



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

FOURTH SECTION

CASE OF SZWAGRUN-BAURYCZA v. POLAND

(Application no. 41187/02)

JUDGMENT

STRASBOURG

24 October 2006

FINAL

24/01/2007

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 Szwagrun-Baurycza v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 41187/02) against the Republic of Poland lodged with the Court on 5 November 2002 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Leokadia Szwagrun-Baurycza. The applicant was represented before the Court by Mr S. Filek, a lawyer practising in Wrocław.

2. The Polish Government ("the Government") were represented by their Agents, Mr K. Drzewicki and subsequently by Mr J. Wołosiewicz, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the domestic courts' refusals to resume civil proceedings in which she was involved on the ground that she had failed to indicate the identities and addresses of persons potentially interested in the outcome of the case amounted to a denial of effective access to court since no decision on the merits has ever been given by a court.

4. The application was allocated to the First 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 20 June 2003 the Court decided to communicate the application to the Government.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 18 October 2005, the Court decided to join to the merits the question of the exhaustion of domestic remedies in respect of the applicant's complaint about the alleged lack of access to a court and declared the application partly admissible.

8. The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 3 November 1975 the applicant's parents requested a court to declare that they had acquired by prescription ownership of a plot of land which had been in their possession for more than 15 years. It appears that they were summoned by the court to identify the successors of the original owners and to indicate their addresses. The participation of these persons in the proceedings was necessary to preclude them from invoking their rights after the matter had been decided upon.

10. As the applicant's parents had failed to establish the addresses of all the persons potentially concerned, the proceedings were stayed on 31 July 1976. The number of persons potentially affected by the outcome of the proceedings amounted at that time to thirty-eight, some of whom resided abroad.

11. On unspecified dates in 1977 the applicant's parents died and the applicant and her sister inherited their estate.

12. Between 1975 and 1990, some of the original owners of the property or their successors died and the number of persons potentially affected by the outcome of the proceedings (as further successors of the original owners) increased.

13. On 15 October 1990 the applicant, being unable to identify all the successors of the original owners or to indicate their addresses, requested the Ostrów Wielkopolski District Court to publish a press notice summoning persons potentially interested in the outcome of the case and to resume the proceedings.

14. On 17 September 1993 the court decided to appoint a court officer (*curator absenti*) to represent persons potentially affected by the proceedings but whose addresses were unknown. The court also ordered the publication of a press notice to summon other persons potentially concerned.

15. At a hearing held on 29 April 1994 the court found that some of the other persons already involved in the proceedings had died. The court again instructed the applicant to indicate the addresses of their successors. The applicant failed to do so and by a decision of 13 January 1997 the court refused to resume the proceedings.

16. On 22 February 1999 the applicant again requested the court to resume the proceedings on the merits. Apparently, by that stage fifty-three persons were potentially interested in the outcome of the proceedings.

17. On 25 March 1999 the Ostrów District Court refused to resume the proceedings in view of the applicant's failure to submit the addresses of all persons potentially affected. The court also decided to discontinue the proceedings, finding that more than three years had elapsed since the date of the last procedural step in the case.

18. On 2 April 1999 the applicant appealed against this decision and on 27 October 1999 the Kalisz Regional Court partly allowed her appeal. In particular, the court found that there were no grounds to discontinue the proceedings as some procedural steps had been taken during the preceding three years even though technically the proceedings had been stayed. Nevertheless, the court decided that the proceedings should remain stayed in view of the applicant's failure to comply with the court order.

19. On 3 March 1999 the Ostrów District Court again summoned the applicant to indicate the current address of one of the potential litigants and the legal successors of another.

It appears that the applicant did not file with the court the addresses requested and on 2 February 2000 the trial court rendered a decision discontinuing the proceedings. The applicant appealed. On an unspecified date her appeal was allowed.

20. On 18 January 2002 the applicant was again summoned to submit the names and addresses of potential litigants, including one allegedly living in Ukraine, on pain of a stay of the proceedings. On 19 February 2002 the court stayed the proceedings, having regard to the applicant's failure to indicate the legal successors of five litigants and to give the current addresses of a further seven litigants.

21. On 21 February 2005 the court discontinued the proceedings, having regard to the fact that the applicant had failed to request, within three years, that the stayed proceedings be resumed.

22. On 21 March 2005 the applicant appealed and objected to the obligation to identify and find the legal successors of former owners and to indicate their addresses. She submitted that the case would have been terminated long ago had the appointment of the *curator absenti* and the publication of press notice been properly used by the court. She requested the court to publish a press notice or appoint a curator again.

23. On 31 May 2005 the court summoned her to pay PLN 160 by way of a court fee for the appeal, to identify the legal successors of another six parties who had died and to submit fifty copies of her appeal. The applicant refused to pay the fee, arguing that she had paid this amount several times, but that this had not led to any progress in the resolution of the merits of the case. She also refused to identify the legal successors or addresses of sixteen persons referred to in the decision of 21 February and the summons of 31 May 2005 and reiterated that she had already repeatedly informed the court that she was unable to do so. She referred to her request to publish a press notice to summon potential parties to join the proceedings by way of a press notice.

24. On 15 June 2005 the court refused to entertain her appeal on the ground that she had refused to pay the court fee and refused to submit fifty copies of the appeal.

25. The applicant appealed against this decision, submitting that in the absence of the addresses of all potential litigants the requirement to submit fifty copies of her appeal was unreasonable because in any event these copies could not be served on them.

26. On 28 July 2005 the court summoned her to rectify her appeal by paying PLN 160, by submitting twenty six copies of the appeal, by indicating the legal successors of six deceased litigants and by giving the addresses of two further litigants.

27. In her pleadings of 12 August 2005 the applicant again submitted that publication of a press notice and the appointment of *curator absenti* provided for in Article 609 of the Code of Civil Procedure were specifically designated to address situations such as this which had arisen in her case.

28. On 12 August 2005 the court rejected her appeal against the decision of 15 June 2005, having regard to her failure to comply with the summons of 28 July 2005.

29. The applicant appealed against this decision, again submitting that she was unable to identify the names and addresses of the persons concerned.

30. On 21 September 2005 the court rejected her appeal on the ground that she had failed to pay a court fee in the amount of PLN 160 and to submit twenty six copies of her appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. Under Polish law, a request for a declaration that property had been acquired by prescription is examined in the so-called “non-litigious procedure”. However, the claimant is obliged to identify persons who are potentially affected by these proceedings, notably the original owners or their successors. Should these persons express their interest in the proceedings, they may be granted the status of a “party”.

32. If a claimant is objectively unable to identify persons who could be affected by the outcome of the proceedings, the court orders the publication of a press notice, summoning such persons to join the proceedings. If the identity of the persons is known but their current addresses cannot be established, the court shall appoint a court officer (*curator absenti*) to represent such persons.

33. Article 510 of the Code of Civil Procedure (Chapter on: Non-litigious proceedings: general provisions) provides as follows:

§ 1. Any person, whose rights and obligations are affected by the outcome of the proceedings, is an interested person; he or she may participate in the proceedings at any stage. If the person decides to participate, he or she becomes a party to the proceedings. An appeal is available against a refusal to be admitted as a party to the proceedings.

§ 2. If it turns out that a person concerned is not a party to the proceedings, the court will summon him or her to participate in them. Following the summons, a person becomes a party to the proceedings. If a need arises to appoint a court officer (*curator absentis*) to represent a party whose address is unknown, such appointment is made *ex officio*.

34. Article 524 § 2 of the Code of Civil Procedure (Non-litigious proceedings: general provisions) provides as follows:

An interested person who has not participated in the proceedings terminated by a final decision on the merits, may request that these proceedings be reopened. Provisions on the reopening on the grounds of being deprived of the possibility to act shall apply.

35. Article 609 § 2 of the Code of Civil Procedure (Acquiring property by prescription) provides as follows:

If a person who files a motion (for a declaration that property has been acquired by prescription) fails to indicate other interested persons, the decision (on the merits) may only be rendered after such persons are summoned by a press notice. A press notice may also be published in other circumstances where the court finds this necessary.

THE LAW

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

36. The applicant complained that the refusals of the domestic courts to resume the proceedings on the ground that she had failed to indicate the addresses of all interested persons amounted to a denial of an effective access to court. She invoked Article 6 § 1 of the Convention which, insofar as relevant, reads:

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

A. The Government’s preliminary objection

37. The Government first argued that the applicant had failed to exhaust relevant domestic remedies. They submitted that the applicant who had been obliged by the domestic law to give the court the names and addresses of persons who could be potentially affected by the outcome of the case, should have had recourse to the provisions of the Act on Registration and Identity Cards. Under this Act, a request could be submitted to the relevant municipal authorities for the disclosure of the addresses of persons whose addresses were unknown to her.

38. The applicant disagreed. She argued that she could not have had recourse to the procedure referred to by the Government precisely because she did not know their place of residence. Not knowing in which municipality they resided, she could not have requested the assistance of the municipal authorities in establishing their addresses. She further stressed that since she did not even know the identities of many of the persons who could be interested in the outcome of the case, the procedure suggested by the Government would have provided little assistance to her.

39. The Court notes that there is a close link between the applicant's difficulties in establishing the identities and addresses of persons potentially affected by the outcome of the civil case and the merits of her complaint under Article 6 of the Convention. For this reason, in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 7 above). The Court confirms its approach to the non-exhaustion issue.

B. The merits of the case

1. The parties' submissions

40. The Government submitted that under the Convention the right to a court enshrined in Article 6 was not absolute. It could be subject to limitations, but only insofar as they did not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of this right was impaired.

41. They emphasised that the obligation to identify potential litigants and their legal successors could not be regarded as an impermissible restriction on access to a court.

42. They further submitted that in proceedings in which a claim for acquisition of property by prescription was made the claimant was obliged under domestic law to identify persons potentially affected by the outcome of such proceedings. If the claimant was objectively unable to identify such persons, the court was empowered to order the publication of a press notice informing such persons of the proceedings and summoning to join them. In the present case such an order had been made by the Ostrów Wielkopolski District Court on 17 September 1993 under Article 609 § 2 of the Code of Civil Procedure. Further, if the identity of such persons was known, but their addresses could not be established, the court could appoint a *curator absenti* to represent them in the proceedings. This obligation had been discharged by the order of the same court given on 17 September 1993.

43. The Government further asserted that the applicant had failed to take steps in order to have the identities and addresses of potential parties to the proceedings established. In 1997 she had failed to comply with the court's instruction to indicate the addresses of the legal successors of certain parties

who had died (see paragraph 15 above). In January 2002 the applicant likewise failed to submit the names and addresses of potential litigants (see paragraph 20 above). In this context, the Government emphasised that no particular difficulty arose for obtaining these data as the names of persons who had died were already to be found in the case file. Furthermore, the applicant had not informed the court that she had experienced difficulties in identifying successors. Through her negligent conduct the applicant had obliged the court to act *ex officio*. However, in civil cases conducted under the non-litigious procedure the court was under no obligation to take *ex officio* steps to identify potential litigants.

44. The applicant agreed that the requirement to establish the names and addresses of persons potentially affected by the outcome of a civil case should not be regarded as a restriction of the right of access to a court that was *per se* incompatible with the requirements of Article 6 § 1 of the Convention. However, in the particular circumstances of her case the way in which this requirement had been applied by the courts amounted to a denial of an effective access to court.

45. The applicant first argued that in cases in which a claim for prescription was made, the passage of time - which in any event was an essential legal prerequisite for any reasonable prospects of success of such a claim - made it more difficult to establish the identities and addresses of all persons potentially interested in the outcome of the case. The possibility to make court orders provided for in Articles 510 and 609 § 2 of the Code of Civil Procedure was intended to minimise such difficulties. However, in her case these provisions had been used too late. The applicant stresses that after the orders of 17 September 1993 had been given, the court had not made proper use of them and no progress in the proceedings had been made.

46. As regards the appointment of the *curator absentis* and the publication of the press notice, the applicant observed that the court had taken these measures only after the proceedings had already been pending for eighteen years. She further submitted that the Government had failed to explain why after these orders had been given the court had again repeatedly summoned her to provide it with the addresses of all interested persons. This rendered these orders meaningless with the result that the measures failed to bring about any progress in the case.

47. The applicant submitted that the courts had repeatedly summoned her to establish the identities and addresses of persons potentially interested in the outcome of the case, even when they were examining her appeals against the decisions to stay the proceedings in which she had argued that an obligation to establish the addresses of fifty potential litigants, some of whom resided abroad, was an unreasonable burden (see paragraphs 23 and 24 above). The applicant argued in this connection that the formal shortcomings on which the court relied when refusing to examine her appeal against a decision to stay the proceedings did not constitute an obstacle to the examination of the merits of the appeal. In particular, there had been no need to submit to the court fifty copies of her appeal, given that at that time

the addresses of only twenty six participants to the proceedings had been known.

2. The Court's assessment

48. The Court reiterates that Article 6 § 1 of the Convention guarantees the right of access to court to an applicant who has, at least on arguable grounds, claims concerning a civil right or obligation (see, among many other authorities, *Le Compte, Van Leuven and De Meyere v. Belgium* judgment of 23 June 1981, Series A no. 43, § 44; *Tre Traktörer v. Sweden*, judgment of 27 July 1989, Series A no. 159, p. 18, § 40; and *Z and Others v. the United Kingdom*, no. 29392/95, [GC], ECHR 2001-V, §§ 91-92). This provision applies to disputes of a “genuine and serious nature” concerning the actual existence of a right as well as to the scope or manner in which it is exercised (*Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97, p. 15, § 32).

49. The right of access to court is not, however, absolute. It may be subject to legitimate restrictions, for example, statutory time-limits or prescription periods, security for costs orders, regulations concerning minors and persons of unsound mind, etc. (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1502-3, §§ 51-52; *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 62-67). Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought (*Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57; *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, 21 September 2004, §§ 28- 29).

50. The Court first notes the Government's argument that a requirement to establish the identities and addresses of persons potentially affected by the outcome of a civil case should not be regarded as incompatible *per se* with the right of access to a court. However, it observes that its task is not to rule on the relevant provisions of Poland's Code of Civil Procedure providing for this requirement *in abstracto*. It must, rather, examine whether its implementation in the case at issue gave rise to a violation of the Convention (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 60, ECHR 1999-II).

51. The Court observes that the difficulty in establishing the names and addresses of persons potentially affected by the outcome of a case is a matter which is not unique to cases concerning claims for acquisition of property by prescription.

52. In the present case the court decided in 1993, when the proceedings had already been pending for eighteen years, that it was necessary to take

certain procedural steps aimed at remedying the difficulties encountered by the applicant in identifying other interested parties. Accordingly, it appointed a *curator absenti*. It also ordered that information about the proceedings be published in the press and that persons interested in the outcome of the case be summoned to participate in the proceedings. These measures, provided for by the Code of Civil Procedure, were also meant to ensure a fair opportunity for interested persons to join the proceedings and to have their interests properly represented. In the Court's view, it may reasonably be considered that, already at that stage, the court considered that further progress in the proceedings depended on the efficacy of these measures.

53. However, the Court observes that there is no indication that any progress was subsequently made. Later on, the proceedings were stayed by the decision of 13 January 1997, the domestic court having regard to the applicant's failure to comply with a renewed order to indicate the names and addresses of the successors of persons who had died since the appointment of the *curator absenti* in 1993. The applicant's subsequent attempts to advance the proceedings were unsuccessful, the courts repeatedly relying on her failure to identify all of the potential parties to the proceedings and to give their addresses. The court finally decided to discontinue the proceedings on 21 February 2005. The applicant's later efforts to have this decision set aside failed for similar reasons (see paragraphs 22-30 above).

54. Having regard to the fact that as far back as 1993 the domestic court was of the view that the circumstances of the case called for the taking of procedural measures to ensure the participation in the proceedings of persons having a potential legal interest in their outcome, the Court is of the opinion that, in view of the passage of time between 1993 and 2005, a further attempt could have been made by the court to take steps to identify those who had an interest in the case. The Court considers that no convincing explanation has been provided as to why this was not done.

55. In this respect, the Court observes that the applicant had repeatedly drawn the courts' attention to the fact that she was unable to establish the names and addresses of the legal successors of the former owners. Despite her arguments, the courts repeatedly ordered her to submit the names and addresses of potential litigants (see paragraphs 19, 20, 23, 26 above), notwithstanding the fact that it had been accepted at a much earlier stage that the applicant required the assistance of the court in order to comply with this obligation. When examining her successive appeals against refusals to resume the proceedings, the courts requested her to submit fifty copies of her procedural appeals (see paragraph 24 above). Moreover, it is also relevant to note that the applicant had emphasised that the proceedings could have been terminated long before had proper use been made of the appointment of a *curator absenti* and the publication of press notice. Moreover, on 21 February 2005, she requested that the court publish a further press notice (see paragraph 22 above).

56. The Court notes the Government's argument that it was open to the applicant to have recourse to the Act on Registration and Identity Cards and to request relevant municipal authorities to disclose the addresses of persons whose addresses she did not know and who were potentially interested in the outcome of the proceedings. However, the essential difficulty which the applicant encountered in the present case consisted in the fact that she did not know even the names of the legal successors of the late owners of the property. Hence, the remedy referred to the Government was not capable of remedying her situation.

57. Lastly, the Court notes that no decision on the merits of the case has been given, despite the fact that the proceedings have lasted thirty years. In the circumstances, it considers that the applicant was made to shoulder an unfair burden in the course of the proceedings to the point where she was denied an effective access to court. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed just satisfaction for moral damage which she suffered as a result of the denial of effective access to a court for a decision on the merits of her claim. She did not specify her claims.

60. The Government did not take a position on this issue.

61. The Court considers that an award of just satisfaction must be based in the present case on the fact that the applicant did not have the benefit of the right of access to a court. It cannot speculate as to what would have been the final outcome of the proceedings. Nonetheless, it does not find it unreasonable to regard the applicant as having suffered a loss of opportunity in that she could not obtain a ruling on the merits of her claim. (see *Tinnelly & Sons Limited and Others*, and *McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports* 1998-IV, p. 1633, § 93). Deciding on an equitable basis, it awards the applicant EUR 8,000.

B. Costs and expenses

62. The applicant, who was granted legal aid for the purpose of the proceedings before the Court, did not claim reimbursement of costs and expenses over and above the EUR 850 paid in legal aid.

C. Default interest

63. 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. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 6 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 8,000 (eight thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, together with any tax that may be applicable;
 - (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.

Done in English, and notified in writing on 24 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President