



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

FIRST SECTION

CASE OF STAROSZCZYK v. POLAND

(Application no. 59519/00)

JUDGMENT

STRASBOURG

22 March 2007

FINAL

09/07/2007

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 Staroszczyk v. Poland,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER,

Mr L. GARLICKI, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 15 February 2007 ,

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

PROCEDURE

1. The case originated in an application (no. 59519/00) 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 two Polish nationals, Mrs Marianna Staroszczyk and Mr Stanisław Staroszczyk (“the applicants”), on 15 November 1999.

2. The applicants, who had been granted legal aid, were represented by Mr Wojciech Hermeliński, a lawyer practising in Warszawa. The Polish Government (“the Government”) were represented by their Agent, Mr Jakub Wołosiewicz.

3. The applicants complained under Article 6 § 1 of the Convention that the proceedings had been unfair in that they had been denied effective access to a court. They referred to the fact that the lawyer appointed under applicable legal aid scheme had failed to undertake necessary steps to represent their interests effectively and refused to bring a cassation appeal to the Supreme Court against a judgment of an appellate 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. The Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the case of *Siałkowska v. Poland* (application no. 8932/05).

6. Third-party comments were received from the Council of Bars and Law Societies of Europe and from the Helsinki Foundation for Human

Rights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 June 2006 (Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*

Mr Jakub Wołosiewicz, Ambassador, *Agent*,
Ms Małgorzata Kosicka, Legal Expert, *Counsel*,
Ms Eliza Suchożębska, Third Secretary, *Adviser*;

(b) *for the applicants*

Mr Wojciech Hermeliński,
Ms Bogdana Słupska-Uczkiewicz, *Counsel*.

The Court heard addresses by Mr Jakub Wołosiewicz, Mr Wojciech Hermeliński, Ms Bogdana Słupska-Uczkiewicz and Ms Eliza Suchożębska.

8. By a decision of 15 June 2006, following the hearing on admissibility and the merits, the Court declared the application partly admissible. It joined the examination of the Governments objections regarding incompatibility *ratione personae* and exhaustion of domestic remedies to the merits of the case.

9. The applicants and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1932 and 1933 respectively and live in Pruszków.

11. The applicants owned a plot of land situated in Pruszków, near Warsaw. In 1982 the applicants were informed by the local authorities that, pursuant to a local zoning plan, their land was to be expropriated as a construction of dwelling buildings was planned in its place.

12. The applicants requested the Pruszków City Council to be compensated by another plot of land. Their son also filed a request asking that a plot of land be allocated to him. By a letter of 16 May 1986 the Pruszków City Council informed the applicants that their request could not be granted. On 22 April 1987 the applicants' son was informed that his request to be allocated a plot of land within the Pruszków community was viewed favourably by the Social Commission (*Komisja Społeczna*) but could

only be processed after the expropriation of his parents' plot. In 1987 the expropriation procedure commenced. In their letters the local authorities confirmed that after the expropriation of the applicants' land an allocation of a plot of land within the Pruszków community to the applicants' son would become possible.

13. Eventually the applicants' land was not expropriated but the applicants consented to a contract of sale. On 8 December 1987 they transferred ownership of their land to the State Treasury represented by the Pruszków City Council. They received the amount.

14. Following the sale they repeatedly inquired about the allocation of building land within the municipality but no steps were taken in order for the allocation to become effective and no decision as to the allocation was given.

15. In 1990 the applicants' son was informed by the City Council that the allocation of plots of land within the community had been conducted in violation of the law and in disregard of the principles of transparency. Therefore, the entire process was to be reviewed.

16. On 26 November 1991 the applicants instituted proceedings against the State Treasury represented by the Pruszków City Council. They requested the Pruszków District Court "to oblige the Pruszków City Council to allot a plot of land to their son, as promised". The Pruszków District Court transferred the matter to the Warsaw Regional Court which rejected the claim finding that only the administrative authorities had jurisdiction in matters concerning expropriations and granting replacement plots. The Court of Appeal upheld that decision on 10 February 1993.

17. On 26 August 1993 the applicant sent a letter of complaint to the Ministry of Justice. On an unspecified date the Ministry of Justice transferred the letter to the Warsaw Regional Court. That court recognised that the applicants' action should be interpreted as an action to revoke the contract of sale with the Pruszków City Council of 8 December 1987 as they had consented to it on the mistaken belief that the City Council would allocate a comparable plot of land to their son. On 15 December 1993 the Warsaw Regional Court decided that, in view of fact that the value of the claim amounted to PLN (old) 10,000,000, a district court should examine the matter. The case was transferred to the Pruszków District Court. Subsequently, the applicants extended their claim and, on 18 August 1994, the Pruszków District Court transferred the case to the Warsaw Regional Court. On 18 October 1994 the case was transferred back to the Pruszków District Court and that court examined the case. On 3 June 1996 the first instance judgment was delivered. The court allowed the applicants' claim finding that they had indeed acted on the assumption that the sale of their property had been the condition for the allocation of a new plot of land to their son and that that assumption had been prompted and maintained by the Pruszków City Council.

18. The State Treasury, represented by the Pruszków City Council, filed an appeal. On 6 February 1997 the Warsaw Regional Court quashed the judgment and remitted the case to the first-instance court for reconsideration. The Warsaw Regional Court found that not all circumstances of the case had been examined by the first-instance court and that although the applicants had indeed acted upon the promise that the applicants' son would be allocated a plot of land, no time limit had been set for that. Therefore, the trial court was instructed, in particular, to examine whether the applicants' son could still be allocated a plot of land.

19. Having reconsidered the case, on 26 February 1998 the Pruszków District Court dismissed the applicants' action. It found that the transfer of the applicants' plot of land to the State had been inevitable since it had been planned for expropriation. Thus, the applicants could not validly claim that they had relied on the promises that their son would be allocated another plot of land and that they had therefore been unduly induced to sign the contract.

20. The applicants appealed.

21. On an unspecified date the applicants tried to obtain free legal aid in the proceedings. By a letter of 23 June 1998 the Polish Bar Association informed the applicants that it was not competent to grant legal aid and that such a request should be addressed to a court. On 29 June 1998 the applicants sent a letter to the President of the District Court in Pruszków requesting free legal aid in the proceedings. On 11 September 1998 the court granted free legal aid to the applicants and on 21 September 1998 it addressed the Warsaw Bar to appoint an advocate for the applicants. Following this decision, on 6 October 1998 the Warsaw Bar Association appointed advocate A.Z. as the applicants' *ex officio* attorney. Apparently, advocate A.Z. could not represent the applicants. On 3 November 1998 A.Z. informed the court that she did not wish to represent them. The Warsaw Bar Association accepted this argument and discharged A.Z. from the representation of the applicants. On 3 December 1998, the Warsaw Bar Association appointed advocate G.P.-R. to represent the applicants. On 31 December 1998 G.P.-R. sent a letter to the Warsaw Bar requesting the Bar to discharge her of her duties.

22. On 7 January 1999 the applicants wrote a letter to the President of the Pruszków District Court in which they complained that despite the court's decision granting them legal aid none of the attorneys appointed so far expressed any interest in their case. In response, the President of the Pruszków District Court instructed the applicants that they should address the Warsaw Bar Association directly. At the same time, the President also undertook to draw attention of the Warsaw Bar Association to the applicants' problem. On 18 January 1999 the applicants wrote to the President of the Warsaw Regional Court. They stated that their case was about to be examined by the second-instance court for the second time and

that they were at a significant disadvantage in comparison with the defendants, the State Treasury, which was represented by a lawyer.

23. On 5 February 1999 the Warsaw Bar Association appointed advocate K.B. to represent the applicants. He met with the applicants in March 1999 and represented them at the hearing held before the appellate court on 25 May 1999. On that date the Warsaw Regional Court issued a judgment dismissing the applicants' appeal. The applicants were informed by that court that a cassation appeal could be filed.

24. After the hearing the lawyer instructed the applicants to take steps in order to have the judgment with its written grounds served on them.

25. On 25 May 1999 the applicants themselves requested the court to serve on them the judgment with its written grounds.

26. On 23 September 1999 the applicants were duly served with a copy of the judgment together with its written grounds.

27. In a letter to the court of 30 September 1999 the applicants complained about certain errors in the judgment. Subsequently, the court corrected certain clerical errors in the written grounds of the judgment and sent it to the applicants by registered post. The applicants did not collect it from the post office.

28. On 23 October 1999 the applicants sent a registered letter to advocate K.B. asking him to indicate when he could be available for consultation or to call them back. There was no reply to this letter.

29. On 22 November 1999 the applicants wrote to the Warsaw Bar Association asking for assistance. They complained that since the date of the hearing before the appellate court they could not reach advocate K.B.

30. On 30 November 1999 the applicants wrote to the President of the Warsaw Regional Court stating that they could not reach their *ex officio* lawyer and asking for instructions. In response, the applicants were informed that the President of the Court did not have any supervisory powers in respect of *ex officio* attorneys and that they should contact the Warsaw Bar Association. The President of the Regional Court also stated that he had obliged the President of the Civil Division at that court to draw the attention of the Warsaw Bar to the problem submitted by the applicants.

31. On 23 December 1999 the applicants sent a letter to the Warsaw Bar Association, complaining about the lawyer's failure to contact them and asking for assistance in their case.

32. On 5 January 2000 the applicants sent another registered letter to K.B. asking for urgent contact in view of the impossibility to reach him. They stated that they had unsuccessfully tried to get in touch with him for several months as his cellular phone had been changed and the fixed phone did not reply.

33. On 12 January 2000 the judgment of 23 May 1999 was sent to the lawyer's office by registered post. It was served on K.B. on 21 January 2000.

34. On 27 January 2000 the applicants and the lawyer met at his office. They were informed during this meeting that there were no grounds for filing a cassation appeal in their case.

35. By a letter of 28 January 2000 the applicants informed the President of the Warsaw Regional Court of the meeting held on 27 January 2000. They submitted that K.B. had given them the judgment, had informed them that there were no grounds on which he could lodge a further appeal against it and suggested that they sign a declaration that they wished to give up pursuing the case.

36. On 15 February 2000 they sent a further letter to the Warsaw Regional Bar Association, in which they complained that the legal aid lawyer had met with them “seven months after the termination of the proceedings” and informed them that he saw no grounds to pursue the case any further.

37. On 1 March 2000 the Secretary of the Warsaw Bar Association informed the applicants that K.B. had responded to the charges brought against him in the applicants' complaint lodged on 22 November 1999. According to his explanations, there were no grounds for lodging a cassation appeal in the applicants' case and the applicants had been informed thereof. The Secretary informed the applicants that if an *ex officio* attorney had found no grounds on which to lodge a cassation appeal, the Bar Association would not appoint another lawyer to do so.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

38. Article 45 of the Constitution, insofar as relevant, reads:

“Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. ...”

39. Article 17 of the Constitution, insofar as relevant, reads:

“By means of a statute, associations may be created within a profession in which the public repose confidence, and such professional associations shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, public interest.”

B. Legal aid

40. Pursuant to Article 5 of the Code of Civil Procedure, a court should give all necessary procedural instructions to a party acting without a lawyer and, in particular should indicate the consequences of that party's acts or failures to act.

41. Article 113 § 1 of the Code of Civil Procedure provides that a party to the proceedings may ask the court competent to deal with the case to grant him or her an exemption from court fees provided that he submits a declaration to the effect that the fees required would entail a substantial reduction in his and his family's standard of living.

42. Pursuant to Article 117 of the Code, persons exempted from the court fees may request that legal aid be granted to them. The court will then request the relevant District Bar Association or the District Chamber of Legal Advisers to assign an advocate or a legal adviser to the claimant's case.

C. The cassation appeal

43. At the material time a party to civil proceedings could lodge a cassation appeal with the Supreme Court against a final judicial decision of a second-instance court which terminated the proceedings.

44. Under Article 393 ⁴ § 1 of the Code of Civil Procedure a cassation appeal had to be lodged with the court that had given the relevant decision within one month from the date on which the decision with its written grounds was served on the party concerned. Cassation appeals which were not lodged by an advocate or a legal adviser would be rejected.

45. Article 393 ¹ of the Code as applicable at that time listed the grounds on which a cassation appeal could be lodged. It read as follows:

“The cassation appeal may be based on the following grounds:

1) a breach of substantive law by its erroneous interpretation or wrongful application;

2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case.”

46. Article 393 ³ specified the requirements of a cassation appeal. It read in its relevant part:

“§ 1. A cassation appeal should include:

1) an indication of the decision under appeal together with information as to whether the appeal is lodged against this decision in its entirety or in part only;

2) an indication of the grounds for the cassation appeal;

3) arguments showing that its examination would be justified;

4) a motion to have the decision under appeal quashed or amended, specifying also the scope of the motion.”

47. Article 393 ⁴ read as follows:

“A second-instance court rejects in a hearing held in camera a cassation appeal lodged after a prescribed time-limit or which is inadmissible on other grounds (...).”

48. The reasons justifying the examination of a cassation appeal by the Supreme Court could be inferred *a contrario* from Article 393 of the Civil Code of Procedure which, as applicable at that time, read, in its relevant part:

“1. The Supreme Court may refuse to entertain the cassation appeal, if:

- i) there is no appearance of any significant legal issue in the case,
- ii) there is no need for the interpretation of provisions raising serious doubts or causing discrepancies in the courts' case law,
- iii) the appeal is manifestly ill-founded.

2. Paragraph 1 shall not apply if the judicial decision challenged manifestly breached the law or where the proceedings are invalid in law.”

D. Judgment of the Constitutional Court of 31 March 2005

49. In its judgment of 31 March 2005 the Constitutional Court examined a number of constitutional complaints in which the complainants argued essentially about certain provisions of Article 393 of the Code of Civil Procedure, also insofar as they regulated the conditions that cassation appeals had to comply with.

50. The Court observed, *inter alia*, that certain terms describing the conditions which cassation appeals had to meet under Article 393 *et seq.* of the Code (“important legal issue”, “provisions raising serious doubts or causing discrepancies in the courts' case law”, “arguments showing that examination of the cassation appeal would be justified”) were drafted in the broadest terms. It noted that the judicial practice regarding their application had given rise to serious interpretational difficulties and discrepancies in the case-law of the Polish courts.

E. Relevant provisions of the Bar Act

51. Article 1 of the Bar Act of 1982, as amended, reads, insofar as relevant:

- “1. The Bar is established to provide legal assistance, co-operate in protecting a person's rights and freedoms as well as to formulate and apply the law.
- 2. The Bar is organized as a self-governing association.
- 3. An advocate whilst executing his/her professional duties is accountable only to the law.”

52. Article 3 of the Act provides as follows:

“The general tasks of the professional Bar Council are as follows:

- 1) creation of conditions for the statutory performance of the Bar's tasks,
- 2) representation of the Bar and protection of its rights,
- 3) supervision over the observance of the rules regulating the practice of the profession,
- 4) development of professional skills and training of advocates,
- 5) determination and promotion of professional ethics and ensuring their observance,
- 6) management (...) of the Bar's assets.”

53. Article 28 of the Act reads:

“1. An advocate may only refuse to provide legal assistance for important reasons of which he must notify the interested party. Any doubts as to whether to provide legal assistance or refuse to do so shall be resolved by the local Bar Council, and in situations where time is of the essence, by the Dean of that Council.

2. In cases where legal assistance is granted on the basis legal regulations concerning legal aid, only the entity appointing the advocate to represent the client may decide to relieve him or her from providing legal assistance.”

54. Under Article 21 § 3 of the Act, an advocate shall provide legal aid services in the jurisdiction of a court where he or she has its office.

55. Lawyers are bound to act in accordance with rules of professional and ethical conduct enacted by the Bar Association. They may be held accountable for professional misconduct or a breach of ethical principles in the proceedings before the bar disciplinary court.

56. Under Article 57 of the Body of Ethical Rules adopted by the National Bar Council on 10 October 1998, when an advocate, either privately hired by the client or appointed under legal aid scheme, considers that submission of an appeal in a case offers no reasonable prospect of success and the client disagrees with his or her view, the lawyer shall give notice of termination of the power of attorney terminate the representation, or notify the refusal to the body which appointed him or her.

F. Resolution of the Supreme Court of 2000 (III CZP 14/00)

57. In 2000 the Supreme Court issued a resolution in reply to a legal question whether a legal aid lawyer could refuse to lodge a cassation appeal. It replied to the question in the positive.

58. The court observed that issues involved in the legal aid concerned not only proper administration of justice, but also touched on human rights,

and a right of access to a court in particular. Nevertheless, there was no comprehensive and coherent regulation of legal aid available under Polish law.

59. The mere fact that it was necessary for a cassation appeal to be lodged by a qualified representative was not open to criticism. However, a certain conceptual confusion was to be noted in the provisions governing legal aid as a whole, mostly because the legislator had failed to harmonise the relevant provisions of civil and criminal procedure. In particular, the scope of legal aid lawyers' obligations when legal representation was mandatory was not directly addressed by provisions of civil procedure. This was so partly because the essential body of law concerning civil procedure had been enacted in 1964, while the provisions on mandatory legal representation for the purposes of the cassation appeal had been introduced in 1996, when this new kind of appeal had been created.

60. As a result, the scope of legal aid lawyers' obligations to provide a party to the proceedings with "legal aid" in civil proceedings was unclear. In particular, the provisions on the lawyers' legal aid obligations in connection with cassation proceedings before the Supreme Court lacked clarity. The court noted that the judicial practice regarding the application of relevant provisions had given rise to serious difficulties of interpretation and discrepancies in the case-law of the Polish courts.

61. The court observed that the issue of possible conflict between the opinion of a party granted legal aid and a lawyer assigned to represent him or her for the purpose of cassation proceedings had not been directly addressed by the applicable law. It further noted that the notion of legal assistance could not be identified with a simple obligation of a lawyer to act in accordance with the client's wishes. The role of a legal aid lawyer had rather to be understood as obliging him or her to provide legal advice to the party, including as to the prospects of success offered by a cassation appeal against a given judgment.

62. The constitutional role of the Supreme Court, the highest judicial authority, was also an argument in favour of a conclusion that a legal aid lawyer was not compelled by the will of the party to have a cassation appeal lodged if such an appeal was bound to fail. In case of a disagreement between the party and the lawyer, it was open to the party to complain to the local Bar under Article 28 of the Bar Act. The Bar could then appoint a new lawyer who could lodge a cassation appeal, requesting at the same time to be granted leave to appeal out of time under Article 169 of the Code of Civil Procedure. It was true that the practice of the Supreme Court was not coherent in that in some cases it had been rejecting such requests and in other it accepted them. However, it did not prevent the parties from having recourse to this course of action.

G. Retrospective leave to appeal out of time

63. Pursuant to Article 169 of the Code of Civil Procedure, a party to the proceedings may ask for retrospective leave to perform a procedural measure outside the prescribed time-limit; this measure shall be performed simultaneously with lodging the request.

H. Service of court correspondence

64. Article 133 § 3 of the Code of Civil Procedure reads, insofar as relevant:

“3. If a legal representative or a person authorised to receive court correspondence on behalf of a party has been appointed in a case, the court correspondence shall be served on these persons.”

65. Pursuant to the case-law of the Supreme Court, if a party to civil proceedings is represented by a lawyer, the procedural time-limits set by the Code of Civil Procedure start to run on the date of the service of judicial decisions on him or her (III CRN 324/72; I UZ, 65/04).

III. RELEVANT NON-CONVENTION MATERIAL

A. Code of Conduct of the Council of Bars and Law Societies of Europe

66. The Council of Bars and Law Societies of Europe has adopted a Code of Conduct in the European Union.

Its Article 1 provides that a lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is his or her duty not only to plead his or her client's case but also to be his or her adviser.

67. A lawyer's function therefore lays on him or her a variety of legal and moral obligations, sometimes appearing to be in conflict with each other, towards the client, the courts and other authorities before whom the lawyer pleads his or her client's case or acts on his or her behalf; the legal profession in general and each fellow member of it in particular; the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

68. Pursuant to Article 3.1.2 of the Code, a lawyer shall advise and represent his or her client promptly, conscientiously and diligently.

69. Under Article 3.1.4 a lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prejudice being suffered by the client.

B. Recommendations of the Council of Europe

1. Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice

70. This recommendation, insofar as most relevant, reads:

“4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.”

2. Recommendation No. R (93) 1 of the Committee of Ministers to Member States on effective access to the law and to justice for the very poor

71. The Recommendation, in its most relevant parts, provides:

“Recalling that in addition to the right of access to the law and to justice provided for in Article 6 of the European Convention on Human Rights, the other provisions of the Convention and particularly Articles 2, 3 and 8 are equally applicable to the very poor, as are the other legal instruments of the Council of Europe such as the European Social Charter;

Considering that this recommendation is intended to improve, especially with regard to the very poor, existing legal advice and legal aid systems, and therefore to complement existing machinery with regard to the other categories of people for which the systems were designed.

Recommends that the governments of member states:

1. Facilitate access to the law for the very poor (“the right to the protection of the law”) by:

[...]

b. promoting legal advice services for the very poor;

[...]

3. Facilitate effective access to the courts for the very poor, especially by the following means:

[...]

c. recognising the right to be assisted by an appropriate counsel, as far as possible of one's choice, who will receive adequate remuneration;

[...]

e. simplifying the procedure for granting legal aid to the very poor, [...]"

3. Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer

72. The Recommendation provides, *inter alia*:

"The Committee of Ministers, under the terms of Article 15.b of the Statue of the Council of Europe, [...]

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms; [...]

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member States to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in this Recommendation.

[...]

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

[...]

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers,

2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.

3. Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from the public funds."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

1. Incompatibility ratione personae with the provisions of the Convention

73. The Government first argued that the application was incompatible *ratione personae* with the provisions of the Convention. In the present case the courts had acknowledged the need for the applicants to be represented by a legal aid lawyer and such a lawyer had been assigned to the case. He had duly represented them in the proceedings before the court of appeal. However, any disagreements that might have arisen afterwards between the applicants and the lawyer in connection with the issue of lodging of the cassation appeal had not incurred the liability of the State. The lawyer had been a member of an independent and self-governing professional association, which adopted its own rules of conduct and disciplinary regulations. The public authorities had not had powers to exercise any direct control over the methods of the lawyers' work and could not impose on a legal aid lawyer an obligation to draw up a cassation appeal.

74. It followed from the independence of the legal profession from the State that the conduct of the defence was essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed, and, as such, could not, other than in special circumstances, incur the State's liability under the Convention. The Government referred to the Court's case law in similar cases (*Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, § 18; *Daud v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, § 33). They reiterated that special guarantees required with regard to defence rights in criminal proceedings were not applicable in the same way in civil proceedings (*Skrobol v. Poland* (dec.), no. 44165/98, 8 July 2003).

75. The applicants emphasised that legal professions carried out their functions in accordance with, and for the purpose of protecting, the public interest. It had been for a court to decide on the need of a party to civil proceedings to be represented by a lawyer and only the court could discharge the lawyer from this duty. Thus, the bar association had been charged only with a purely technical part of the whole process of launching effective legal aid, namely with assigning an individual lawyer to a case. Consequently, the State should be regarded as bearing responsibility for the conduct of legal aid cases.

76. The applicants referred in this respect to the *Daud* and *Artico* judgments (cited above) as relevant to the assessment of the case.

77. The Court notes that there is a close link between the Government's preliminary objection and the applicant's above complaint under Article 6 of the Convention. For this reason, in its decision on the admissibility of the application it joined the examination of this objection to the merits of the case (see § 8 above). The Court confirms its approach.

2. Non-exhaustion of domestic remedies

78. The Government furthermore argued that the applicants had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention.

79. Firstly, they submitted that if the applicants had been dissatisfied with the legal assistance they had received from the officially appointed lawyers, it had been open to them to complain to the local Bar Association under Article 28 of the Bar Act and to ask that another lawyer be assigned to the case. If the local Bar Association had shared their doubts regarding the soundness of the lawyer's refusal to draw up a cassation appeal, it could have appointed another lawyer to represent them. Even assuming that this new lawyer would not have had time to submit a cassation appeal within the time-limit provided for by law, he or she could have done that after the expiry of that time-limit and, at the same time, requested retrospective leave to appeal out of time.

80. Secondly, the applicants could have appointed a lawyer of their own choice for the purposes of representing them before the Supreme Court.

81. Thirdly, had the cassation appeal lodged by a lawyer of their own choice been successful, they could have sought compensation, under provisions of civil law governing liability in tort, from the legal aid lawyer for damage caused by his refusal to prepare the appeal.

82. The applicants submitted that Article 28 of the Bar Act had not been applicable to their situation at all. This provision was applicable only to situations in which a lawyer simply refused to provide legal assistance. In the present case the legal aid lawyer had not refused to do so, because, under the applicable provisions of domestic law, the notion of legal assistance could not be identified with a simple obligation of a lawyer to act in accordance with the client's wishes. The lawyer had represented the applicants before the appellate court and had subsequently found no grounds on which to lodge a cassation appeal. This conduct could not be said to amount to a "refusal to provide legal assistance".

83. The applicants further disagreed with the Government insofar as they argued that following a successful complaint to the local Bar Association another lawyer could have been assigned to the applicants in order to lodge a cassation appeal out of time and, at the same time, request a retrospective leave to appeal out of time. The applicants referred this respect to the letter of 1 March 2000, in which the local Bar Association had stated that if an *ex officio* attorney had found no grounds on which to lodge a

cassation appeal, the Bar Association would not appoint another lawyer to do so.

84. Insofar as the Government argued that the applicants could have sought compensation, by way of civil proceedings in tort, from the legal aid lawyer who had refused to lodge a cassation appeal, the applicants emphasised that no examples of such successful claims before domestic courts had been adduced.

85. The Court notes that there is a close link between the Government's preliminary objection and the applicant's above complaint under Article 6 of the Convention. For this reason, in its decision on the admissibility of the application it joined the examination of this objection to the merits of the case (see § 8 above). The Court confirms its approach.

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

86. The applicants complained under Article 6 § 1 of the Convention that the proceedings in their case had been unfair in that they had been denied effective access to the court.

Article 6 § 1 of the Convention, in so far as relevant, reads:

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

1. The parties' submissions

87. The Government first recalled that the right of access to a court was not absolute but might be subject to limitations which were permitted by implication since the right of access by its very nature called for regulation by the State. In this respect, the Contracting States enjoyed a certain margin of appreciation (*Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 147).

88. The Government submitted that the judgment of the appellate court had been served on the applicants themselves on 23 September 1999. However, under the applicable provisions of domestic law the time-limit for the lodging of a cassation appeal had not started to run on that date. In cases in which a party had been represented by a lawyer, the service of a judgment on the party had not produced any legal effects. Only the service of a judgment on the lawyer had made the time-limit run.

89. The Government further asserted that the court had served the judgment on the lawyer after it had already been served on the applicants. He received it by registered post on 21 January 2000. It was only from that date that the thirty-day time-limit provided for by Article 393⁴ of the Code of Civil Procedure as applicable at that time had started to run. Hence, on 27 January 2000, when the applicants had a meeting with the lawyer who then refused to draw up the appeal, the time-limit had still been running.

Afterwards the applicants had twenty-four days during which to make efforts in order to have the appeal lodged with the Supreme Court.

90. The Government averred that the applicants had failed to pursue their case actively. The fact that a legal aid lawyer had been appointed to represent them had not exempted them from the obligation of due diligence, binding on all parties to civil proceedings. In the present case, they had informed their lawyer about their request to have the second-instance judgment served on them; they had not sent him a letter asking him to take steps to lodge a cassation appeal against this judgment and had failed to check with the registry of the court whether this judgment had been served on him.

91. In any event, prior to 21 January 2000, the date of the service of the judgment on him, there had been no need for the attorney to take any steps in connection with the cassation appeal. Only from that date did the question of whether there were grounds on which to lodge a cassation appeal become relevant. He could not therefore be said to have acted negligently in the applicants' representation before 21 January 2000.

92. Likewise, after the meeting on 27 January 2000, the applicants had failed to take any steps in order to have the cassation appeal lodged in the case, despite the fact that they still had twenty-four days within which they could do so. Only on 15 February 2000 did they complain to the Warsaw Regional Bar about the lawyer's conduct, but they had not asked the Bar to appoint another lawyer to their case, as foreseen by Article 28 of the Bar Act.

93. The applicants accepted that there was no obligation under the Convention to make legal aid available for disputes (*contestations*) in civil proceedings, as under the Court's case-law there was a clear distinction between the wording of Article 6 § 3 (c), which guaranteed the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which made no reference to legal assistance (*Del Sol v. France*, no. 46800/99, § 20, ECHR 2002-II).

94. In this context, the means by which a State ensured effective access to civil courts fell within its margin of appreciation (*Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, §§ 26-36).

95. However, the applicants submitted that Article 6 § 1 provided a guarantee for persons seeking legal assistance for the purposes of civil proceedings before the national courts, although a less extensive one than in criminal cases. The question of legal assistance should be seen as an element of the right of access to a court. They relied on the Court's judgment in the case *Airey v. Ireland* (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32). In discharging that obligation, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (*R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001).

96. The applicants accepted that the right of access to a court did not encompass also a right of access to a court competent to examine appeals on points of law. However, if the legislature chose to create such court, it should respect the principles of procedural fairness in the procedure before it. These principles applied also to the proceedings in which the party's access to that court was determined. Under applicable Polish legislation, these principles had not been observed properly, as indicated by the Supreme Court in its resolution of 21 September 2000. It had emphasised therein a certain conceptual confusion to be noted in the provisions governing legal aid as a whole, mostly because the legislator had failed to harmonise the relevant provisions of civil and criminal procedure. The applicants stressed that these systemic shortcomings had manifested themselves in the concrete circumstances of their case.

97. The applicants submitted that it had been improper on the part of the lawyer to oblige them to ask for the written grounds of the judgment on the merits and to have that judgment served on them. The burden of the conduct of the proceedings had fallen on them, while this essentially was a task of the legal aid lawyer. Further, the subsequent difficulties which the applicants experienced in getting in touch with him showed that the conduct of legal assistance in their case had not been sufficiently diligent. The applicants repeatedly tried to arrange a meeting with him, but to no avail.

98. The applicants maintained that it was of little importance that the judgment was finally served on the lawyer on 21 January 2000. Even assuming, as the Government did, that the time-limit for the lodging of the cassation appeal started to run from that date, it did not justify the fact that the conduct of the representation by the legal aid lawyer had been negligent during a period of more than eight months.

99. The applicants submitted that during the meeting of 27 January 2000 the lawyer had merely told them that he saw no grounds on which to lodge a cassation appeal. It was in February 2000, and only in reply to their written complaint to the local Bar Association, that this refusal had been formulated in writing.

100. The applicants pointed out that, even accepting the Government's submission that from 27 January 2000 the applicants had twenty-four days for lodging the cassation appeal, they did not have financial means to hire a lawyer. It was essentially for that reason that the courts had granted legal aid to them. In the absence of any mechanism available under domestic law to regulate properly situations in which legal aid lawyer refused to draw up the cassation appeal, they had been deprived of any remedies by which to improve their procedural situation and effectively lodge an appeal with the Supreme Court.

2. *The third parties' submissions*

a) **The Council of Bars and Law Societies of Europe**

101. The Council of Bars and Law Societies of Europe recalled that Article 6 § 1 of the Convention embodied the “right to a court”, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constituted one aspect (*Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, § 72). In some circumstances, professional legal assistance was necessary to ensure that an individual enjoys the right to a court. This requirement could be fulfilled by the grant of legal aid. Article 6 § 1 might sometimes compel the State to provide for the assistance of a lawyer when such assistance proved indispensable for an effective access to court either because legal representation was rendered compulsory, as was done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26).

102. Should a legal aid board determine that legal assistance was crucial for the proper conduct of a case, the right to effective access to a court demanded that such representation be provided. Such was the situation also when successive lawyers refused to act on the party's behalf (*Bertuzzi v. France*, no. 36378/97, §§ 27-2, CEDH 2003-III)

103. The Council of Bars and Law Societies of Europe believed, taking into account the Court's case-law and the Code of Conduct it had adopted and having regard to the general principles by which justice had to be governed, that the Member States of the Council of Europe were under a general obligation to secure that the system under which a citizen was entitled to obtain legal aid provided effective representation in judicial proceedings.

104. The Council stressed that access to justice should be equal for all citizens. This principle could only be enforced if the equality of arms in the exercise of defence rights was guaranteed. Indeed, the principle of equality of arms was an aspect of a right to a fair hearing within the meaning of Article 6 § 1 of the Convention. This obligation was particularly important in those civil cases, in which – as the present case – a litigant had had a State body as an opposite party.

105. Legal aid was one of the means to have the objective of fair access to justice realised. The Court held in its case-law that legal aid served the purpose of ensuring effective access to justice. In allowing citizens with very low financial means to be able to have recourse to legal aid assistance, the legal aid institutions allowed them to obtain legal advice and identify

legal remedies appropriate to their situation. To this effect, legal aid should be adequate and effective.

106. There were various systems of legal aid in State Parties. Although legal aid institutions were responsible to ensure a satisfactory end result, i.e. adequate and timely appointment of a lawyer, the final obligation to ensure that the legal aid system, seen as a whole, was effective, is to be discharged by the State. This requirement of effectiveness was of a crucial importance, as the procedural requirements had to be respected by the legal aid lawyer so that the client's interests were well represented. While it was true that the guarantees of Article 6 § 1 of the Convention were not as extensive as those of Article 6 § 3 of the Convention, the requirements of a fair hearing called for legal aid to be available also in civil cases.

107. The Council further submitted that procedures similar to cassation appeal procedure before the Polish Supreme Court existed, albeit with different characteristics defined by laws governing civil procedure, in several State Parties. In those countries in which all lawyers were entitled to plead before the cassation court, as was the case in Poland, the principles governing legal aid had to take into consideration the specificity of such procedures. As cassation appeals normally provided a legal framework specially designed for the purposes of judicial review of the lawfulness of decisions given by lower courts, special strict condition of admissibility applied to them. Lawyers were by definition best placed to judge whether any given case offered prospect of success before a cassation court. This discretion was a vital element of the independence of the legal profession and implied that the lawyer should freely take a decision not to submit an appeal to the court of cassation if he or she were of the view that relevant legal grounds for doing so did not obtain in the case.

108. However, it logically followed from the principle of effectiveness of legal aid that the beneficiary of legal aid should have a reasonable possibility of requesting for another legal aid lawyer to replace the first one, within a reasonable time-frame and taking into consideration the special characteristics of the cassation procedure. Short deadlines applicable in the cassation proceedings could in certain cases render such change of lawyers difficult, but the legal aid scheme should allow such a change of counsel before the applicable deadline expired.

109. In conclusion, the Council submitted that the State Parties were obliged to see to it that an effective mechanism of legal aid allowed adequate access to justice. The State Parties were responsible for ensuring that the system worked efficiently. It was for the Court to examine on case-to-case basis whether this had indeed been the case in various individual situations. However, no State Party should bear the responsibility for actions of lawyers, acting as members of independent bar associations. Only where the legal aid scheme did not adequately meet the conditions of effectiveness, should the role played by the State be assessed by the Court,

in order to determine whether the State had taken all measures to ensure fair access to justice.

110. In order for the effective access to justice to be compatible with the requirements of Article 6 § 1 of the Convention, a balance should be struck between the possibility for a lawyer to refuse to represent a client and the opportunity for a party to the proceedings to request either a bar association or the court, as the case may be, to replace a lawyer by another one, in full respect of the independence of the legal profession.

b) The Polish Helsinki Foundation for Human Rights

111. The Polish Helsinki Foundation for Human Rights submitted that in civil cases, lack of legal aid could hinder resolution of disputes having an impact on civil rights and obligations of individuals. Taking into account the broad scope of cases considered as „civil” and their importance for individuals, the need for professional legal aid in civil proceedings was substantial for guaranteeing the access to court. The possibility to refuse the preparation of a cassation appeal by the advocate had an important impact on the access to legal aid and consequently on the right to a court.

112. The Code of Civil Procedure did not normally provide for mandatory legal representation. However, the lodging of a cassation appeal required mandatory assistance of an advocate or legal advisor.

113. Nonetheless, an *ex officio* advocate or legal advisor were not obliged by law to prepare and to submit a cassation appeal in every and each case assigned to them. They could refuse to do so in two situations. Firstly, pursuant to Article 28 of the Bar Act, a lawyer could give notice on termination of power of attorney when he or she considered that an “important reasons” prevent him or her from further representing the client. He or she had to notify the Regional Bar Council of this refusal.

114. Secondly, under Article 57 of the Body of Ethical Rules and Dignity of Advocate Profession an advocate could refuse to prepare a cassation appeal if he or she was of the opinion that there were no reasonable prospects of its success.

115. This principle that a legal aid lawyer could refuse to draw up a cassation appeal had been confirmed by the resolution of the Supreme Court of 28 September 2000. The Supreme Court had stated therein that such a refusal could only be justified by “important reasons” within the meaning of Article 28 of the Bar Act. In civil cases it was only the Regional Bar Council who was competent to countenance such a refusal. The Supreme Court had also observed that this notion of “important reasons” had not been defined by law. It had been of the view that Article 57 of the Body of Ethical Rules and Dignity of Advocate Profession, insofar as it referred to the lack of prospects of success of this remedy, should serve as a basis for interpretation of this notion.

116. The Foundation further stressed that the legal provisions concerning refusal of legal assistance, applicable at the material time, had been unclear and provoked serious difficulties of interpretation. Until the Supreme Court's resolution of 2000 even the case-law of the Supreme Court in that matter had been divergent.

117. When a lawyer refused to draw up a cassation appeal, he or she should notify his or her decision to the local Bar Council. However, there had been no detailed rules determining what information or grounds should be specified in such notice. The commentaries to the Civil Procedure Code highlighted that under the applicable law there had been no direct possibility to control the legitimacy of the legal aid advocate's refusal. If a client disagreed with the lawyer's decision, he or she could complain to the local Bar Council. However, there were no regulations in force which would have governed the procedure of examination of such complaints by the Bar. There were no further instruments allowing the party to obtain any answer from the Bar Council, or to obtain assistance of another legal aid lawyer for the purposes of preparation of the appeal.

118. Moreover, while the refusal to prepare and submit a cassation appeal had to be justified, there had been no standards determining the manner and scope of such justification to be provided for by a lawyer.

119. The Foundation concluded that the applicable regulations, including the Code of Civil Procedure, had failed to safeguard access to the Supreme Court in case of an arbitrary refusal to prepare and to submit the cassation appeal by a lawyer. The party had not had at its disposal any remedy or procedure to review the legitimacy of the lawyer's decision. Furthermore, a thirty-day time-limit for the lodging of a cassation appeal as applicable at the material time had been relatively short. When a legal aid lawyer had refused to draw up a cassation appeal, the party had not had enough time to lodge with the court a new motion for the appointment of another lawyer. The procedure of appointment of a legal aid lawyer had been too long to make it possible for a new lawyer to submit the cassation appeal within the time-limit.

120. Lastly, it was argued that the costs of legal representation within the legal aid scheme were covered out of the State budget. Hence, the State should have had, at least to some degree, a possibility of reviewing lawyers' refusals to prepare cassation appeals in civil cases.

3. Principles established by the Court's case-law

a. The scope of the State's liability *ratione personae* under the Convention

121. The Court notes at the outset that the responsibility of the Contracting Parties is incurred by the actions of their organs. A lawyer, even if officially appointed, cannot be considered to be an organ of the State. Given the independence of the legal profession from the State, the conduct

of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 30 May 1980, Series A no. 37, p. 18, § 36; *Daud v. Portugal* judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 749, § 38; *Tuziński v. Poland* (dec), no. 40140/98, 30.03.1999; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI).

122. Nevertheless, there may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. It will depend on the circumstances of the case whether the relevant authorities should take action (see the above-mentioned *Daud* judgment, p. 750, §§ 40-42) and whether, taking the proceedings as a whole, the legal representation may be regarded as “practical and effective” (see, *mutatis mutandis*, *Artico v. Italy*, cited above, § 33; *Goddi v. Italy* judgment of 9 April 1984, Series A no. 76, p. 11, § 27; *Rutkowski v. Poland*, cited above). Assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (*Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § 38).

b. Access to the court

123. The Court further reiterates that it would be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit without also protecting the right of access to a court which makes it in fact possible to benefit from such guarantees. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings (*Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 31-39). The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). A restrictive interpretation of the right of access to a court guaranteed by Article 6 § 1 would not be consonant with the object and purpose of the provision (*De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, § 30).

124. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State (*Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 34; *Garcia Manibardo v. Spain*, no. 38695/97, § 36). In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the

Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, § 50; *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, § 72; *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, 21 September 2004, §§ 28-29).

125. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, *Reports* 1996-V, pp. 1544-45, § 44; *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 13-15).

126. The manner in which Article 6 § 1 applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the Court of Cassation's role in them. Given the special nature of the Court of Cassation's role, which is limited to reviewing whether the law has been correctly applied, the Court is able to accept that the procedure followed in the Court of Cassation may be more formal (*mutatis mutandis*, *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002-VII;

c. Legal aid

127. In this context, the Court points out that there is no obligation under the Convention to make legal aid available for disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which does not contain any reference to legal aid (*Del Sol v. France*, no. 46800/99, § 20, ECHR 2002-II; *Essaadi v. France*, no. 49384/99, § 30, 26 February 2002).

128. The Court further reiterates that the requirement that an appellant be represented by a qualified lawyer before the court of cassation, such as applicable in the present case, cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as a highest court examining appeals on points of law and it

is a common feature of the legal systems in several member States of the Council of Europe (see, for instance, *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A no. 109, § 69; *Vacher v. France*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2148-49, §§ 24 and 28; *Tabor v. Poland*, no. 12285/02, § 42). It is for the Contracting States to decide how they should comply with the fair hearing obligations arising under the Convention.

129. However, the Court must satisfy itself that the method chosen by the domestic authorities in a particular case is compatible with the Convention. In discharging obligation to provide parties to civil proceedings with legal aid, when it is provided by domestic law, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (*Del Sol, R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001). It is also essential for the legal aid system to offer individuals substantial guarantees to protect those having recourse to it from arbitrariness (*Gnahoré v. France*, no. 40031/98, § 38, ECHR 2000-IX).

4. Application of the principles to the facts of the case

130. Turning to the circumstances of the present case, the Court observes at the outset that the Polish law of civil procedure requires that a party to civil proceedings be assisted by an advocate or legal counsel in the preparation of his or her cassation appeal against a judgment given by a second-instance court and that an appeal drawn up by the party, without legal representation, will be rejected by the court (see § 44 above). The Court accepts that this requirement cannot, *per se*, be regarded as contrary to the requirements of Article 6 of the Convention.

131. The Court observes that on 21 January 2000 the judgment of the appellate court was served on the lawyer. During the meeting with the applicants on 27 January 2000, the lawyer informed them orally that, in his view, a cassation appeal against the judgment of the appellate court did not offer prospects of success.

132. The Court emphasises that after the judgment of the appellate court, with its written grounds, was served on the applicants on 23 September 1999, they showed requisite diligence in that they made efforts to establish contact with the lawyer, but to no avail.

It is true that later the judgment was served also on the lawyer. Under the applicable provisions of the domestic law the thirty-day time-limit for lodging of the cassation appeal started to run from that date (see § 65 above). It was therefore to expire on 20 February 2000. However, taking into consideration the lawyer's manifest and long-lasting lack of diligence in establishing effective channels of communication with his clients, the Court is not satisfied that the mere fact that after the refusal of 27 January 2000 they had twenty – four days to find another legal aid lawyer to represent

them was sufficient. It would have been too formalistic on its part to consider that in such circumstances the applicants' interest in having an effective legal representation was properly safeguarded.

133. In this context, the Court considers that it is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of independent legal profession in a democratic society which is founded on trust between lawyers and their clients. The Court emphasises that it is the responsibility of the State to ensure requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other.

134. In this connection, the Court notes that the Polish Supreme Court, in its resolution of September 2000, emphasised that the role of a legal-aid lawyer had to be understood as obliging him or her to provide comprehensive legal advice to the party, including as to the prospects of success offered by a cassation appeal in a given individual case. It therefore concluded that that it was permissible for a legal aid lawyer assigned to a civil case to refuse to prepare and lodge a cassation appeal (see §§ 57-62 above). The Court cannot but endorse this conclusion.

135. The Court is further of the view that when examining the circumstances of the present case it must have regard to the specific features of the Polish system of legal aid. In this respect, the Court deems that the refusal of a legal aid lawyer should meet certain quality requirements. In particular, the refusal must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds. In this connection, the Court observes that under the applicable domestic regulations the legal aid lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal. Nor did the law set any standards as to the legal advice he had to give to justify his refusal to lodge a cassation appeal. As a result, in the present case the lawyer did not prepare such opinion and only informed the applicants orally about his refusal to lodge a cassation appeal on their behalf. The Court notes in this connection that the Constitutional Court, in its judgment of 31 March 2005, observed that the legal provisions concerning the admissibility conditions of a cassation appeal applicable at the relevant time had given rise to serious interpretational difficulties and discrepancies in the case-law of the Polish courts (see § 50 above).

136. The Court is of the view that if requirements concerning the written form of refusal, including the reasons for it, to draw up a cassation appeal had existed, they would have rendered possible an objective *post-hoc* assessment of whether the refusal to prepare the cassation appeal in a given individual case had been arbitrary. This is particularly important in view of

the difficulties involved in such an assessment, highlighted by the Constitutional Court.

137. Consequently, the lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation appeal to be accepted by the Supreme Court. The mere fact that the timing of the refusal seemed unobjectionable could not cure this deficiency.

138. In the light of the circumstances of the case seen as a whole, the Court is of the view that the applicants were put in a position in which their efforts to have access to a court secured in a “concrete and effective manner” by way of legal representation appointed under the legal aid system failed.

139. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. 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

141. The applicants sought compensation for pecuniary damage in the amount of EUR 25,000.

142. The Government submitted that the applicants failed to adduce any evidence to show that they had suffered any actual loss.

143. The Court is of the view that it has not been duly substantiated that the applicants sustained pecuniary damage as a result of the violation of their right to a fair hearing. However, the Court accepts that the applicants have suffered non-pecuniary damage which would not have been sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicants EUR 4,000 under this head.

B. Costs and expenses

144. The applicants, who received legal aid from the Council of Europe in connection with the presentation of their case, sought EUR 4,000 for costs and expenses incurred in the proceedings before the Court.

145. The Government considered that the sum was excessive. They asked the Court to make an award, if any, only in so far as the costs and expenses concerned had been actually and necessarily incurred and were reasonable as to quantum.

146. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,500 for costs and expenses involved in the proceedings before it, less EUR 2,168.76 received by way of legal aid from the Council of Europe.

C. Default interest

147. 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. *Dismisses* unanimously the Government's preliminary objections;
2. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicants, from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, 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:
 - (i) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 3,500 (three thousand five hundred euros) in respect of costs and expenses, less EUR 2,168.76 received by way of legal aid from the Council of Europe;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 March 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judge Vajić and of Judge Loucaides, joined by Judges Rozakis and Steiner are annexed to this judgment:

S.N.
C.L.R.

CONCURRING OPINION OF JUDGE VAJIĆ

1. I regret that I am unable to share the reasoning of the majority in the present case. My finding of a violation is based on reasoning different from that set out in § 136 and 137 of the judgment and is explained in point 3 *infra*.

2. In the majority's view the main reason for finding a violation in the present case was the fact that the lawyer's refusal to prepare a cassation appeal was not provided in writing and had therefore left the applicants in a state of uncertainty as to the legal grounds for such a refusal.

It should be noted, firstly, that no obligation to prepare a written legal opinion on the prospects of a cassation appeal arises under domestic law; this is true with regard to all lawyers, whether or not they are working under the legal aid scheme. Although national authorities are free to introduce such a requirement into their domestic legal system, it is not for the Court to impose such an obligation on them. The Court has often stated that it is not for it to indicate to the States Parties legislative or organisational measures to be taken in the organisation of their legal system in general. The same applies to the organisation of their legal aid system, more particularly in view of preserving the independence of the legal profession, which is primordial in a democratic society. The Court thus leaves to the States the choice of the means of ensuring that a right guaranteed under the Convention is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of the Convention (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, § 38).

In such a context it seems difficult to understand how the finding of a violation of the Convention in the present case can be based on the lack of written grounds for the refusal. In addition, a lawyer's refusal to provide written grounds cannot, in our opinion, be put on the same footing as that of a court which refuses to grant legal aid without giving legal grounds to justify such a decision (see *Tabor v. Poland*, judgment of 27 June 2006, §§ 45-46, in which the Court found a violation of Article 6 of the Convention).

Other States Parties to the Convention have procedures similar to the cassation appeal procedure in Polish law, in which only lawyers or specialised advocates are entitled to plead before certain courts. It would not appear, however, that there is a requirement in any of those countries that those advocates or lawyers must provide their clients with a written legal opinion or explanation concerning their views on the cases in question. The

same is true of contacts between lawyers and clients in general, which are habitually based predominantly on oral communication. A different conclusion cannot be deduced from the submissions of the Council of Bars and Law Societies of Europe, which intervened in the present proceedings as a third party.

3. I can, however, agree, albeit with some hesitation, that there has been a violation of the applicants' rights in the present case if we examine the effectiveness of the legal aid proceedings as a whole. The applicants would appear to have experienced real difficulties in finding a lawyer who would agree to represent them (see paragraphs 21-22; see also *Rutkowski v. Poland*, (dec), no. 45995/99, 19 October 2000) and who would then be diligent in that task (see paragraphs 24-34; see also *Siałkowska v. Poland*, judgment of 22 March 2007, § 16-19); the procedure involved is also time-consuming (see, *mutatis mutandis*, *Tabor v. Poland*, cited above, §§ 44-46) and somewhat complicated, so that when one lawyer refuses to provide legal representation it does not seem possible to have another appointed speedily. In the event of refusal to prepare a cassation appeal, this would make it impossible for the new lawyer to submit such an appeal within the prescribed time-limit (see the submissions by the Polish Helsinki Foundation for Human Rights, paragraph 117). Moreover, the applicants in the present case were informed by the Bar that, where an *ex officio* lawyer found no grounds on which to lodge a cassation appeal, the Bar Association would not appoint another lawyer for that purpose (see paragraph 37).

Of course, it is not the role of the State to oblige a lawyer, whether appointed under the legal aid scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding an action or remedy's prospects of success. Such powers in the hands of the State would be detrimental to the essential role of an independent legal profession in a democratic society, which is founded on trust between lawyers and their clients. It is, however, the responsibility of the State to ensure the requisite balance between, on the one hand, the effective enjoyment of access to justice and, on the other, the independence of the legal profession. The Court has repeatedly held that, for the effective exercise of the right to a fair hearing guaranteed by Article 6 of the Convention, it is also important that legal aid lawyers discharge their obligation to give appropriate legal advice with due diligence (see *Artico v. Italy*, judgment of 13 May 1980, and *Daud v. Portugal*, judgment of 21 April 1998), even if the lawyer's conclusion is that a case, or a further remedy, do not offer prospects of success.

The aim of legal aid, where it is available for disputes in civil proceedings, is to ensure, among other means, the right of fair and effective

access to justice for applicants who do not dispose of sufficient personal means to pay for their own legal representation. That is why, in view of all the difficulties encountered by the applicants in the present case and bearing in mind the cumbersome procedure required in order to obtain representation in proceedings before a court in which the national legal system obliged them to be legally represented, the State should not, in my opinion, remain passive (see *Rutkowski v. Poland*, (dec), no. 45995/99, 19 October 2000, and, *mutatis mutandis*, *Tabor v. Poland*, cited above, paragraph 43).

Rather, it is a State's obligation to see to it that an effective legal aid mechanism allows adequate access to justice. The circumstances of this case, as well as those of the *Siałkowska v Poland* case (cited above), in which a judgment is adopted by the Chamber on the same day, show the need for the authorities to review their legal aid system as a whole and to take action to improve it so that it will operate efficiently (see *Tabor v. Poland*, cited above, § 43). Which of the various possible legal aid systems they may wish to select, or what the real reasons may be for the malfunctioning of the present system – these are questions to be answered and resolved by the national authorities, preferably after a thorough debate which would include all the actors involved. The result, however, should be to secure an adequate institutional and procedural framework to ensure that citizens who are entitled to obtain legal aid will be provided with effective representation in judicial proceedings so that their interests are properly represented.

4. In view of the foregoing and of all the circumstances of the present case, I consider that there has been a violation of the applicants' right to a fair hearing guaranteed under Article 6 § 1 of the Convention.

DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGES ROZAKIS AND STEINER

I do not agree with the majority that there has been a breach of Article 6 § 1 of the Convention in this case.

The majority stated that a refusal of a legal aid lawyer to undertake the lodging of a cassation appeal “should meet certain quality requirements. In particular, the refusal must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds. However, the majority proceeds to observe “that under the applicable domestic regulations the legal aid lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal. It was also stated that the domestic law “did not set any standards as to the legal advice he had to give to justify his refusal to lodge a cassation appeal”.

Nevertheless, the majority found a violation of Article 6 on the ground that the lawyer in this case did not formulate in writing his refusal to prepare the cassation appeal and the reasons for such a refusal. According to the majority “the lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation appeal to be accepted by the Supreme Court.”

My disagreement with the majority is based on the following:

a) I do not think it is fair or necessary to require from a legal aid lawyer to formulate his opinion in writing so long as such a requirement does not exist under the domestic law in respect of the other lawyers to whom any individual might have had recourse on payment for lodging a cassation appeal. A person is entitled to have a legal aid lawyer under the same conditions as in the case of a non legal aid lawyer.

b) The applicant did not allege that he did not comprehend the legal opinion given by the legal aid lawyer for his refusal to draw up a cassation appeal.

c) There is no concrete evidence to show that if the refusal to lodge such an appeal was given in writing the applicant would have been in a better position or that the opinion would have been more useful. In this respect one should bear in mind that in fact the legal aid lawyer has later on -sometime in February 2000 - expressed his opinion not to lodge an appeal also in writing in answer to a complaint of the applicants to the Secretary of the Warsaw Bar Association and it does not emerge from the facts that the written opinion was more enlightening than the oral one.

d) The gist of the refusal to lodge a cassation appeal by the legal aid lawyer was that in his opinion there were no grounds for filing a cassation appeal in the applicant's case. I find it difficult to accept that an elaboration of such an approach would have given the applicants more necessary or useful information as to their legal situation.

e) There is no evidence that the lawyer has acted in any negligent or arbitrary way

f) The applicant had sufficient time before the expiration of the time-limit for lodging the cassation appeal to seek a second legal opinion regarding his case but he failed to take any steps in that direction.