



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

FIRST SECTION

CASE OF SIAŁKOWSKA v. POLAND

(Application no. 8932/05)

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 Siałkowska 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. 8932/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms Krystyna Siałkowska (“the applicant”), on 28 February 2005.

2. The applicant, who had been granted legal aid, was represented by Ms Bogdana Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government (“the Government”) were represented by their Agent, Mr Jakub Wołosiewicz.

3. The applicant complained under Article 6 § 1 of the Convention that the proceedings had been unfair in that she had been denied effective access to a court. She referred to the fact that the lawyer appointed under applicable legal aid scheme had failed to undertake the necessary steps to represent her interest effectively in that he had refused to bring the cassation appeal to the Supreme Court against a judgment of the 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 *Staroszczyk v. Poland* (application no. 59519/00).

6. The applicants and the Government each filed further written observations (Rule 59 § 1). In addition, 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 Government's objections as regards 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 applicant was born in 1950 and lives in Wrocław.

11. After the applicant's husband had died in September 2002, she instituted proceedings in which she claimed her widow pension.

12. By a decision of 3 October 2002, the social insurance authority dismissed her request.

13. On 4 March 2003 the Wrocław Regional Court dismissed her appeal against this decision. On 2 September 2004 the Wrocław Court of Appeal dismissed her further appeal.

14. The appellate court observed that the findings of fact made by the social insurance authority were correct. The applicant and her husband had *de facto* separated in 1994. He had been living since then with another woman. The applicant had not been receiving any maintenance payments

from him. When he had fallen ill, she had not been taking care of him and she had been informed of his poor health only in March 2002. The court considered that the lower court had not erred when it assessed the testimony of one witness, who had submitted that the couple had been living together, as not being credible. The appellate court concluded that the legal requirements for granting a widow pension were not complied with.

15. The applicant requested that legal aid for the purposes of lodging a cassation appeal with the Supreme Court be granted to her and her request was allowed. The court requested the local Bar Association to assign a lawyer to the case and advocate Z.W. was so assigned on 17 September 2004.

16. The copy of the judgment of the appellate court was served on Z.W. on 9 November 2004.

17. By a written opinion of one page and a half dated 3 December 2004 Z.W. advised the applicant that, in his view, a cassation appeal against the judgment of the appellate court did not offer reasonable prospect of success. He referred to the written grounds of the judgment of the appellate court by which that court had explained why the applicant had not complied with the requirements of the applicable law, and considered that in the light of the evidence examined by the courts, there were no grounds on which to argue that the second-instance judgment was in breach of the law. Consequently, he did not draw up the cassation appeal.

18. The opinion contained the following paragraph:

“I would like to stress that the judgment of the Wrocław Court of Appeal of 2 September was served on me on 9 October (*sic*) 2004 and that the thirty-day time-limit for the lodging of a cassation appeal expires on 9 December 2004.”

19. On 6 December 2004 the applicant had a meeting with the lawyer at his office. He gave her his opinion and informed her that he saw no grounds on which to prepare a cassation appeal in her case. On the same occasion the applicant was served with the copy of the appellate court's judgment with its written grounds.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Constitution

20. 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. ...”

21. 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

22. 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.

23. 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.

24. 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

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

26. 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.

27. 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.”

28. 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.”

29. Article 393⁴ 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 (...).”

30. 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

31. 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.

32. 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

33. 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.”

34. 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 performance of the Bar's statutory 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.”

35. 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.”

36. 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.

37. 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.

38. 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)

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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

45. 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

46. 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.”

47. 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

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

49. 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.

50. 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.

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

52. 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

53. 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

54. 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*

55. 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

56. The Government first argued that the application was incompatible *ratione personae* with the provisions of the Convention. In the present case the court had acknowledged the need for the applicant to be represented by a legal aid lawyer and such a lawyer had been assigned to the case. However, any disagreements that might have arisen between the applicant 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 did not 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.

57. It followed from the independence of the legal profession 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*, no. 44165/98, dec. 8 July 2003).

58. The applicant disagreed with the Government and maintained that the State could not be regarded as not bearing any responsibility for the conduct of legal aid cases such as this concerned in the present case.

59. 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 paragraph 8 above). The Court confirms its approach.

2. Non-exhaustion of domestic remedies

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

61. Firstly, they submitted that if the applicant had been dissatisfied with the legal assistance she received from the officially appointed lawyer, it had been open to her to make a complaint to the local Bar Association under Article 28 of the Bar Act and to ask that another lawyer be assigned to her case. If the local Bar Association had shared her doubts regarding the soundness of the lawyer's refusal to draw up a cassation appeal, it could have appointed another lawyer to represent her. 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.

62. Secondly, the applicant could have appointed a lawyer of her own choice for the purposes of representing her before the Supreme Court.

63. Thirdly, the applicant could also have requested the Minister of Justice, the Prosecutor General or the Ombudsman, to lodge a cassation appeal on her behalf within six months from the date of the service of the judgment.

64. Having regard to the subsidiary character of the supervision carried out by the European Court of Human Rights, the Government concluded that the application should be rejected for failure to exhaust relevant domestic remedies.

65. The applicant submitted that, having been served by her legal aid lawyer with the copy of the second-instance judgment on 6 December 2004, she had believed that the thirty-day time-limit for lodging a cassation appeal had started to run, according to information provided for by Z.W., on 9 October 2004. Accordingly, she had been convinced that it had expired on 9 November 2004. Even assuming that she had known that on 6 December she had still had three days within which to lodge a cassation appeal, she did not have any realistic opportunity to have a legal aid lawyer assigned to the case within such a short time and to have the appeal lodged on her behalf.

66. 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 paragraph 8 above). The Court confirms its approach.

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

67. The applicant complained under Article 6 § 1 of the Convention that the proceedings in her case had been unfair in that she 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

68. The Government pointed out that the applicant's request for legal aid for the purposes of legal assistance in connection with the cassation proceedings had been granted by the appellate court. The State had thereby discharged its obligations under Article 6 of the Convention to ensure effective access to a court by acceding to the applicant's request for legal aid.

69. Having carefully considered her case, the lawyer had refused to prepare a cassation appeal on her behalf and provided a reasonable explanation of the reasons for his decision. In this connection, the Government emphasised that the notion of legal aid, within the meaning of the applicable provisions of domestic law and of the resolution of the Supreme Court of 21 September 2000, was not limited to carrying out instructions of a client. Its essence consisted in providing legal advice to the parties according to the lawyer's best knowledge. Hence, a decision not to pursue the applicant's case further also fell within the ambit of the notion of legal aid.

70. The legal opinion of 6 December 2004 prepared by Z.W. had been aimed at securing proper administration of justice in the cassation proceedings before the Supreme Court. The Government emphasised that this opinion had been extensively reasoned. The legal aid lawyer had stressed that in the circumstances of the case there had been no factual or legal grounds on which to lodge a cassation appeal.

71. The Government further recalled that a State could not be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes (*Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, § 36). It followed from the independence of the legal profession from the State that the conduct of defence was essentially a matter between

the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed (*Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, § 65).

72. Lastly, the Government argued that a cassation appeal was an extraordinary remedy by which it was possible to challenge final judicial decisions. The recourse to this remedy should be limited to exceptional cases, the more so as the applicant's case had been examined by two levels of courts with full jurisdiction as to the fact and law.

73. The Government concluded that the system under which a legal aid lawyer could refuse to lodge a cassation appeal was compatible with the requirements of Article 6 § 1 of the Convention.

74. The applicant submitted that the compatibility of the legal aid system in civil cases in Poland, and in particular the issue of refusals to lodge cassation appeals by legal aid lawyers should be seen against a general background governing cassation appeals introduced into the Code of Civil Procedure in 1996 as applicable at the material time. She drew the Court's attention to Articles 393, 393¹ and 393³ of that Code as applicable at the material time which, read together, defined conditions under which cassation appeals were deemed fit to be examined by the Supreme Court.

75. The applicant argued that, given that these provisions were drafted in very broad terms, a decision whether a cassation appeal complied with the conditions they defined was of a highly discretionary nature. A decision whether to accept a cassation appeal for examination was normally given by the Supreme Court within the framework of a so-called judicial pre-assessment of the cassation appeal. Under the applicable legal provisions as they stood at that time, a single judge of the Supreme Court was empowered to give such a decision. Moreover, the law did not provide for an obligation to provide reasons for it.

76. Following the adoption of these provisions in 2001, a judicial practice had developed under which many cassation appeals were rejected by unmotivated decisions of the Supreme Court, given by a single judge.

77. The applicant emphasised that this judicial practice had seriously limited access to the Supreme Court and resulted in many cases being rejected by that court. In addition, under the legal aid provisions it had been possible for a legal aid lawyer to carry out an assessment of prospects of success of cassation appeal before it was even drawn up. It had often been the case that legal aid lawyers, bearing in mind serious difficulties in having a cassation appeal declared admissible and accepted for examination by the Supreme Court, had been refusing to represent legal aid clients, arrogating thereby for themselves a judicial function which should have been carried out by that Court itself. As a result of a combination of these factors, access to the Supreme Court had become unduly restricted.

78. The applicant further submitted that although, regard being had to the independence of the legal profession, the State could not be held

responsible for acts and decision of legal aid lawyers, it fell to the State to ensure effective access to justice. An effective exercise of the right of access to a court required that the legal aid system should be organised in such a way as to make access to legal aid both transparent and effective.

2. *The third parties' submissions*

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

79. 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).

80. 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*, n°36378/97, §§ 27 - 32, CEDH 2003-III)

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.

86. 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.

87. 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.

88. 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

89. 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.

90. 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.

91. 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.

92. 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.

93. 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.

94. 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.

95. 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.

96. 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.

97. 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.

98. 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

99. 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).

100. 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

101. 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).

102. 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).

103. 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).

104. 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

105. 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).

106. 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; *Tabov v. Poland*, § 42). It is for the Contracting States to decide how they should comply with the fair hearing obligations arising under the Convention.

107. 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

108. 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 § 26 above). The Court accepts that this requirement cannot, *per se*, be regarded as contrary to the requirements of Article 6 of the Convention.

109. The Court further notes in this connection that in the present case the Wrocław Court of Appeal allowed the applicant's request for legal aid for the purposes of cassation proceedings. Subsequently, the local bar assigned advocate Z.W to represent the applicant. The copy of the second-instance judgment was served on him on 9 November 2004. Under the applicable provisions of the domestic law the thirty-day time-limit for lodging the cassation appeal started to run from that date (see § 46 above). It was to expire on 9 December 2004.

110. The lawyer advised the applicant, by a written opinion dated 3 December 2004 that, in his view, a cassation appeal against the judgment of the appellate court did not offer reasonable prospects of success. Subsequently, he met with the applicant in his office on 6 December 2004. During this meeting he reiterated that he believed that there were no grounds on which to prepare the appeal.

111. In this connection, the Court emphasises that the independence of the legal profession is crucial for an effective functioning of the fair administration of justice. When analysing the scope of the responsibility of the State for acts of lawyers appointed under legal aid scheme, the Court must have due regard to the guarantees of such independence.

112. 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 an 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 a requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other.

113. 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 it was permissible for a legal aid lawyer assigned to a civil case to refuse to prepare and lodge a cassation appeal (see §§ 38-43 above). The Court cannot but endorse this conclusion.

114. 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 this connection, the Court observes that the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation appeal. When the applicant and the lawyer met, the time-limit for lodging of a cassation appeal was to expire in three days. The Court is of the view that in the circumstances of the present case, it would have been impossible for the applicant to find a new lawyer under the legal-aid scheme.

115. Consequently, the shortness of time left to the applicant to undertake any steps to have the cassation appeal in her case prepared did not give her a realistic opportunity of having her case brought to and argued before the cassation court.

116. In the light of the circumstances of the case seen as a whole, the Court is of the view that the applicant was put in a position in which her 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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

119. The applicant sought compensation for pecuniary and non-pecuniary damage in the amount of EUR 25,000.

120. The Government submitted that in so far as the applicant's claims related to alleged pecuniary damage, she had failed to adduce any evidence to show that she had suffered any actual loss. As to non-pecuniary damage, the Government submitted that the amount claimed by the applicant was excessive.

121. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of her right to a fair hearing. However, the Court accepts that the applicant has suffered non-pecuniary damage which is not 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 applicant EUR 4,000 under this head.

B. Costs and expenses

122. The applicant, who received legal aid from the Council of Europe in connection with the presentation of her case, sought EUR 7,000 for costs and expenses incurred in the proceedings before the Court.

123. 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.

124. 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 1,928.67 received by way of legal aid from the Council of Europe.

C. Default interest

125. 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 objections;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, 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 1,928.67 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* the remainder of the applicant's 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 concurring separate opinion of Judge Vajić is 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 paragraphs 114 and 115 of the judgment. I refer in this respect to my concurring opinion in the case of *Staroszczyk v. Poland*, judgment of 22 March 2007.

2. In the majority's view, the main reason for finding a violation in the present case was due to the fact that - in the absence of domestic regulations specifying the time-frame within which clients should be informed of a refusal to prepare a cassation appeal - the applicant met with her lawyer only three days before the time-limit for lodging a cassation appeal was due to expire. The Court was of the view that, in the circumstances of this case, it would have been impossible for the applicant to find a new lawyer. Consequently, the brevity of the time remaining to the applicant to take any steps to have the cassation appeal in her case prepared and lodged by another lawyer did not give her a realistic opportunity of having her case brought to and argued before the cassation court.

3. I agree that there has been a violation of the applicant's right in this case. However, I should like to point out that it is not necessary that all the details of a legal aid mechanism be strictly regulated in domestic law (for example, the time-frame for a refusal to prepare a cassation appeal). The accessibility, quality and diligence of advice provided by lawyers should be the same, whether or not provided under a legal aid scheme. Had the legal aid system functioned properly and efficiently, making legal aid accessible in all circumstances, there might have been enough time for the applicant to take additional steps to seek advice from another lawyer and to have an appeal prepared, even at a very late stage prior to the expiry of the time-limit for lodging such appeals. Thus, within an efficient legal aid system, the lack of time, even if it placed the applicant in a difficult situation, might not in itself have been enough to result in a violation of the applicant's right of access to a court. In this respect, I consider that the situation cannot be compared to that in the case of *Tabor v. Poland* (no. 12825/02, judgment of 27 June 2006), where the Court did find a violation, in a case where the national **court** dealt with the applicant's request for legal aid in a way which left him without any realistic opportunity of seeking legal assistance of his choice in lodging a cassation appeal. In the Court's view, the manner in which the relevant court handled the applicant's request for legal aid was not compatible with the requirement of diligence (see *Tabor v. Poland*, cited above, § 46).

In the present case, it is instead the existing, albeit defective, framework of the legal aid mechanism as such, as set out in point 3 of my concurring opinion in *Staroszczyk v. Poland* (cited above), which placed the applicant in a position in which “her 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” (see paragraph 116 of the judgment).