



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

FOURTH SECTION

CASE OF WENDE AND KUKÓWKA v. POLAND

(Application no. 56026/00)

JUDGMENT

STRASBOURG

10 May 2007

FINAL

24/09/2007

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 *Wende and Kukówka v. Poland*,

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

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

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

Having deliberated in private on 12 April 2007,

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

PROCEDURE

1. The case originated in an application (no. 56026/00) 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 Stefania Wende and Franciszek Kukówka (“the applicants”), on 4 February 2000.

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

3. On 4 December 2001 the Court decided to communicate the complaint concerning the length of proceedings to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicants are siblings. They were born in 1945 and 1944 respectively and live in Tarnowskie Góry, Poland.

5. In 1953 a building and a plot of land owned by the applicants were expropriated. The compensation granted pursuant to the expropriation decision was not paid.

6. In 1992 the second applicant, Mr F. Kukówka, requested the Katowice Governor (*wojewoda*) to declare the expropriation decision null and void.

7. On 30 March 1993 the Governor refused. The second applicant appealed against this decision.

8. On 20 December 1993 the Minister of Construction (*Minister Gospodarki Przestrzennej i Budownictwa*) dismissed the appeal. The second applicant appealed.

9. On 15 June 1994 the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) quashed both decisions taken in 1993.

10. On 31 January 1995 the Minister of Construction, having re-examined the second applicant's request, declared the 1953 expropriation decision null and void. The applicants' ownership right to the property was entered in the relevant land and mortgage register.

11. On 7 April 1995 the second applicant requested the Minister of Construction for compensation for the unlawful use of the property by a State-owned enterprise.

12. On 15 January 1996 the Minister of Construction refused the request. The applicant filed a civil action with the Katowice Regional Court (*sąd wojewódzki*).

13. On 22 February 1996 the Katowice Regional Court declared that it lacked jurisdiction to deal with the case and transferred it to the Warsaw Regional Court.

14. The Warsaw Regional Court held hearings on 5 September 1996, 17 October 1996, 6 May 1997 and 21 August 1997.

15. On 8 May 1998 the first applicant joined the proceedings as an intervenor (*interwenient uboczny*).

16. On 25 May 1998 the lawyer representing the State Treasury contested an expert's opinion filed in the case.

17. On 22 October 1998 a hearing was held.

18. On 26 October 1998 the defendant (the State Treasury) requested the court to order an opinion from another expert.

19. On 23 April 1999 the court ordered an expert witness to give an opinion. The opinion was submitted on 3 August 1999. The parties submitted their comments on 25 October 1999, 3 November 1999 and 6 December 1999.

20. The hearing scheduled for 27 January 2000 was adjourned because the defendant's lawyer had failed to attend. The expert witness had informed the court that he would not be able to attend hearings scheduled before 7 February 2000 because he would be abroad.

21. The expert witness was heard on 19 March 2000.

22. On 27 March 2000 the Warsaw Regional Court delivered a judgment. It awarded the second applicant 103,818 zlotys (PLN) in compensation for damage actually suffered (*damnum emergens*), together

with statutory interest payable from 11 May 1998. The court dismissed the claim for the alleged loss of profits (*lucrum cessans*).

23. On 31 March 2000 the first applicant filed a motion to supplement the judgment. On 22 September 2000 the defendant submitted its comments. On 10 October 2000 the court dismissed the first applicant's motion. She appealed. Her appeal was dismissed on 14 May 2001.

24. On 24 July 2000 the first applicant filed a complaint with the President of the Regional Court about the alleged excessive length of the proceedings.

25. The written reasons of the judgment of 27 March 2000 were served on the applicants on 16 October 2000. The first applicant and the defendant appealed against the judgment.

26. The first applicant's appeal against the judgment was rejected on 14 May 2001. Her appeal against this decision was dismissed on 29 June 2001.

27. On 10 July 2001 the applicants summoned the defendant to pay the compensation awarded by the Regional Court. In reply, they were informed that the judgment of 27 March 2000 was not enforceable since the appellate proceedings were pending.

28. The applicants requested the Regional Court to provide them with an interpretation of its judgment. On 25 July 2001 the court refused that request.

29. Subsequently, they requested that court to add an enforcement clause to the judgment. On 21 September 2001 the court refused since the proceedings were pending before the Court of Appeal.

30. On 29 August 2002 the Court of Appeal upheld the judgment of the first-instance court, but held that interest was payable from 27 March 2000.

31. On 17 February 2003 the Court of Appeal attached an enforcement clause to the judgment.

32. The compensation was eventually paid by the State on 5 March 2003.

33. On 18 March 2003 the applicants lodged a request for the re-opening of the proceedings. The request was eventually refused on 26 April 2006.

34. On 26 October 2004 the first applicant lodged a complaint under the 2004 Act (see paragraph 37 below) with the Court of Appeal about the excessive length of the proceedings. She invoked section 18 of the 2004 Act and requested the court to “deliver a decision concerning the unreasonable length of proceedings which had lasted eight years” (since the proceedings for re-opening were still pending). She further presented the substance of the impugned proceedings and submitted that she had lodged a complaint about the length of the proceedings with the European Court of Human Rights and that the Court had communicated her complaint to the respondent Government.

35. On 5 November 2004 the Court of Appeal asked the Ministry of Foreign Affairs whether the first applicant had lodged an application with the Court and whether an admissibility decision had been issued.

In reply to its question of 5 November 2004, on 16 November 2004 the Registry informed the Ministry of Foreign Affairs that the first applicant's application was pending before the Court and had not been declared admissible.

36. On 1 December 2004 the Court of Appeal rejected the complaint without examining its merits. The court first noted that it had been informed by the Government that the first applicant's case in Strasbourg had been declared inadmissible. Further, the court noted that the first applicant's complaint had not contained a request to find that there had been an unreasonable delay in the impugned proceedings. Lastly, the court considered that the applicant had failed to indicate circumstances that would justify her request, as required by section 6 of the 2004 Act. The court found that the mere fact, relied on by the applicant, that the proceedings had lasted over eight years, could not suffice to find that the proceedings had lasted longer than was necessary. Therefore, according to section 9 of the Act, the complaint had to be rejected without requiring the plaintiff to complete it.

37. The second applicant also lodged a length complaint with regard to the same proceedings. His complaint was examined by the same panel of judges and on the same day as the first applicant's complaint. The second applicant's complaint was partly rejected and partly dismissed. The Court of Appeal considered that the second applicant's complaint concerned two separate sets of proceedings, the original proceedings and those in which the applicant had sought to have the original proceedings re-opened. In so far as the proceedings which had ended on 29 August 2002 were concerned, the Court of Appeal found that the complaint had not been lodged while the impugned proceedings were still pending. Therefore, the second applicant had not complied with the provisions of section 5 of the 2004 Act and his complaint had therefore to be rejected. The court did not refer to the applicant's reliance on section 18 of the 2004 Act in his complaint.

II. RELEVANT DOMESTIC LAW

38. On 17 September 2004 the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") entered into force. A party to pending proceedings may ask for the acceleration of those proceedings and/or just satisfaction for their

unreasonable length under section 2 read in conjunction with section 5(1) of the 2004 Act.¹

39. Section 6 § 2 provides that a complaint must include:

1) a request to find that there was an unreasonable delay in the impugned proceedings;

2) circumstances that would justify the request.

40. According to section 9 of the Act, when a complaint does not meet the requirements of section 6 of the Act, it must be rejected without prior summons to the plaintiff to complete the shortcomings in the complaint.

41. Under section 18 of the Act, within six months after the entry into force of the Act, that is, from 17 September 2004, anyone who had lodged an application with the European Court of Human Rights complaining of a violation of the 'reasonable-time' requirement contained in Article 6 § 1 of the Convention was entitled to lodge a length of proceedings complaint provided for by the Act, if the application to the Court had been lodged when the proceedings were still pending and if it had not yet been declared admissible by the European Court.

42. Under Article 130 of the Code of Civil Procedure if a statement of case or a pleading fails to comply with formal requirements, the party shall be summoned to complete or remedy the formal shortcomings within a one-week time-limit.

THE LAW

I. THE WITHDRAWAL OF THE SECOND APPLICANT

43. In a letter of 17 October 2006 the second applicant, Mr F. Kukówka, informed the Court that he wished to withdraw his case.

44. Having regard to Article 37 § 1 (a) of the Convention, the Court concludes that the second applicant no longer intends to pursue the application. Furthermore, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the examination of this application to be continued in so far as it concerned the second applicant.

45. Accordingly, the case should be struck out of the list of cases insofar as it relates to the second applicant.

¹ For a detailed presentation of the relevant domestic law concerning the available remedies against excessive length of proceedings, see *Ratajczyk v. Poland* (dec.), no. 11215/02, ECHR 2005; *Barszcz v. Poland*, no. 71152/01, 30 May 2006, §§ 26-35.

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

46. The first applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

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

47. The Government contested that argument.

A. Admissibility

1. Application of Article 6 to the proceedings for re-opening

48. As to the proceedings concerning the request for re-opening, the Court recalls that the guarantees of Article 6 § 1 of the Convention do not apply to proceedings concerning the re-opening of a civil case, where the reopening was not granted (see *Sablon v. Belgium*, no. 36445/97, § 87, 10 April 2001; *Komanický v. Slovakia* (dec.), no. 13677/03, 1 March 2005; *Eder v. Germany* (dec.), no. 11816/02, 13 October 2005).

It follows that this part of the application, insofar as it relates to the proceedings instituted after 18 March 2003, is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. Exhaustion of domestic remedies

49. With respect to the requirement of exhaustion of domestic remedies, the Court notes that the applicant made use of the remedy provided for by the 2004 Act and lodged a complaint about the unreasonable length of the proceedings. However, her complaint was rejected on formal grounds.

50. In the present case the Court is not called upon to examine whether the decision to reject the applicant's complaint without examining it on the merits was arbitrary. It must be determined, however, whether the applicant's failure to fulfil the formal requirements leads to a finding that her application is inadmissible for failure to exhaust domestic remedies.

51. In this connection the Court emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. This means, in particular, that the Court must take realistic account, not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as

the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 69, and *Yaşa v. Turkey* judgment of 2 September 1998, *Reports* 1998-VI, § 77).

52. The Court observes that the applicant in her length complaint presented the substance of her allegations, invoked the legal basis for her complaint and clearly expressed, though not in the exact wording of the 2004 Act, her request for a declaration that the length of the proceedings was unreasonable. She also informed the domestic court that the Strasbourg Court had already decided to communicate her length complaint concerning the same proceedings to the Government.

53. With regard to the domestic court's finding that the applicant "had failed to indicate circumstances that would justify her request", the Court notes that it is not called upon to interpret this procedural rule and its application in the present case. Nevertheless, it has already found that declaring a complaint inadmissible on the grounds that an applicant "had not specified the circumstances in which his/her complaint had been based" is a too formalistic approach, which may prevent an applicant's claims from being examined on merits. Such a limitation of one's right to a court has been found to be disproportionate to the aim of ensuring legal certainty and the proper administration of justice (see, *mutatis mutandis*, *Liakopoulou v. Greece*, no. 20627/04, §§ 23-24, 24 May 2006).

54. The Court notes that the applicant had not been summoned to provide the required justification and therefore she had not been given a chance to remedy the formal deficiencies of her complaint. It is true that according to the relevant provisions the applicant could have lodged a fresh complaint. However, lodging a new complaint rather than completing an original one may entail further consequences for respecting the relevant time-limits. The Court considers that when the relevant law provides individuals with a possibility of lodging a complaint without being represented by a lawyer, domestic court should advise applicants on how to remedy formal deficiencies of their complaints.

55. Further, the Court recalls that an applicant is only required to exhaust domestic remedies that are effective, that is capable of expediting the proceedings or providing an adequate redress (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, § 158-159, ECHR 2000-XI). First and foremost, however, an effective length remedy must lead in each case to an examination of the substance of the length complaint. In this connection, the Court notes that the second applicant also filed a length complaint and, in so far as it concerned the proceedings under consideration, it was also rejected, although on different grounds (see paragraphs 36-37 above). Thus, in the circumstances of this case, it is questionable whether the first applicant's

complaint, had she presented it in the way prescribed by the 2004 Act would have been any more successful (compare *Orel v. Slovakia*, no. 67035/01, § 77-78, 9 January 2007).

56. Therefore, applying the above criteria, and having regard to the vague and ill-defined nature of the requirement (c.f. *Šidlová v. Slovakia*, no. 50224/99, § 53, 26 September 2006) the Court is satisfied that the applicant did everything that could reasonably be expected of her to exhaust domestic remedies.

57. This complaint is therefore not inadmissible for non-exhaustion of domestic remedies. The Court notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

58. The Court reiterates that its case-law on the intervention of third parties in civil proceedings makes the following distinction: where the applicant has intervened in domestic proceedings only on his or her own behalf the period to be taken into consideration begins to run from that date, whereas if the applicant has declared his or her intention to continue the proceedings as an heir he or she can complain of the entire length of the proceedings (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 220, ECHR 2006-...).

59. The period to be taken into consideration therefore began only on 8 May 1998, when the first applicant joined the proceedings. By that time, the proceedings had already lasted three years.

60. The Court further notes that the proceedings on the merits came to an end on 29 August 2002, when the judgment of the Court of Appeal was delivered. However, the applicant was unable to institute enforcement proceedings until the Court of Appeal had issued an enforcement measure on 17 February 2003. The Court also notes that the compensation was eventually paid by the State on 5 March 2003.

61. In that context, the Court observes that, for the purposes of Article 6 § 1 of the Convention, the termination of the proceedings on the merits of the claim does not always constitute an end of a “determination of a civil right” within the meaning of that provision. What is decisive is the point at which the right asserted by a claimant actually becomes “effective”, that is to say, when his civil claim is finally satisfied. Therefore, in cases such as the present one, where the party to civil proceedings has to institute enforcement proceedings in order to satisfy his or her judicially-determined claim, those proceedings must be regarded as a second stage of proceedings on the merits and, consequently, an integral part of the original proceedings

(see *Dewicka v. Poland*, no. 38670/97, § 41-43, 4 April 2000; *Zappia v. Italy* judgment of 26 September 1996, *Reports* 1996-IV, p. 1411, §§ 18-22).

62. Accordingly, the length of the proceedings to be considered under Article 6 § 1 is at least four years and nine months for two levels of jurisdiction.

2. Reasonableness of the length of the proceedings

63. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII; *Zynger v. Poland*, no. 66096/01, § 45, 13 July 2004).

42. The Court observes that the substantive law issues before the domestic courts were not complex. The Government have not offered any satisfactory explanation for the length of the proceedings, the intervals between the hearings (during the period in question only two hearings were held at first instance). There were significant delays in the proceedings, in particular between 21 August 1997 and 17 April 1998, when the court awaited a report from an expert witness and did not take any steps to oblige the appointed expert to expedite the preparation of the report. The Court also notes that one hearing was adjourned as the defendants' lawyer failed to appear. The fact that the State was the defendant in the proceedings cannot be overlooked.

64. The Court notes that the applicant, at the later stage of the proceedings, filed appeals against several decisions rejecting her appeal. She has not, however, contributed substantially to the length of the proceedings. On the other hand, the period of the proceedings before the second instance was substantially devoted to the examination of the defendant's appeal.

65. Having examined all the materials submitted to it and having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

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

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

66. The first applicant also complained of an infringement of her right to the peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 in that her property was expropriated without payment of compensation in 1953. Article 1 of Protocol No. 1 reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

67. The Court observes that Poland ratified Protocol No. 1 on 10 October 1994. In accordance with universally recognised principles of international law, a State can only be held responsible in respect of events following the ratification of the Convention. The contested decision was issued in 1953, that is prior to that date. It follows that this complaint is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to paragraph 4 of that Article (see *Futro v. Poland* (dec.), 51832/99, 12 December 2000).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

69. The applicant claimed 1,132 583 PLN in respect of pecuniary and non-pecuniary damage.

70. The Government contested these claims.

71. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. The Court considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards her EUR 1,800 under that head.

B. Costs and expenses

72. The applicant also claimed reimbursement of the costs and expenses incurred before the domestic courts and the Court.

73. The Government contested the claim.

74. 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. The Court reiterates that costs incurred before national courts may only be taken into account if they were incurred in seeking redress for

the violations of the Convention found, which was not so in the instant case (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II).

The Court considers it reasonable to award the applicant, who was represented by her husband, the sum of EUR 100 for the costs and expenses incurred in the Convention proceedings.

C. Default interest

75. 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. *Decides* to strike the application out of its list of cases insofar as it relates to the second applicant;
2. *Declares* the complaint concerning the excessive length of the proceedings up until 17 February 2003 admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros) in respect of non-pecuniary damage and EUR 100 (one hundred euros) in respect of costs and expenses, to be converted into Polish zlotys at the rate applicable on the date of payment, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 10 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President