



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

FOURTH SECTION

CASE OF BARSZCZ v. POLAND

(Application no. 71152/01)

JUDGMENT

STRASBOURG

30 May 2006

FINAL

30/08/2006

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 Barszcz v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 9 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 71152/01) 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 a Polish national, Mr Kazimierz Barszcz ("the applicant") on 18 October 2000.

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

3. On 6 October 2005 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. On 13 December 1994, the applicant sold a horse to A.G. for PLN 2,500. Two days later the buyer returned the horse claiming that it was ill. The applicant was therefore forced to pay the costs of the horse's upkeep during the following year. As A.G. constantly refused to take the horse back, the applicant sold it to another buyer, as he could not afford the costs of upkeep.

5. On 25 January 1995 A.G. lodged a suit against the applicant with the Tarnobrzeg District Court, claiming payment of the price.

6. On 14 March 1995 the applicant lodged a counter-claim for costs of the upkeep of the horse.

7. During the first hearing on 15 March 1995 the court admitted witness evidence and adjourned the case.

8. On 5 April 1995 the court heard witnesses and adjourned the case.

9. On 22 May 1995 the court admitted in evidence an opinion of a veterinary surgeon and adjourned the case.

10. On 25 July 1995 the expert submitted the opinion, stating that the horse was well and had never been ill.

11. On 6 September 1995 the court called an expert in agriculture, who estimated that the costs of upkeep of the horse had greatly exceeded its value. The court adjourned the case.

12. On 2 October 1995 the court heard the parties.

13. On 11 October 1995 the court delivered a judgment. Both parties appealed.

14. On 28 March 1996 the Tarnobrzeg Regional Court returned the case file to the District Court to have it completed.

15. On 5 September 1996 the Regional Court quashed the first-instance judgment and remitted the case for re-examination.

16. On 16 January 1997 the parties declared that they could not reach a friendly settlement.

17. On 9 October 1997 the court admitted the evidence of a witness and adjourned the case.

18. On 10 February 1997 a witness was heard and the case was adjourned.

19. On 9 April 1998 further witnesses were heard.

20. On 2 June 1998 the court admitted in evidence another expert's opinion.

21. On 18 January 1999 the expert submitted the opinion.

22. On 31 March 1999 the court summoned the expert and adjourned the case.

23. On 5 May 1999 the court found that the plaintiff had not paid an advance for the expert's opinion and adjourned the case until 2 June 1999. The expert failed to attend the hearing on that day and the case was adjourned until 25 June.

24. On 19 November 1999 the District Court delivered a judgment, ordering PLN 4,690 to be paid by the applicant with interest from 1995, and 903 PLN to be paid by A.G. to the applicant.

25. On 13 April 2000 the Tarnobrzeg Regional Court dismissed the appeals of both parties.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. State's liability for a tort committed by its official

1. Provisions applicable before 1 September 2004

26. Articles 417 et seq. of the Civil Code (*Kodeks cywilny*) provide for the State's liability in tort.

In the version applicable until 1 September 2004, Article 417 § 1, which lays down a general rule, read as follows:

“1. The State Treasury shall be liable for damage caused by a State official in the course of carrying out the duties entrusted to him.”

27. Article 418 of the Civil Code, as applicable until 18 December 2001, provided for the following exception in cases where damage resulted from the issue of a decision or order:

“1. If, in consequence of the issue of a decision or order, a State official has caused damage, the State Treasury shall be liable only if a breach of the law has been involved in the issue of the decision or order and if that breach is the subject of prosecution under the criminal law or of a disciplinary investigation, and the guilt of the person who caused the damage in question has been established by a final conviction or has been admitted by the superior of that person.

2. The absence of the establishment of guilt by way of a criminal conviction or in a decision given in disciplinary proceedings shall not exclude the State Treasury's liability for damage if such proceedings cannot be instituted in view of the [statutory] exception to prosecution or disciplinary actions.”

2. Provisions applicable as from 1 September 2004

28. On 1 September 2004 the Law of 17 June 2004 on amendments to the Civil Code and other statutes (*Ustawa o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw*) (“the 2004 Amendment”) entered into force. While the relevant amendments have in essence been aimed at enlarging the scope of the State Treasury's liability for tort under Article 417 of the Civil Code – which included adding a new Article 417¹ and the institution of the State's tortious liability for its omission to enact legislation (the so-called “legislative omission”; “*zaniedbanie legislacyjne*”) – they are also to be seen in the context of the operation of a new statute introducing remedies for the unreasonable length of judicial proceedings.

Following the 2004 Amendment, Article 417¹, in so far as relevant, reads as follows:

“3. If damage has been caused by failure to give a ruling (*orzeczenie*) or decision (*decyzja*) where there is a statutory duty to give them, reparation for [the damage]

may be sought after it has been established in the relevant proceedings that the failure to give a ruling or decision was contrary to the law, unless otherwise provided for by other specific provisions.”

29. However, under the transitional provisions of Article 5 of the 2004 Amendment, Article 417 as applicable before 1 September 2004 shall apply to all events and legal situations that subsisted before that date.

B. Constitutional Court’s judgment of 4 December 2001

30. On 4 December 2001 the Constitutional Court (*Trybunał Konstytucyjny*) dealt with two constitutional complaints in which the applicants challenged the constitutionality of Article 417 and 418 of the Civil Code. They alleged, in particular, that those provisions were incompatible with Articles 64 and 77 § 1 of the Constitution.

On the same day the Constitutional Court gave judgment (no. SK 18/00) and held that Article 417 of the Civil Code was compatible with Article 77 § 1 of the Constitution in so far as it provided that the State Treasury was liable for damage caused by the unlawful action of a State official carried out in the course of performing his duties. It further held that even though Article 418 of the Civil Code was compatible with Article 64 of the Constitution, it was contrary to Article 77 § 1 since it linked the award of compensation for such damage with the personal culpability of the state official concerned, established in criminal or disciplinary proceedings.

31. On 18 December 2001, the date on which the Constitutional Court’s judgment took effect, Article 418 was repealed. The Constitutional Court’s opinion on the consequences of the repeal read, in so far as relevant:

“The elimination of Article 418 of the Civil Code from the legal system ... means that the State Treasury’s liability for an action of a public authority consisting in the issue of unlawful decisions or orders will flow from the general principles of the State liability laid down in Article 417 of the Civil Code. This, however, does not rule out the application in the present legal system of other, not necessarily only those listed in the Civil Code, principles of the State liability laid down in specific statutes.”

C. The Law of 17 June 2004

32. On 17 September 2004 the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) (“the 2004 Act”) entered into force. It lays down various legal means designed to counteract and/or redress the undue length of judicial proceedings.

A party to pending proceedings may ask for the acceleration of those proceedings and/or just satisfaction for their unreasonable length under Article 2 read in conjunction with Article 5(1) of the 2004 Act.

Article 2, in so far as relevant, reads as follows:

“1. Parties to proceedings may lodge a complaint that their right to a trial within a reasonable time has been breached [in the proceedings] if the proceedings in the case last longer than is necessary to examine the factual and legal circumstances of the case ... or longer than is necessary to conclude enforcement proceedings or other proceedings concerning the execution of a court decision (unreasonable length of proceedings).”

Article 5 provides, in so far as relevant:

“1. A complaint about the unreasonable length of proceedings shall be lodged while the proceedings are pending. ...”

33. Article 16 refers to proceedings that have been terminated and that do not fall under the transitional provision of Article 18 in the following terms:

“A party which has not lodged a complaint about the unreasonable length of the proceedings under Article 5 (1) may claim – under Article 417 of the Civil Code ... – compensation for the damage which resulted from the unreasonable length of the proceedings after the proceedings concerning the merits of the case have ended.”

34. Article 442 of the Civil Code sets out limitation periods in respect of various claims based on tort. That provision applies to situations covered by Article 417 of the Civil Code. Article 442, in so far as relevant, reads:

“1. A claim for compensation for damage caused by a tort shall lapse 3 years following the date on which the claimant learned of the damage and the persons liable for it. However, the claim shall in any case lapse 10 years following the date on which the event causing the damage had occurred.”

35. Article 18 of the 2004 Act lays down the following transitional rules in relation to the applications already pending before the Court:

“1. Within six months after the date of entry into force of this law persons who, before that date, had lodged a complaint with the European Court of Human Rights ... complaining of a breach of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ..., may lodge a complaint about the unreasonable length of the proceedings on the basis of the provisions of this law if their complaint to the Court had been lodged in the course of the impugned proceedings and if the Court has not adopted a decision concerning the admissibility of their case.

2. A complaint lodged under subsection 1 shall indicate the date on which the application was lodged with the Court.

3. The relevant court shall immediately inform the Minister of Foreign Affairs of any complaints lodged under subsection 1.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

36. 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 ... hearing within a reasonable time by [a] ... tribunal...”

37. The Government contested that argument.

38. The period to be taken into consideration began on 25 January 1995 and ended on 13 April 2000. It thus lasted approximately 5 years and 3 months for two levels of jurisdiction.

A. Admissibility

39. The Government submitted that the applicant had not exhausted remedies available under Polish law. They maintained that from 17 September 2004 when the 2004 Act had come into force, the applicant had a possibility of lodging a claim for compensation for damages suffered due to the excessive length of proceedings with the Polish civil courts under Article 417 of the Civil Code read together with Article 16 of the 2004 Act. They argued that the three-year prescription period for the purposes of a compensation claim in tort based on the excessive length of proceedings could run from a date later than the date on which a final decision in these proceedings had been given.

The Government further submitted that such a possibility had existed in Polish law even before the entry into force of the 2004 Act since the judgment of the Constitutional Court of 4 December 2001, which entered into force on 18 December 2001.

40. The applicant contested the Government’s arguments.

41. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see the *Aksoy v. Turkey* judgment

of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275–76, §§ 51–52).

42. The Court notes that it has already examined whether after 18 December 2001 and prior to the entry into force of the Law of 17 June 2004 a compensation claim in tort as provided for by Polish civil law was an effective remedy in respect of complaints about the length of proceedings. It held that no persuasive arguments had been adduced to show that Article 417 of the Civil Code could at that time be relied on for the purpose of seeking compensation for excessive length of proceedings or that such action offered reasonable prospects of success (see *Skawińska v. Poland* (dec.), no. 42096/98, 4 March 2003, and *Malasiewicz v. Poland*, no. 22072/02, §§ 32–34, 14 October 2003).

43. As regards the period after 17 September 2004, the Court has also examined whether the civil action for damages brought under Section 16 of the 2004 Law read together with Article 417 of the Civil Code was an effective remedy in respect of the length of judicial proceedings. It held, having regard to the characteristics of these remedies and notwithstanding the absence of established judicial practice in respect of such claims, that these remedies were effective in respect of persons who on 17 September 2004, when the 2004 Law entered into force, could still lodge such an action with the relevant domestic court (see *Krasuski v. Poland*, no. 61444/00, § 72, 14 June 2005).

However, the Court reiterates that a civil action for compensation provided for by Article 417 of the Civil Code read together with Article 16 of the 2004 Act cannot be regarded as an effective remedy if more than three years elapsed between the date of the final decision and the entry into force of the 2004 Act, on 17 September 2004 (see, *Ratajczyk v. Poland*; (dec), 11215/02, 31 May 2005).

44. The Court further 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).

45. According to the Government, the applicant should have availed himself of a compensatory remedy. The Court observes that the Government's objection is confined to the mere argument that the applicant should have had recourse to that remedy which, in the Government's view, offered prospects of success even when the proceedings concerned had come to end more than three years before 17 September 2004.

The Court observes that in the present case the proceedings at issue terminated on 13 April 2000, which is more than three years before the relevant provisions of the 2004 Act read together with the Civil Code became effective. It follows that the limitation period for the State's liability for tort set out in Article 442 of the Code Civil had expired before 17 September 2004.

The Court emphasises that no evidence of any judicial practice was provided to show that a claim for compensation based on Article 417 of the Civil Code had ever been successful before the domestic courts when the proceedings concerned had come to an end more than three years prior to 17 September 2004.

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

46. The Court notes that this complaint 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.

B. Merits

47. 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 following criteria: the complexity of the case, the conduct of the applicant and 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).

48. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

49. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE PROCEEDINGS

50. The applicant also complains about the unfavourable outcome of the proceedings he was involved in, in particular the allegedly wrong assessment of evidence.

51. The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention (see *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999- I).

52. In the light of all the material in its possession and insofar as the applicant's complaint about the outcome has been substantiated, the Court finds that it does not disclose any appearance of a violation of the Convention. In particular, it finds no elements which would indicate that the national courts went beyond their proper discretion in the assessment of fact or reached arbitrary conclusions.

It follows that this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

III. 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 20,000 PLN¹ in respect of pecuniary and non-pecuniary damage.

55. The Government contested this claim.

56. 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 considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis and having regard to its case-law in similar cases, it awards him EUR 3,000 under that head.

B. Costs and expenses

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

¹ Approximately EUR 5,000.

C. Default interest

58. 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 complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
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, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, 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 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 30 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President