judge.

12. Further hearings, scheduled for 8 July 1993, 25 March 1994, 31 May and 14 June 1995 were adjourned because of the absence of the defendants, their counsel, a witness and the applicant. The court decided to impose a fine on one of the witnesses who had failed to appear.

13. At the hearing on 29 June 1995 the defendants' counsel informed the court that he would not represent them any longer.

14. On 20 July 1995 the trial was adjourned because the defendants had failed to appear. The court ordered that both defendants be subjected to police supervision in order to ensure the proper course of the proceedings.

15. On 18 October 1995 the court lifted police supervision in respect of M.W.

16. A hearing set down for 1 March 1996 was adjourned since the defendants and a witness had failed to appear before the court. The court ordered that A.P. be detained on remand to ensure his presence at hearings.

17. A hearing scheduled for 29 March 1996 was adjourned because M.W., the applicant and witnesses had failed to appear.

18. On 4 April 1996 M.W. challenged the impartiality of all the judges sitting in the Dzierżoniów District Court. The challenge was dismissed as unfounded by the Wałbrzych Regional Court (*Sąd Wojewódzki*) on 24 May 1996.

19. At a hearing on 5 April 1996 the Dzierżoniów District Court decided to re-hear evidence due to the change of the composition of the court. It also

lifted A.P.'s detention and ordered that he be subjected to police supervision.

20. Hearings scheduled for 26 September and 10 October 1996 were adjourned because of M.W.'s and his counsel's absence.

21. On 24 October 1996 the court held a hearing.

22. The next hearing, which was to be held on 7 November 1996, was adjourned because A.P. had failed to appear. The court ordered that he be brought to the court by the police for the next hearing.

23. At the hearing on 15 November 1996 M.W.'s counsel asked the court to allow him time to inspect new documentary evidence and to adjourn the trial.

24. The proceedings were subsequently stayed because the applicant's lawyer was ill.

25. A hearing scheduled for 29 January 1998 was adjourned because of the absence of M.W., his lawyer and witnesses.

26. The court resumed the proceedings at a hearing on 19 February 1998. It also imposed a fine on one of the witnesses who had failed to appear.

27. On 6 March 1998 the court held that the conduct of M.W. made it impossible for it to try the case and decided to sever the charges against him. On the same day M.W.'s counsel refused to represent him any longer.

28. A hearing set down for 19 March 1998 was adjourned because a witness had not appeared.

29. A hearing scheduled for 9 April 1998 was cancelled due to the judge's absence.

30. On 23 April 1998 the Dzierżoniów District Court convicted M.W. as charged and ordered that he publish an official apology to the applicant in a local newspaper. It also conditionally discontinued the proceedings against A.P.

31. Both defendants appealed against that judgment.

32. On 27 October 1998 the Wałbrzych Regional Court quashed the first-instance judgment and remitted the case.

33. On 3 March 1999 the Dzierżoniów District Court discontinued the proceedings against both defendants, as the statutory period of limitation for imposing a sentence had expired.

34. On 9 March 1999 the applicant appealed against that decision.

35. The case was again remitted on 20 July 1999.

36. On 25 August 1999 the Dzierżoniów District Court stayed the proceedings because A.P. had absconded and a warrant to search for him by a “wanted notice” had been issued.

37. Hearings set down for 5 April and 7 May 2001 were adjourned due to the defendants' absence.

38. On 6 June 2001 the Dzierżoniów District Court discontinued the proceedings on the same grounds as before.

39. The Świdnica Regional Court upheld that decision on 7 September 2001.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provision relating to defamation

40. Article 178 of the Criminal Code 1969 (which is no longer in force and was repealed and replaced by the so-called "New Criminal Code"), as applicable at the material time, reads as follows:

"§ 1. Anyone who imputes to another person, a group of persons or an institution such behaviour or characteristics, which may debase them in the public opinion or expose to loss of the trust necessary for a certain position, occupation or a type of activity, shall be liable to imprisonment not exceeding 2 years, a restriction of liberty or a fine.

§ 2. Anyone who raises or makes public untrue allegation about behaviour or characteristics of another person, a group of persons or institutions in order to debase them in the public opinion or expose to loss of the trust necessary for a certain position, occupation or a type of activity, shall be liable to imprisonment not exceeding 3 years.

...

§ 4. The prosecution takes place under a private bill of indictment."

B. Provisions relating to coercive measures

41. At the material time the rules governing detention on remand were contained in Part VI of the Code of Criminal Procedure of 1969 (repealed and replaced by the so-called "New Code of Criminal Procedure" of 6 June 1997) entitled "Coercive measures" (Ś*rodki przymusu*). Under Article 235 § 2 a court, in order to ensure the proper course of the proceedings, could subject an accused to police supervision. Article 217 § 1 (1) provided that detention on remand could be imposed if there was a reasonable risk that an accused would abscond or go into hiding. Article 242 § 1 stated that a fine could be imposed on a witness who failed to appear before a court when summoned. Under § 2 of that provision, a court could also order that such person be brought to a court by the police.

THE LAW

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

42. 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. This provision reads as follows:

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

43. The Government contested that argument.

A. Period to be taken into consideration

44. The proceedings started on 6 March 1992. However, the period to be taken into consideration began only on 1 May 1993, when Poland's declaration recognising the right of individual petition took effect. Nevertheless, 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, 15 October 1999, § 59). The period in question ended on 7 September 2001. It thus lasted nearly 9 years and 6 months, of which 8 years and 4 months fall within the Court's jurisdiction *ratione temporis*.

B. Admissibility

1. The Government's plea of inadmissibility on the ground of incompatibility ratione materiae

45. The Government maintained that Article 6 § 1 did not apply to the proceedings at issue, as this provision did not guarantee a right to bring a criminal prosecution against third persons. They recalled that the applicant had two possibilities under Polish law: he could join the proceedings as a civil party and lodge a claim for compensation against the defendants or institute separate civil proceedings for compensation. He had not, however, availed himself of any of those possibilities and had continued to take part in the proceedings as a private prosecutor. His application was therefore incompatible *ratione materiae* with the provisions of the Convention.

46. The applicant opposed the Government's arguments. He argued that his right to enjoy a good reputation was undoubtedly a "civil right" within the meaning of the Convention. The aim of the trial he had instituted had been to protect this right. Article 6 § 1 was, therefore, applicable to the proceedings in question.

47. The Court reiterates firstly that the "civil" character of the right to enjoy a good reputation follows from its established case-law (see *Helmers v. Sweden* judgment of 29 October 1991, Series A no. 212-A, p. 14, § 27 and *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, § 58).

48. Further, the Court notes that, although Article 6 § 1 does not guarantee a right for the individual to institute a criminal prosecution himself, such a right was conferred on the applicant by the Polish legal system in order to allow him to protect his reputation.

49. The Court considers that the existence of a dispute ("*contestation*") concerning a "civil right" does not necessarily depend on whether or not monetary damages are claimed; what is important is whether the outcome of the proceedings is decisive for the "civil right" at issue. (see *Helmers*, cited above, § 29) This was certainly so in the present case as the outcome of the private prosecution depended on an assessment of the merits of the applicant's complaint that the defendants had attacked and harmed his good reputation.

50. It follows that Article 6 § 1 applies to the present case.

Accordingly, the Court dismisses the Government's preliminary objection.

2. The Government's plea on inadmissibility on the ground of non-exhaustion of domestic remedies

51. The Government submitted that the applicant had not exhausted remedies available under Polish law. They recalled that, since 18 December 2001, there had been a possibility to lodge a claim for compensation for damages suffered due to the excessive length of proceedings with the Polish courts.

52. The applicant generally contested the Government's arguments.

53. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, 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 *T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999).

The Court observes that the Government merely maintain that Polish law provides a new remedy. They do not submit any information as to juridical practice that would allow the Court to find that the remedy at issue is an effective one (see *Małasiewicz v. Poland*, no 22072/02, § 32,

14 October 2003 and *Skawińska v Poland* (dec), no. 42096/98, 4 March 2003).

54. Moreover, the Court reiterates that, according to its case-law, no specific remedy in respect of the excessive length of proceedings exists under Polish law (see *Kudła v. Poland* [GC], no. 30210/96, § 160, ECHR 2000-XI and *D.M. v. Poland*, no. 13557/02, §§ 47-50, 14 October 2003).

55. Accordingly, the Court concludes that, for the purposes of Article 35 § 1 of the Convention, there was no adequate and effective remedy which the applicants should have exercised.

For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

3. Substance of the complaint

56. As to the substance of the complaint, the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. The applicant's submissions

57. The applicant submitted that the courts had failed to handle his case with due diligence. He emphasized that the delay in the proceedings had mainly been caused by the courts' negligence and their procedural mistakes.

58. He further maintained that the excessive length of the proceedings put a severe strain on him and that his reputation, career and health suffered because his case had not been examined within the reasonable time.

2. The Government's submissions

59. The Government acknowledged that the case was not particularly complex. In their view, given the issues involved in the examination of the case, no special diligence was required of the Polish authorities.

60. As regards the conduct of the authorities, the Government argued that they had showed due diligence when examining the case and had made every effort to ensure the proper course of the proceedings. In particular, the courts had on several occasions imposed fines on the witnesses and had ordered that defendants be subjected to police supervision or detained on remand. The Government stressed that it was, first of all, the conduct of the defendants that had contributed to prolongation of the proceedings.

61. The Government invited the Court to find that there had been no violation of Article 6 § 1.

3. The Court's assessment

62. 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; *Humen v. Poland* [GC], no. 266114/95, 15 October 1999, § 60).

63. The Court considers that the case was not particularly difficult to determine.

64. As to the applicant's conduct, the Court observes that it does not appear that he materially contributed to the prolongation of the trial.

65. As regards the conduct of the authorities, the Court is not persuaded by the Government's arguments that they showed due diligence in the proceedings. It notes that the conduct of the defendants and the witnesses was one of the reasons for the prolongation of the proceedings. However, in the Court's opinion, the domestic authorities failed to take adequate steps in order to ensure their attendance. It observes that the defendants on numerous occasions failed to appear at hearings. It is true that the court subjected them to police supervision and, subsequently, ordered that A.P. be detained on remand (see paragraphs 14 and 16 above). Nevertheless, those measures were afterwards lifted within a relatively short time (paragraphs 15 and 19) and the defendants continued to obstruct the proceedings. Moreover, the court decided to sever the charges against M.W. only on 6 March 1998 when the proceedings had already been pending for 6 years. The Court notes further that the hearings were frequently adjourned due to the absence of the witnesses. However, the trial court reacted to that behaviour only on two occasions when it decided to impose fines on them (see paragraphs 12 and 26 above). Accordingly, the Court considers that, the courts did not avail themselves of the measures available to it under national law to discipline the participants to the proceedings and to ensure that the case be heard within a reasonable time. It finds that the overall length of the proceedings is not explained satisfactorily in the Government's observations.

66. Furthermore, the Court notes that, due to the length of the trial, the statutory period of limitation for imposing a sentence on the defendants had expired. As the result, the applicant failed to obtain the satisfaction he sought.

67. Consequently, the Court holds that 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

68. 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

69. The applicant claimed 195,922 Polish zlotys (PLN) in respect of pecuniary damage. That sum comprised loss he suffered in his professional career prospects and loss of earnings caused by the fact that his good name had been tarnished. He also sought a monthly allowance amounting to half of the average salary in the public sector in Poland.

Under the head of non-pecuniary damage, the applicant claimed a sum of PLN 200,000 in compensation for suffering, stress and loss of health.

70. The Government submitted that the applicant's claims were excessive.

71. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore sees no reason to make any award under the head of pecuniary damage. On the other hand, it considers that the applicant certainly suffered non-pecuniary damage, such as distress and frustration resulting from the excessive length of the proceedings. Accordingly, taking into account the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant 4,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

72. The applicant did not seek to be reimbursed for any costs and expenses in connection with the proceedings before the Court.

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 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, EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 21 September 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President