



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

FOURTH SECTION

CASE OF MAKUSZEWSKI v. POLAND

(Application no. 35556/05)

JUDGMENT

STRASBOURG

13 January 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of Makuszewski v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 9 December 2008,

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

PROCEDURE

1. The case originated in an application (no. 35556/05) 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, Mr Cezary Makuszewski (“the applicant”), on 21 September 2005.

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

3. On 15 October 2007 the President of the Fourth Section of the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1970 and lives in Białystok.

A. The enforcement proceedings

5. On 15 May 1995 the Białystok District Court ruled that J.C. was to pay the applicant the sum of 2,977 Polish zlotys (PLN), plus statutory

interest from 23 August 1994. On 5 July 1995 the District Court issued a writ of execution in respect of the judgment.

6. On 16 October 1995 the applicant asked the bailiff of the District Court (*Komornik Sądu Rejonowego*) to institute enforcement proceedings.

7. Between October 1995 and April 1996 the bailiff of the Białystok District Court made several unsuccessful attempts to recover the debt. As it was impossible to recover the debt, on 30 September 1996 the bailiff initiated proceedings for possession of J.C.'s apartment.

8. On 29 December 1998 the applicant (at the bailiff's request) paid an advance on the fees payable to the expert responsible for valuing J.C.'s apartment.

9. The bailiff set the date for the valuation of the apartment for 15 January 1999. However, the valuation was not done until 15 July 1999.

10. In June and August 2000 the applicant submitted requests for an auction of J.C.'s apartment to be held. However, the bailiff failed to reply to the applicant's requests.

11. On 29 November 2000 the applicant again requested the bailiff to schedule a date for the first auction.

12. In reply to the request, on 6 June 2001, the bailiff requested from the applicant an advance on payment for the auction. On 9 July 2001 the bailiff stayed the proceedings because of the applicant's failure to pay. After the amount due was paid, the bailiff reopened the proceedings on 16 August 2001.

13. On 18 September 2001 the bailiff informed the applicant that J.C.'s apartment was being auctioned.

14. On 16 October 2002 the bailiff informed the applicant that the enforcement proceedings had been ineffective. The co-owner of the apartment was J.C.'s husband.

15. On 6 November 2002 the applicant requested the court to issue a writ of execution in respect of J.C.'s husband. On 7 November 2002 the bailiff stayed the proceedings.

16. On 10 March 2003 the applicant requested the proceedings to be resumed. On 23 April 2003 the bailiff granted the request. The bailiff noted that the apartment's co-owner, J.C.'s husband, was abroad and requested that a guardian be appointed for him.

17. On 11 August 2004 the bailiff requested a further valuation of the apartment. The expert informed the applicant and the bailiff that it had not been possible to enter the apartment to carry out the valuation.

18. On 29 October 2004 the bailiff requested that someone other than J.C. be named in the administration of the property.

19. On 25 July 2006 the applicant sold the debt.

B. Proceedings under the 2004 Act

20. The applicant filed a complaint with the Białystok Regional Court, alleging that there had been a breach of his right to a trial within a reasonable time. He relied on the provisions of the Act of 17 June 2004 on complaints about a breach of the right to a fair trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) (“the 2004 Act”), which entered into force on 17 September 2004. Under section 3 of the 2004 Act a complaint can be lodged during enforcement proceedings.

21. On 27 May 2005 the Białystok Regional Court dismissed the applicant’s complaint. The court held that the 2004 Act produced legal effects as from the date of its entry into force. The court acknowledged the excessive length of the proceedings as a whole and found periods of inactivity on the part of the bailiff of the District Court, especially prior to the year 2001. However, it also found that at the time of entry into force of the 2004 Act and after that date there had been no inactivity or undue delays on the part of the authorities. In that connection, the court held that there had been no breach of the right to a fair trial within a reasonable time after 17 September 2004.

C. Criminal proceedings against the applicant

22. On 6 February 2003 the Białystok District Court convicted the applicant of taking profits from prostitution and engaging in acts of mental and physical cruelty towards a prostitute. The applicant and the prosecutor appealed. The applicant stressed that he had been deprived of any opportunity to challenge the statements made by the injured prostitute, O.J., before the prosecutor or to cross-examine her. He also maintained that the authorities had made no real attempt to produce her as a witness before the court.

23. On 20 January 2004 the Białystok Regional Court upheld the impugned judgment, recognising the period spent in custody as time spent serving the sentence. It held that the alleged breach of the applicant’s procedural rights could not be sustained. The court relied on the impossibility of finding the witness and stressed the Regional Court’s attempts to find her address in Belorussia. Moreover, the court referred to the significant number of witnesses heard during the trial and found that the applicant’s conviction had not been based solely on O.J.’s statements given in the investigation phase of the proceedings.

24. The applicant lodged a cassation appeal with the Supreme Court. On 5 May 2005 the Supreme Court dismissed the appeal at a session held *in camera* without giving written reasons.

25. On 8 February 2006 the applicant requested from the Białystok District Court copies of the records produced in his case. The copies were delivered on 24 October 2006. On 8 September 2006 the applicant lodged a complaint with the Białystok Regional Court, alleging that there had been a breach of his right to² a trial within a reasonable time under the 2004 Act. On 24 October 2006 the court declined to rule on the complaint holding that the 2004 Act could not be applicable because there were no proceedings pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The relevant domestic law and practice concerning remedies for the excessive length of judicial proceedings, in particular the applicable provisions of the 2004 Act, are stated in the Court's decisions in the cases of *Charzyński v. Poland* no. 15212/03 (dec.), §§ 12-23, ECHR 2005-V and *Ratajczyk v. Poland* no. 11215/02 (dec.), ECHR 2005-VIII, and the judgment in the case of *Krasuski v. Poland*, no. 61444/00, §§ 34-46, ECHR 2005-V.

THE LAW

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

27. The 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..."

28. The Government contested that argument.

29. The period to be taken into consideration began on 16 October 1995 and ended on 25 July 2006. It thus lasted ten years, nine months and eleven days.

A. Admissibility

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

31. 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).

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

33. Having examined all the material submitted to it, the Court considers that there were particular delays in the enforcement proceedings in the years 2000 and 2001 (see paragraphs 10 and 11 above). Having regard to its case-law on the subject, the Court considers that in the instant case the overall length of the proceedings was excessive and failed to meet the “reasonable time” requirement. Furthermore, the Court considers that, in dismissing the applicant’s complaint that the proceedings in his case exceeded a reasonable time, the Regional Court failed to apply standards which were in conformity with the principles embodied in the Court’s case-law (see *Majewski v. Poland*, no. 52690/99, § 36, 11 October 2005).

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE CRIMINAL PROCEEDINGS

34. The applicant complained that the criminal proceedings against him had been unfair in that he had been unable to examine a witness whose statements had served as the main basis for his conviction. The relevant parts of Article 6 §§ 1 and 3 (d) provide as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

35. The Government did not submit observations on the admissibility and merits of the complaint.

Admissibility

1. Applicable principles

36. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaint under Article 6 §§ 1 and 3 (d) taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997 (*Reports of Judgments and Decisions* 1997-III, p. 711, § 49).

37. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others*, cited above, p. 711, § 50, and *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67).

38. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Van Mechelen and Others*, cited above, p. 711, § 51, and *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49).

39. As the Court has stated on a number of occasions (see, among other authorities, *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to statements made during the investigative stage. If the defendant has been given an adequate and proper opportunity to challenge the statements, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on statements that have been made by a person whom

the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; *Lucà v. Italy*, no. 33354/96, § 40, 27 February 2001; and *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X).

40. With respect to statements of witnesses who proved to be unavailable for questioning in the presence of the defendant or his counsel, the Court reiterates that paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps so as to enable the accused to examine or have examined witnesses against him (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII). However, *impossibilium nulla est obligatio*; provided that the authorities cannot be accused of a lack of diligence in their efforts to give the defendant an opportunity to examine the witnesses in question, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see, in particular, *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21; *Scheper v. the Netherlands* (dec.), no. 39209/02, 5 April 2005; *Mayali v. France*, no. 69116/01, § 32, 14 June 2005; and *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005). The defendant's conviction may, in any event, not be based solely or to a decisive extent on the statements of such a witness.

2. Application of the above principles

41. The Court notes that in convicting the applicant, the domestic courts relied on the statements given by O.J. at the investigative stage of the proceedings and on statements given by several other witnesses both before the prosecutor and the courts.

42. It appears from the written reasoning of the Regional Court's judgment of 20 January 2004 that the authorities made efforts to secure O.J.'s attendance at the hearing. However, in the course of the proceedings, she had moved to Belorussia, her country of origin. The efforts to hear the witness in Belorussia failed because she was not living at the address provided. The authorities were therefore unable to determine the actual address of O.J. Thus, the domestic courts could not secure the presence of O.J. at the hearing.

43. The Court readily agrees that it would have been preferable for O.J. to have been heard in person, but her unavailability could not be allowed to block the prosecution, the appropriateness of which was, moreover, not for the European Court to determine (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 28).

44. The Court finds that in view of the unsuccessful efforts to establish O. J.'s address and the subsequent impossibility to summon her, it was open to the national courts, subject to the rights of the defence being respected, to have regard to O. J.'s statements obtained by the prosecution.

45. In that connection, the Court considers that it is of cardinal importance that the applicant's conviction was not based solely or to a decisive degree on O. J.'s statements. Both the District Court and the Regional Court had regard to consistent evidence given by several other witnesses.

46. Having regard to the proceedings as a whole, the Court considers that the lack of opportunity to examine O. J. at the hearing did not, in the circumstances of the case, infringe the rights of the defence to such an extent that it constituted a breach of paragraphs 1 and 3 (d) of Article 6, taken together (see, *mutatis mutandis*, *Artner v. Austria*, cited above, pp. 10-11, §§ 22-24). The Court cannot, therefore, find that the applicant's trial as a whole was unfair. There is no appearance of a breach of Article 6 §§ 1 and 3 (d) of the Convention.

47. Accordingly, this part of the application is inadmissible as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. The applicant also complained, invoking Article 6 § 1 of the Convention, that for several months the Bialystok District Court had not granted his request for copies of the records from the criminal proceedings and therefore had infringed his right to have his case heard within a reasonable time (see paragraph 25, above).

49. The Court notes that the Convention does not as such secure a right to have documents concerning terminated proceedings submitted to an applicant.

50. It follows that this complaint 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.

51. Lastly, the applicant complained that the investigation against him had been in breach of Article 3 of the Convention and, relying on Article 13 of the Convention, he complained that his appeals in criminal proceedings had not been effective, as the courts had not taken into account the arguments that he had raised in those appeals and that the Supreme Court had dismissed his cassation appeal at a session held *in camera* and had failed to reason its decision.

52. Having examined these complaints, and regardless of other possible grounds of inadmissibility, the Court finds nothing in the case file which

might disclose any appearance of a violation of these Convention provisions.

53. As regards the complaints concerning the dismissal of the applicant's cassation appeal by the Supreme Court at a session held *in camera*, and without giving reasons, the Court notes that it has already examined similar complaints and, finding that in such cases cassation appeals are in fact examined on the merits by the Supreme Court, declared them manifestly ill-founded (see *Walczak v. Poland*, no. 77395/01 (dec.)).

54. It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 37,274 Polish zlotys (PLN) in respect of pecuniary damage and PLN 175,000 in respect of non-pecuniary damage.

57. The Government contested these claims, submitting that the amounts claimed were excessive.

58. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

59. The applicant also claimed PLN 23,887 for the costs and expenses incurred before the domestic courts and before the Court.

60. The Government contested the claim.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of 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 rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 150 for the proceedings before the Court.

C. Default interest

62. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the enforcement proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts to be converted into Polish zlotys at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 150 (one hundred and fifty euros) in respect of costs and expenses, 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President