



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF ANTONICELLI v. POLAND

(Application no. 2815/05)

JUDGMENT

STRASBOURG

19 May 2009

FINAL

19/08/2009

This judgment may be subject to editorial revision.

In the case of Antonicelli 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,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 2815/05) 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 Radosław Antonicelli, (“the applicant”), on 11 January 2005.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs. The applicant was represented by Mr T. Sak, a lawyer practising in Głubczyce.

3. The applicant complained under Article 6 § 1 read together with Article 6 § 3 (c) of the Convention that he had been deprived of access to the Supreme Court.

4. On 20 November 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974. He is currently serving a prison sentence.

6. On 9 November 2004 the Opole Regional Court convicted the applicant of manslaughter and sentenced him to fifteen years' imprisonment. The prosecution appealed.

7. On 8 December 2004 J.G., the lawyer assigned to represent the applicant under the legal-aid scheme, also submitted an appeal against the first-instance judgment, arguing that the sentence was too severe. In the same pleadings J.G. also requested the court to dispense him from his obligation to represent the applicant and to appoint another lawyer to the case.

8. In a letter of the same date he informed the applicant that, in his view, the appeal offered no reasonable prospects of success. He also stated that under no circumstances would he represent him for the purposes of cassation proceedings.

9. On 16 December 2004 the Wrocław Court of Appeal dismissed both appeals. In the proceedings before the appellate court the applicant was represented by another legal-aid lawyer, D.K.

10. On 4 March 2005 the court allowed the applicant's request for the grant of legal aid and assigned J.G. to represent him for the purposes of cassation proceedings.

11. On 15 March 2005 the second-instance judgment with the written statement of reasons was served on both the applicant and his lawyer.

12. By a letter of 16 March 2005 the lawyer requested the court to be exempted from the obligation to represent the applicant. He submitted that he had already informed the applicant that he would prepare an appeal against the first-instance judgment on the ground that in the circumstances of the case the sentence was disproportionate. He had also informed him that, in his view, this appeal offered no reasonable prospects of success. In the light of the judgment of the Court of Appeal his opinion proved justified. He also stated that he had warned the applicant that under no circumstances would he represent him for the purposes of cassation proceedings. In his view, there were no grounds on which to accept that any grounds for a cassation appeal obtained in the case. This was so because in the appeal against the first-instance judgment he had relied only on the disproportionate nature of the sentence, which could not be argued before the Supreme Court.

13. The Wrocław Court of Appeal informed the applicant of this refusal by a letter dated 22 March 2005. It was further stated that in these circumstances the only course of action left to the applicant was to request the Ombudsman to lodge a cassation appeal on his behalf. This letter was served on the applicant on 29 March 2005.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. Under the Law of 6 June 1997 - Code of Criminal Procedure (“the Code”), which entered into force on 1 September 1998, a party to criminal proceedings can lodge a cassation appeal with the Supreme Court against any final decision of an appellate court which had terminated criminal proceedings. The cassation appeal has to be lodged and signed by an advocate, on pain of being declared inadmissible. The relevant part of Article 523 § 1 of the Code provides:

“A cassation appeal may be lodged only on the grounds referred to in Article 439 [these include a number of procedural irregularities, such as, for instance, incorrect composition of the trial court; lack of legal assistance in cases where such assistance was compulsory; breach of the rules governing jurisdiction in criminal matters; trying a person *in absentia* in cases where his presence was obligatory and thus depriving him of an opportunity to defend himself, etc.] or on the ground of another flagrant breach of law provided that the judicial decision in question was affected as a result of that breach. A cassation appeal shall not lie against the severity of the penalty imposed (*niewspółmierności kary*).”

15. Pursuant to Article 524 § 1 of the Code, a cassation appeal has to be lodged with the appellate court competent to carry out an initial examination of its admissibility within thirty days from the date of service of the judgment of the appellate court with its written grounds on the party or, if the party has been represented, on his or her lawyer.

3. Legal assistance for the purposes of lodging a cassation appeal

16. Under Article 83 of the Code, an accused may appoint a lawyer to represent him or her in criminal proceedings. If he or she cannot afford lawyers’ fees, a request for legal aid may be made under Article 78 of the Code.

17. A grant of legal aid expires upon a judgment of an appellate court. A new decision on legal aid has to be made if the convicted person wishes to institute further proceedings in order to lodge a cassation appeal with the Supreme Court. The relevant part of Article 84 § 3 of the Code provides:

“A defence counsel appointed under the legal-aid scheme in the cassation proceedings ... shall prepare and sign a cassation appeal ... or shall inform the court, in writing, that he or she has not found any grounds for lodging a cassation appeal ... If a cassation appeal ... is lodged, the defence counsel is entitled to represent the defendant in the subsequent proceedings.”

18. In its decision of 17 June 1997 (V KX 57/97, OSNKW 1997/9-010/82) the Supreme Court stated that cassation proceedings had a special character in that the judgment essentially became final after it had been upheld by the appellate court. Bearing in mind the special character of these proceedings, the court was of the view that at this stage the mere fact that the convicted person was granted legal aid was sufficient to ensure an

effective exercise of his or her defence rights. It was the lawyer's task to analyse the case and establish whether there were grounds on which to lodge a cassation appeal against the judgment of the appellate court. If the lawyer was of the opinion that there were no grounds on which to do so, there was no legal basis in the Code of Criminal Procedure that would either oblige the lawyer to prepare such an appeal against his or her better judgment, or oblige the court to assign another lawyer to prepare such an appeal in the case.

19. In its decision of 25 March 1998 the Supreme Court stated that the refusal of a legal-aid lawyer to lodge a cassation appeal did not constitute a valid ground for granting retrospective leave to lodge such an appeal by another lawyer out of time (V KZ 12/98). It confirmed this ruling in a further decision of 1 December 1999. The Supreme Court observed that the court could only assign a new legal-aid lawyer to the case if it were shown that the first lawyer had been negligent in his or her task of assessing whether a cassation appeal had any prospects of success. If this were not the case, a court was not obliged to assign a new legal-aid lawyer to represent the convicted person and its refusal was not subject to appeal (III KZ 139/99).

20. In a later decision of 1 July 1999 the Supreme Court expressed the opinion that such negligence could be proved only in disciplinary proceedings instituted against a lawyer under the provisions of the Bar Act (V KZ 33/99).

21. In its decisions of 13 March and 17 September 2002 the Supreme Court expressed the view that when a legal-aid lawyer refused to represent a convicted person before the Supreme Court, the appellate court was not obliged to assign a new lawyer to the case (II KZ 11/02, II KZ 36/02).

22. On 26 February 2002 the Supreme Court changed its previous position concerning the date from which the time-limit for lodging of a cassation appeal started to run (see paragraph 15 above). It examined a particular situation where a legal-aid lawyer had refused to represent a convicted person for the purposes of cassation proceedings, finding that a cassation appeal would offer no prospects of success. It held that in such a situation the appellate court was obliged to instruct the defendant that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the lawyer's refusal and not on the earlier date when the judgment of the appellate court was served on the defendant himself. It stated that it was not open to doubt that a defendant faced with the legal-aid lawyer's refusal had a right to take other measures to seek legal assistance necessary for an effective lodging of a cassation appeal (III KZ 87/01). The Supreme Court reiterated its position in a decision of 6 May 2008 and in a number of similar decisions given in 2008. It observed that there had been certain discrepancies in the judicial practice as to the manner in which the time-limit in such situations was calculated,

but the strand of the case-law launched by the decision given in February 2002 was both dominant and correct, and also accepted by doctrine as providing to the defendants adequate procedural guarantees of access to the Supreme Court within a reasonable time-frame (II KZ 16/08).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 IN CONJUNCTION WITH ARTICLE 6 § 3 (c) OF THE CONVENTION

23. The applicant complained that as a result of the legal-aid lawyer's refusal to draft a cassation appeal he had been denied effective access to the Supreme Court. He relied on Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention. Those provisions, in so far as relevant, read:

“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: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”

A. Admissibility

24. The Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention. He should have submitted an action for damages to a civil court, claiming just satisfaction for a breach of his personal rights and loss of opportunity resulting from the lawyer's refusal to prepare and lodge the cassation appeal. The applicant did not address this issue.

25. The Court observes that the remedy referred to by the Government was merely of a retroactive character. It could only, and if the applicant had been successful, have resulted in the courts granting damages to him. Such retrospective measure alone would not have been sufficient to ensure an effective access to the Supreme Court.

26. The Court further 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

1. The parties' submissions

27. The Government submitted that the court of appeal had acknowledged the need for the applicant to obtain legal assistance for the purposes of the cassation proceedings and granted him legal aid. However, any disagreements that might have arisen between the applicant and the lawyer in connection with the issue of the lodging of the cassation appeal with the Supreme Court could not be regarded as giving rise to the State's liability. 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 lawyers' work and could not impose on a legal-aid lawyer an obligation to draw up a cassation appeal. 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.

28. They further submitted that the applicant had neither been denied access to a court nor had the refusal to prepare and lodge a cassation appeal been tantamount to a deprivation of the right to a fair hearing or of access to court. Under Polish law a cassation appeal was an extraordinary remedy, essentially intended to guarantee uniformity of application of statutes by criminal courts and not the direct protection of individual rights. In any event, the State was not obliged to ensure legal aid in every case. Moreover, the applicant's case had been examined by two levels of courts with full jurisdiction as to the facts and law and he had been granted legal aid for the purpose of those proceedings.

29. The applicant submitted that his rights had been breached in the proceedings because of the legal-aid lawyer's refusal to prepare the cassation appeal and lodge it with the Supreme Court.

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

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

30. The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same Article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom*, judgment of

10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 755, § 52; *Bobek v. Poland*, no. 68761/01, § 55, 17 July 2007).

31. The Court observes 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 *Artico v. Italy*, judgment of 30 May 1980, Series A no. 37, p. 18, § 36; *Daud v. Portugal* judgment of 21 April 1998, *Reports* 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; *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002).

32. Nevertheless, assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § 38). 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, taking the proceedings as a whole, the legal representation may be regarded as practical and effective (see, *mutatis mutandis*, *Artico*, cited above, § 33; *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 11, § 27; *Rutkowski*, cited above; *Staroszczyk v. Poland*, no. 59519/00, §§ 121-122; *Siałkowska v. Poland*, no. 8932/05, §§ 99-100, 22 March 2007).

b) Access to court

33. The Court further emphasises the importance of the right of access to a court, having regard to 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 that right would not be consonant with the object and purpose of this provision (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, § 30). 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 (see *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, 1998-I, § 34 and *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 *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001 – VIII, *mutatis mutandis*).

34. 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. The manner in which this provision 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 such courts may be more formal (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002-VII; *Staroszczyk v. Poland*, cited above, § 125 and *Siałkowska v. Poland*, cited above, § 104). 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 its obligation to provide parties to criminal proceedings with legal aid, when this is provided for 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 (see *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001).

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

35. Turning to the circumstances of the present case, the Court observes that the Polish law of criminal procedure requires that a person whose conviction has been upheld by an appellate court should be assisted by a lawyer in the preparation of his or her cassation appeal against a judgment given by that court. The Court reiterates that the requirement that an appellant be represented by a qualified lawyer before a court of cassation cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as the highest court in Poland 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 *Vacher v. France*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2148-49, §§ 24 and 28; *Staroszczyk v. Poland*, cited above, § 128).

36. The Court further notes that in the present case the second-instance judgment with the written statement of reasons was served on both the applicant and his lawyer on 15 March 2005. By a letter of 16 March 2005

the lawyer requested the court to be exempted from the obligation to represent the applicant, referring to the lack of prospects of success which a cassation appeal in the applicant's case would offer. The Białystok Court of Appeal informed the applicant of this refusal by a letter dated 22 March 2005. This letter was served on the applicant on 29 March 2005.

37. The Court notes that the Polish Supreme Court, in its decision of 17 June 1997 stated 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 concluded that it was permissible for a legal-aid lawyer assigned to a criminal case to refuse to prepare and lodge a cassation appeal and reiterated this conclusion in its subsequent case-law (see paragraphs 18 - 21 above). From the standpoint of Article 6 of the Convention and bearing in mind the nature of a cassation appeal in the context of criminal proceedings, the Court cannot but endorse this conclusion (see *Staroszczyk v. Poland*, cited above, § 113, *mutatis mutandis*).

38. In this connection, the Court emphasises that it is the responsibility of the State to ensure the requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other (see *Siałkowska v. Poland*, cited above, § 112; *Staroszczyk v. Poland*, cited above, § 133). The mere fact that a legal-aid lawyer can refuse to represent a defendant in proceedings before the highest court cannot be said to be, of itself, tantamount to a denial of legal assistance which is incompatible with the State's obligations under Article 6 of the Convention.

39. The Court further reiterates that although admissibility conditions for appeals are necessary to ensure legal certainty and a proper administration of justice and litigants should normally expect those rules to be applied, a particularly strict interpretation of a procedural rule may deprive an applicant of the right of access to a court (see *Běleš and others v. Czech Republic*, no. 47273/99, § 60, 12 November 2002; *Zvolský and Zvolská v. Czech Republic*, no. 46129/99, 12 November 2002; *Kemp and Others v. Luxembourg*, no. 17140/05, § 42, 24 April 2008, *mutatis mutandis*).

40. In this connection, the Court observes that the Supreme Court in a series of decisions noted the difficulties which could arise for the defendant in securing an effective access to the cassation court where the grant of legal aid for the purposes of cassation proceedings had been made but the legal-aid lawyer subsequently concluded that a cassation appeal offered no prospects of success. The Supreme Court has examined the manner in which the beginning of the relevant time-limit should be determined in such special circumstances. It held, in its decision of 26 February 2002, that following a legal-aid lawyer's refusal to prepare a cassation appeal the event triggering the running of the relevant time-limit should be established in

such a way as to accommodate the defendant's situation so as not to deprive him of a practical possibility of having his or her case examined by the Supreme Court. Hence, it held that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was informed of the lawyer's refusal, not when the lawyer was served with the judgment of the second-instance court.

41. The Court further notes that in 2008 the Supreme Court stated that this strand of the case-law was not only correct as providing adequate procedural guarantees to the defendant, but also represented a clear reflection of the prevailing judicial practice.

42. In the present case the applicant was served with the lawyer's refusal on 29 March 2005 and in the light of the case-law of the Supreme Court referred to above (see paragraph 27 above) the thirty-day time-limit started to run on that date. It cannot therefore be said that the applicant was put in a position where he was left with so little time to have a cassation appeal in his case prepared that he was denied a realistic opportunity of having his case brought to and argued before the cassation court (compare and contrast with *Siałkowska*, cited above, §§ 11- 155, where the applicant had only three days left). It has not been shown or argued that in these circumstances it would have been impossible for the applicant to find a new lawyer to represent him.

43. In this connection, the Court notes that the applicant had been found eligible for assistance by a legal-aid lawyer. The domestic court had thereby acknowledged that he could not bear the costs of a privately hired lawyer (see paragraphs 7 and 16 above). The Court is aware that under the case-law of the Supreme Court the mere refusal of a legal-aid lawyer to prepare a cassation appeal did not constitute a sufficient ground for a new lawyer to be assigned to the case under the legal-aid scheme (see paragraphs 19 – 22 above). However, the Court is of the view that Article 6 of the Convention does not confer on the State an obligation to ensure assistance by successive legal-aid lawyers for the purposes of pursuing legal remedies which have already been found not to offer reasonable prospects of success. In the present case the lawyer appointed under the legal-aid scheme found no legal grounds on which to prepare a cassation appeal. In the absence of indications of arbitrariness or negligence on the lawyer's part in discharging his duties, the State can be said to have complied with its obligations to provide a framework for the provision of legal aid in connection with the cassation proceedings.

44. However, the Court notes that under the Supreme Court's decision of 22 February 2002 the Katowice Court of Appeal was obliged to instruct the applicant that the time-limit for lodging a cassation appeal started to run only on the date when he was served with the lawyer's refusal. The court failed to comply with that obligation.

45. The Court is therefore of the view that, to that limited but crucial extent, the relevant procedural framework available under Polish law as from February 2002 was deficient in the applicant's case. The failure of the Katowice Court of Appeal to inform the applicant, who was not represented by a lawyer, of his procedural rights meant that he had no way of knowing that he had a new time-frame within which to find a lawyer who might be persuaded to file a cassation appeal on his behalf. The Court notes in this connection that the procedural framework governing the making available of legal aid for a cassation appeal in criminal cases, as described above, is within the control of the appellate courts. When notified of a legal-aid lawyer's refusal to prepare a cassation appeal, it is entirely appropriate and consistent with fairness requirements, that an appeal court indicate to an appellant what further procedural options are available to him or her. The Supreme Court's case-law stresses this point. However, in the instant case this requirement was not complied with, with the result that the applicant's right of access to the Supreme Court was not secured in a "concrete and effective manner".

46. Accordingly, having regard to the above deficiency, there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

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

47. The applicant complained, relying on Article 6 of the Convention, that the proceedings had been unfair in that the courts had wrongly assessed evidence, erred in establishing the facts of the case and incorrectly applied applicable domestic law.

48. However, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

49. In the present case, even assuming that the requirement of exhaustion of domestic remedies was satisfied, the Court notes that the applicant did not allege any particular failure to respect his right to a fair hearing on the part of the relevant courts. Indeed, his complaints are limited to a challenge to the result of the proceedings. Assessing the circumstances

of the case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant submitted that the prison sentence imposed on him should have been equal to that imposed on the other accused in the same case. He claimed 52,000 Polish zlotys (PLN) in respect of the pecuniary damage which he had suffered as a result of the excessively severe sentence. The amount of damage was calculated on the basis of lost income which he would have earned during the period exceeding the sentences imposed on the other co-accused in his case. The applicant did not make any claim for moral damage.

52. The Government submitted that the applicant’s claim for pecuniary damage was exorbitant and, in any event, irrelevant to the complaint concerning the legal-aid lawyer’s refusal to prepare and lodge a cassation appeal.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

B. Costs and expenses

54. The applicant claimed EUR 550 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

55. The Government contested this claim.

56. The Court notes that the applicant was paid EUR 850 in legal aid by the Council of Europe. Having regard to the applicant’s submissions, it considers that no reimbursement of costs and expenses over and above that amount is called for.

C. Default interest

57. 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* admissible the applicant's complaint concerning lack of access to a court and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c);
3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinions of Judges Bonello and Mijović are annexed to this judgment.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BONELLO

1. The facts of this case disclose that the applicant, a defendant in a criminal trial, had requested his legal-aid lawyer to lodge a cassation appeal against the judgement of the appellate court. The lawyer, barely two days before the lapse of the original period allowed by law for filing the appeal, informed the applicant that his case “lacked prospects of success and that he therefore refused to prepare and lodge one with the Supreme Court”.¹ I am dissatisfied with the reasoning the Court adopted to find a violation of Article 6. In my view, the applicant’s rights were violated not solely because the Wrocław Court of Appeal failed in its obligation to inform him of an extended time limit to file a cassation appeal, as the Court found, but for far more radical reasons.

2. To me the facts in themselves reveal a grievous violation of the applicant’s right of access to a court. Once the Polish legal system has put in place an ultimate recourse to cassation in criminal proceedings, to signify anything at all, this right has to be a meaningful (“practical and effective”) one, and not one dependent exclusively on the unfettered and unreviewable caprice of one single non-judicial person.² If the right to have recourse to the Court of Cassation exists in the Polish system, the guarantees of Article 6 had to be complied with. Moreover, when the state is under an obligation to provide legal aid, this must be done in a manner that secures the beneficiaries “the genuine and effective enjoyment of the rights guaranteed under Article 6”.³

3. This Court has acknowledged the importance of not making the lodging or non-lodging of cassation appeals in civil proceedings depend exclusively on the whims of legal-aid lawyers. It has found a violation of Article 6 when the applicants’ right of access to a court for a cassation review in civil litigation was thwarted by last-minute refusals of legal-aid lawyers to proceed with the appeal.⁴ I see as inconsequential the expectation of high standards in civil proceedings and of lower ones in criminal trials. If anything, what applies to civil proceedings should apply more forcefully still to criminal ones.

4. The Polish legal system establishes (a) the *right* of a cassation appeal in criminal trials; (b) that this *right* can only be exercised through the patronage of legal counsel; (c) the *right* of appellants to the Court of Cassation of restricted means to a legal-aid lawyer. In this case, the Polish courts accepted that the applicant’s indigence justified his request to be assisted by a legal-aid lawyer to prepare and plead his cassation appeal.

¹ At § 12.

² At § 31: “A lawyer, even if officially appointed, cannot be considered to be an organ of the state”.

³ *R.D. v. Poland*, 18 December, 2001.

⁴ *Sialkowska v. Poland*; *Staroszczyk v. Poland*, 22 March 2007.

5. The Polish courts have attached such a determining value to criminal cassation appeals that they have extended the time limit (30 days) for lodging such an appeal when the appellant is assisted by a legal-aid lawyer. It starts running not from the date the lawyer is served with the judgment by the second-instance court, but only from the date on which the defendant was informed of the lawyer's refusal.⁵ The motivation behind this reasoning may have been admirable. Its factual consequences – giving the appellant sufficient time to employ a private lawyer against payment – disastrous, as I will suggest in paragraph 11.

6. In my view the present judgement has emptied of any real substance the right of access to a court. Cumulatively, the three *rights* established by the Polish legal order (v. paragraph 4) have, in practice, morphed into the more overriding right of any legal-aid lawyer to have the first and the last word, and all the other words in between. From today onwards it is not the Court of Cassation that decides on the validity or otherwise of the grounds for cassation. That has been left exclusively – and irrevocably – to the more-or-less inspired fancies of any legal-aid lawyer. The ultimate bulwark of cassation review, willed by the Polish legal system, has been irretrievably weakened by delegating the destiny of impecunious and often petulant clients to the benevolence or otherwise of underpaid and sometimes resentful lawyers.

7. The fundamental right of access to a court hangs solely on the goodwill of a lawyer almost coerced to work for a pittance, rather than on any objective evaluation of merit conducted by an independent and impartial authority. This right has been forsaken to the often merciless mercy of one legal-aid adviser, cheerfully unrestrained by the most minimal checks and balances. The legal-aid lawyer, solo, determines all of this, and some lawyers are known not to be immune from a well-crafted commercial sense of humour. It has not been pointed out by the respondent Government that any legal-aid lawyer has ever been sanctioned for a capricious refusal to lodge a cassation appeal in a criminal trial. Untouchable if they decide well, equally untouchable if they decide irresponsibly. The twentieth century has removed infallibility from the Holy Roman Pontiff and bestowed it on Polish legal-aid lawyers.

8. This delegation of the very ultimate line of defence to the unchallenged discretion of legal-aid lawyers appears more than merely threatening. In refusing to prepare and to lodge a cassation appeal, lawyers are not bound to provide explanations. Their line of reasoning, if it can be charitably so called, may forever remain a well-kept secret. You can't appeal because the legal-aid lawyer says you can't. And why does he say you can't? Because he says you can't, stupid. The domestic courts have

⁵ At § 22.

absolutely no say in it. Nor does the European Court of Human Rights want any.

9. In the present case, the lawyer was allowed to shield his inaction by relying on a formula as hackneyed as it is meaningless: “a cassation appeal offered no reasonable prospects of success”. No reference to stringent argument, to authoritative precedent, no judicial doctrine to comfort his conclusions – just his unsupported ‘opinion’, and next one please. Was his discretion subject to any review? No. Did he give any reasons? No. Did the Cassation Court have any input in his decision? No. Did the applicant have any redress? No. Is he the one and ultimate arbiter? Yes. Only a small minority of the Court seems to have been upset by this concentrate of approved arbitrariness. I *was* upset, but then, I confess, I am sometimes guilty of the unpleasant misdemeanour of straying from the paths of legalism and intruding into reality.

10. What rules is the dictatorship of the legal-aid lawyer. What governs is the tyranny of the unfettered discretion of a person not answerable to anyone. The domestic Court of Cassation exhausts its liability by the mere appointment of a legal-aid lawyer. How those legal-aid lawyers, assigned for the specific purpose of lodging a cassation appeal, discharge their responsibilities, is then nobody’s business. If they discharge it properly, fine. If not, tough luck, but fine all the same. Their whimsy reigns supreme, and this Court of human rights is happy it should be so. It is happy that legal-aid lawyers have absolute power, and no commensurate responsibility. A totality of power that would not disgrace anyone proud to be totalitarian.

11. I find less than convincing the reasoning that, if informed in good time, the would-be appellants to the Court of Cassation can get themselves a private lawyer against payment, if the legal-aid lawyer deserts the cause. An applicant is granted legal aid *only* because the domestic court is satisfied he does not have the means to hire a paid lawyer. Then, after being officially certified indigent by the state, that state invites the appellant to hire and pay for a lawyer to safeguard his rights. A wonderfully consequent way for a state to follow through its own findings - in the view of those who believe that saying white and black in the same breath demonstrates the virtues of versatility.

12. Once the court had acknowledged the applicant’s right to legal aid, arguing that paid services are an acceptable fall-back, is bringing consistency into disrepute and wrecking the very basic architecture of legal aid. Is there a whiff of plutocratic discrimination in all this? Wealthy defendants who pay their lawyer have access to the Court of Cassation for their ultimate defence. Those of limited means, only if their lawyer wakes up in a good mood.

13. This appears to me to have been the right occasion in which, if an equitable solution contrasted with some previous case-law of the Court, the

Chamber should have relinquished jurisdiction in favour of the Grand Chamber.⁶

14. Of course, we can all agree that the right of access to a court - the core issue in this complaint - is not absolute, and may be subject to limitations. But the Court “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”. Oh holy, noble, and meaningless mantras. I do not see that the essence of the right of access of the applicant to the Court of Cassation was “impaired”. It was totally and completely wiped out. The legal community would be eternally thankful to anyone who pointed out what scraps of the right of access to the Court of Cassation were left to the applicant. I have looked for them hard and with plenty of perseverance at the beginning, and I am still looking for them now.

⁶ Article 30.

CONCURRING OPINION OF JUDGE MIJOVIĆ

While I fully support Judge Bonello's arguments expressed in his concurring opinion, I feel compelled to emphasise a few further points since I see the problem of the refusal of lawyers appointed under the legal-aid scheme to represent legally-aided persons on the ground that a claim has no reasonable prospects of success as the general one. Additionally, I do not see this problem as related exclusively to criminal proceedings. It also concerns both civil⁷ and administrative ones, although the facts of this case do not allow me to extend my opinion to such proceedings.

Proceedings concerning the lodging of a cassation appeal against the judgment of the appellate court in this case started with the Wrocław Court of Appeal's appointment of a legal-aid lawyer for the purposes of the cassation proceedings. The letter containing both the legal-aid lawyer's decision not to lodge a cassation appeal and the court's decision not to appoint another legal-aid lawyer was served on the applicant two weeks before the time-limit for lodging a cassation appeal was to expire. However, subsequently the Court of Appeal failed to instruct the applicant that under the case-law of the Supreme Court that time-limit started in fact to run only on the date when he was served with the lawyer's refusal, and that was the main reason for the Chamber to find a violation of Article 6, in accordance with the Court's case-law⁸. However, in my view, the refusal by a lawyer appointed under a legal-aid scheme to prepare grounds of appeal for consideration by the Supreme Court, as well as the requirements for lodging a cassation appeal, are issues that represent a breach of the applicant's right of access to the court and reflect the existence of a serious problem in the legal-aid scheme set up by the Polish legislation in general.

While there are no doubts that it is legitimate for the State to determine that legal aid should be available for some types of proceedings and not for others, the limitations applied must not restrict the access left to the individual in such a way that the very essence of the rights guaranteed by Article 6 is impaired. The applicant in this case complained that as a result of the legal-aid lawyer's refusal to lodge a cassation appeal he had been denied effective access to the Supreme Court. The provisions of Article 6 stipulate that everyone charged with a criminal offence has, among other rights, a right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

As far as I understand the practice of the Supreme Court, once the legal-aid lawyer refuses to lodge a cassation appeal the court could assign a new legal-aid lawyer only if it had been shown that the first lawyer had been

⁷ There are more than 120 such cases pending before the European Court of Human Rights

⁸ *Siałkowska v. Poland*, no. 8932/05, 22 March 2007

negligent in his task of assessing whether a cassation appeal had any prospect of success. The negligence of the first legal-aid lawyer, additionally, had to “be shown” in separate civil proceedings against the lawyer for compensation, the applicant being required to prove that the court should, in the circumstances, have assigned a new legal-aid lawyer. To my mind, this part of the legal-aid scheme is simply too far removed from what I would consider sufficient to ensure effective access to the court.

While it is true that the right to a court, of which the right of access constitutes one aspect⁹ is not absolute but may be subject to limitations, and that the States in these matters surely enjoy a certain margin of appreciation¹⁰, these limitations are not compatible with Article 6 provisions if there is no legitimate aim at issue and if there is a lack of proportionality between the means employed and the aim sought to be achieved¹¹. 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.¹²

These principles of the Court’s case-law are correctly stated in the Chamber’s judgment. Nevertheless, in my opinion, they should have been further developed and taken a step further in order to criticise the conceptual confusion surrounding the domestic provisions governing the legal-aid scheme, namely the fact that under the applicable domestic regulations the legal-aid lawyer is not obliged to prepare a written legal opinion on the prospects of success of the appeal and, moreover, the law does not set any standards as to the quality of the legal advice that has to be given to justify the lawyer’s refusal to lodge the appeal.

Furthermore, I strongly believe that the decision whether a case offers reasonable prospects of success should not be taken by a legal-aid lawyer. I would stress in this connection that the right of access to the Supreme Court should be based on the idea that each and every individual should be granted the right to state his case before a last-instance jurisdiction if she or he considers that the law has been violated or misinterpreted by the lower courts. Giving a right to a legal-aid lawyer to decide on the fate of the case even before it is brought before the Supreme Court and without any written reasons for that decision, is, for me, arbitrary, even, as Judge Bonello pointed out, capricious. Of course, a legal-aid lawyer’s opinion should matter. However, I see legal-aid more in terms of free legal *representation* than legal advice or, even worse, only the legal (and very personal) *attitude* of an individual having no judicial status. Additionally, as a Judge, I find the formula “in a legal-aid lawyer’s opinion, a cassation appeal lacked

⁹ *Golder v. the United Kingdom*, judgment of 21 February 1975

¹⁰ *Vasilakis v. Greece*, judgment of 17 January 2008

¹¹ *Ashingdane v. the United Kingdom*, judgment of 28 May 1985; *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998

¹² *Staroszczyk v. Poland*, judgment of 22 March 2007

prospects of success” not only arbitrary, but offensive and prejudicial, especially bearing in mind the fact that the Court of Appeal in this case relied on this “opinion” by refusing the applicant’s requests for the appointment of a new legal-aid lawyer and thereby finally preventing the applicant from having his case decided by the highest judicial authority. That is what I see as the essence of this problem and that is why I think that the European Court’s case-law should have dealt with this situation more carefully instead of finding a violation of Article 6 for the sole reason that the time-limits set by the Polish legislation had not been respected.