



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

1959 · **50** · 2009

FOURTH SECTION

CASE OF SELIWIAK v. POLAND

(Application no. 3818/04)

JUDGMENT

STRASBOURG

21 July 2009

FINAL

21/10/2009

This judgment may be subject to editorial revision.

In the case of Seliwiak 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,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges*,
and Lawrence Early, *Section Registrar*,
Having deliberated in private on 30 June 2009,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 3818/04) 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 Maciej Seliwiak (“the applicant”), on 16 January 2004.

2. The applicant, who had been granted legal aid, was represented by Mr Z. Szymański, a lawyer practising in Łódź. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his right to a fair trial had been violated in that the appeal hearing in his criminal case had been held in his absence. He further 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 2 April 2008 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 1962. He is currently serving a prison sentence in Łęczyca prison.

1. First set of criminal proceedings

6. On 25 July 2000 the applicant was arrested and his apartment was searched by the police. He was subsequently remanded in custody from 27 July 2000 until 31 May 2001. In a judgment of 8 January 2002 the Kutno District Court found the applicant guilty of burglary and sentenced him to three and a half years' imprisonment. The applicant, who was at that time in detention for the purposes of another criminal case against him, was represented before the court by a legal-aid lawyer, M.M.

7. On an unknown later date the lawyer submitted his appeal to the court. By a letter of 4 July 2002 the court, apparently unaware of the fact that the applicant remained in detention in connection with another criminal case, informed the applicant that the appeal submitted by the lawyer had been declared admissible. This letter was sent by registered letter to the applicant's home address and served on his wife. The court considered it to have been properly served on the party as required by the applicable laws. The appeal itself was neither sent to the applicant nor served on him.

8. On 15 May 2003 the court sent another letter to the applicant's home address, informing him that his legal-aid lawyer had been replaced by another one, A.L. This letter was not collected from the post office within the statutory period and was returned to the registry of the court. The court considered, in compliance with the applicable provisions of criminal procedure, that it had been properly served on the applicant.

9. Subsequently, the court sent a summons to the hearing before the appellate court to the applicant's home address. It was not served on him as he remained in detention.

10. The new legal-aid lawyer did not get in touch with the applicant. The applicant learned from one of the inmates in Łowicz prison that an appeal had been lodged in his case and that a hearing was soon to be held. On 15 July 2003 he wrote a letter to the court requesting it to postpone the hearing and to be brought before the court. He also submitted his own arguments in support of the appeal.

11. On 17 July 2003 a hearing was held, in the applicant's absence, before the Łódź Regional Court. The court dismissed the lawyer's appeal.

12. On 28 July 2003 the applicant was informed by the registry of the court that his request of 15 July and his appeal had been submitted to the

court after the hearing of 17 July 2003. On the same day the applicant complained to the court that he had been unable to participate in the hearing.

13. On 8 August 2003 a copy of the judgment given by the appellate court was sent to the prison where the applicant was detained at that time.

14. On 14 August 2003 the applicant requested legal aid for the purpose of preparing a cassation appeal against the judgment of 17 July 2003. On the same day he submitted a detailed complaint to the Łódź Court of Appeal about the fact that he had not been properly notified of the hearing, that the legal-aid lawyer had been replaced without his knowing it, that he had neither been served with a copy of the appeal nor informed that it had been accepted for examination, and that he could not participate in the hearing. He was of the view that his defence rights had thereby been breached and that the conviction was in any event not safe, given the errors committed by the first-instance court in the assessment of the evidence.

15. On 8 September 2003 A.L., the same lawyer who had represented the applicant before the appellate court, was assigned to the case. On the same day the court, referring to Article 448 § 1 of the Code of Criminal Procedure, informed the applicant that he had not been entitled in law to have a copy of the lawyer's appeal served on him, and that the summons had been served at his home address.

16. On 11 September 2003 the applicant submitted his own cassation appeal to the Supreme Court. He reiterated the procedural complaints which he had made in respect of the appellate proceedings. He also argued that the court had failed to take into consideration circumstances pointing to his innocence.

17. On 12 September 2003 the applicant was informed that he had been granted legal aid for the purposes of the cassation proceedings. On 22 September 2003 A.L. notified the court and the applicant that he had found no grounds on which to prepare a cassation appeal. The applicant was served with this letter on 25 September 2003.

18. On 26 September 2003 the applicant lodged a complaint against A.L. with the Łódź Bar Association. He submitted, essentially, that he should not have been assigned to represent him in the cassation proceedings, given what had happened in the proceedings before the appellate court. On the same day he requested the court to accept his own cassation appeal for examination.

19. The Bar Association answered on 17 October 2003, stating that A.L. had been right to refuse to prepare a cassation appeal in the applicant's case.

20. On 26 September 2003 the applicant lodged further pleadings in support of his cassation appeal dated 11 September 2003 (see paragraph 16 above).

21. On 3 October 2003 the Łódź Regional Court refused to accept the applicant's cassation appeal as it had not been prepared and signed by a

lawyer as required by law. The applicant appealed. On 4 November 2003 the court summoned him to have that appeal submitted by a lawyer.

22. By a letter of 17 October 2003 the Łódź Regional Bar Association informed the applicant that a legal-aid lawyer was, under the applicable laws, entitled to refuse to prepare a cassation appeal.

23. On 18 December 2003 the Łódź Regional Court refused to accept for examination the applicant's appeal against the decision of 3 October 2003, finding that it should have been submitted by a lawyer. On 17 March 2004 an appeal by the applicant against that decision was dismissed by the Supreme Court.

2. Second set of criminal proceedings

24. On 11 February 2002 the Gostynin District Court found the applicant guilty of attempted car theft and sentenced him to two years' imprisonment. The applicant appealed. On 19 June 2002 the Płock Regional Court dismissed the appeal.

25. On 23 June 2003 the applicant issued a request to have both judgments quashed and his case re-examined by the first-instance court. He argued that new evidence had emerged, namely the statement of K.S., who had confessed to the crime of which the applicant had been found guilty.

26. On 21 November 2003 the Warsaw Court of Appeal dismissed the request. The court found K.S.'s statement "implausible".

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Presence of an accused at a hearing before the appellate courts

27. In 1997 a new Code of Criminal Procedure was enacted. Article 451 of the Code provided that an appellate court could order that a defendant be remanded in custody (under Polish law remand in custody is terminated only by a second-instance judgment) and be brought to the courtroom to attend a hearing before that court.

Article 452 of the Code of Criminal Procedure reads:

"§ 1. A court of appeal shall not be allowed to conduct evidentiary proceedings pertaining to the merits of the case.

§ 2. In exceptional cases the appellate court may, if it finds the completion of a judicial examination necessary, nevertheless accept new evidence directly at the hearing, if this will expedite the judicial proceedings and there is no necessity to conduct the whole of the proceedings, or a major part thereof, anew. Before the hearing the court may issue an order on the admission of evidence."

28. In 1999 the Supreme Court adopted a resolution stating that during a hearing before an appellate court a defendant should at least have an

opportunity to defend him- or herself, or to be represented by a defence lawyer (5 October 1999, IV KKN 334/99).

29. In a judgment of 29 March 2000 the Supreme Court stated that it was mandatory to bring the defendant to a hearing before the appellate court, regardless of whether he or she had made a relevant request (V KKN 111/98).

30. In a judgment of 4 October 2000 the Supreme Court stated that in cases in which the arguments made in the statement of appeal were limited to challenging exclusively the legal aspects of a case or where only the sentence was challenged, a decision not to bring a defendant represented by a lawyer before the appellate court was correct (III KKN 164/2000).

31. In July 2000 Article 451 of the Code was amended, in response to the Court's judgment in the case of *Belziuk v. Poland* (*Reports of Judgments and Decisions* 1998-II). The amended provision read:

"The appellate court shall order an accused, who is detained, to be brought to the appellate hearing, unless it finds that the presence of his lawyer is sufficient. If the court decides not to bring an accused who has no defence counsel to the hearing it shall appoint for him *ex officio* a legal-aid lawyer."

32. In 2001 the Supreme Court examined the Ombudsman's request for clarification of issues relating to the presence of the accused at the appeal hearing. In its resolution of 18 October 2001 the court expressed the view that the right to a fair hearing demanded that the person convicted by the first-instance court should be informed of his right to request to be brought before the appellate court, and should be brought to such a hearing. The Supreme Court stated:

"...Finally, it should be underlined that even if the accused requests to be brought to an appeal hearing, the court may establish that the presence of the lawyer at the appeal hearing would be sufficient. If the accused does not have counsel, it is necessary to appoint a legal-aid lawyer for him, whose presence at the hearing would be obligatory. It should however be noted that if an accused deprived of liberty requests to be brought to an appeal hearing, granting such a request should be a rule... Finding that the presence of the lawyer would be sufficient could occur in particular if the appeal hearing concerned only questions of law."

33. On 1 July 2003 extensive amendments to the Code of Criminal Procedure, adopted in February 2003, entered into force. Under Article 451 as amended it became obligatory for an appellate court to inform the accused of his or her right to request leave to attend the hearing before that court. However, proceedings in which hearings before the trial court started before 1 July 2003 were to be governed by the provisions of the Code as they stood before that date.

2. Cassation appeal

34. The Supreme Court has examined, in numerous judgments, cassation appeals based on the allegation that the absence of an accused at the appeal

hearing was a flagrant breach of law that could significantly affect the substance of the ruling in question, within the meaning of Article 523 of the Code of Criminal Procedure.

35. The Supreme Court on many occasions found that a refusal to bring the accused to the appeal hearing was a flagrant breach of law that could significantly affect the substance of the second-instance judgment. In such cases, the Supreme Court quashed the appeal judgment and remitted the case (judgment of 10 August 2000, III KKN 192/00, judgment of 5 June 2001, III KKN 28/01). In a decision of 8 March 2006 the Supreme Court held that when the defendant remanded in custody was unable to have effective contact with his legal-aid lawyer and was not summoned to the hearing before the appellate court because the summons had been sent to his home address, the defendant's defence rights had been breached. This breach was of such a serious character that the judgment of the appellate court given in the applicant's absence, even when he was represented by the lawyer, had to be quashed.

36. 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. Legal representation for the purposes of cassation proceedings is mandatory. 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).

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

37. 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.

38. 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."

39. 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 to oblige the court to assign another lawyer to prepare such an appeal in the case.

40. 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). The Supreme Court reiterated its position in a number of other decisions (e.g. II KZ 11/02, II KZ 36/02).

4. Service of court correspondence

41. The Code of Criminal Procedure provides as follows:

Article 131 § 1

“Summonses, notices and other court correspondence whose date of service activates the running of procedural time-limits shall be served on the addressee by mail or by personal delivery by an official of the agency effecting the service, or if necessary by the police. (...)”

Article 132

“§ 1. Documents shall be served personally on the addressee.”

§ 2. If the addressee is temporarily absent from his or her address, a document shall be served upon an adult member of the household of the addressee (...)”

Article 133 § 1

“If service cannot be effected as prescribed in Article 132, the document dispatched by mail shall be left with the nearest post office (...)”

§ 2. The person serving the court document shall notify the addressee that it has been left [at the post office] by affixing a relevant notice to the door of the addressee's

apartment, specifying where and when the document has been left and stating that it should be collected within seven days.”

Article 134 § 2

“Addressees deprived of their liberty shall have the document served through the administration of the penal institution.”

Article 136 § 1

“If an addressee declines to accept the document, or refuses or is unable to sign the receipt, the person effecting the service shall make an appropriate note on the receipt and service shall then be considered to have been effected.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 IN CONJUNCTION WITH 6 § 3 (c) OF THE CONVENTION CONCERNING THE HEARING HELD BEFORE THE APPELLATE COURT

42. The applicant complained that the proceedings in his case had been unfair and his defence rights had been seriously limited because he could not attend the only hearing held before the appellate court. He relied on Article 6 §§ 1 and 3 (c) of the Convention.

43. Given that the requirements of paragraph 3 (c) represent specific aspects of the right to a fair hearing guaranteed by Article 6 § 1, the Court will examine the applicant’s complaints in the light of the two texts taken in combination (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I, and *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 31-32, § 62). These provisions, in so far as relevant, read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law. ...

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 does not have the means to pay for legal assistance, to be given it free when the interests of justice so require;”

A. Admissibility

44. The Government argued that the applicant had failed to avail himself of the applicable domestic remedies. He should have requested the Ombudsman to submit a cassation appeal on his behalf or, failing that, should have hired a lawyer for that purpose. In so far as the applicant could be understood as complaining about the legal-aid lawyer's refusal to prepare and lodge a cassation appeal on his behalf, they were of the view that any disagreements that might have arisen between the applicant and the lawyer 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.

45. The applicant disagreed. He submitted that a request either to the Ombudsman or to the Minister of Justice to submit a cassation appeal on a defendant's behalf could not be qualified as a normal remedy. The applicant had not had the financial means to appoint a lawyer of his choice. Moreover, as he had been in detention throughout the proceedings concerned, he had experienced serious difficulties in having his defence rights protected in practice. As the legal-aid lawyer refused to prepare a cassation appeal against the judgment of 17 July 2003 and lodge it within the Supreme Court, the applicant had no other remedy which he could possibly pursue.

46. The purpose of the exhaustion rule, contained in Article 35 § 1 of the Convention, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Accordingly, this rule requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach (see, among many other authorities, *İçyer v. Turkey* (dec.), no. 18888/02, 12 January 2006). However, discretionary or extraordinary remedies need not be exhausted (see, among many other authorities, *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002). Hence, the Court is of the view that the applicant should not be required to avail himself either directly or through the intermediary of the Minister of Justice, of a request to the Ombudsman, which the Court has found in previous cases to be a discretionary remedy.

47. In so far as the Government have argued that to exhaust domestic remedies the applicant should have lodged a cassation appeal with the Supreme Court, the Court observes that under Polish law a cassation appeal can be brought by a party alleging a flagrant breach of any substantive or

procedural provision of law capable of affecting the substance of the judgment (see *Dobrowolski v. Poland* (dec.), no. 17842/02, 7 March 2006). The cassation appeal was therefore a remedy whereby the applicant could have effectively submitted the substance of his complaint to the Supreme Court and sought relief.

The Court further notes that legal representation was mandatory for the purposes of preparing a cassation appeal. However, in the applicant's case the legal-aid lawyer refused to prepare a cassation appeal against the judgment of the appellate court, finding no legal grounds on which to do so. The Court notes that the applicant does not complain about the lawyer's refusal to file a cassation appeal and the impact which this had on his right of access to the Supreme Court (compare *Staroszczyk v. Poland*, no. 59519/00 and *Siałkowska v. Poland*, no. 8932/05, 22 March 2007). The Court further notes that the courts, by granting the applicant legal aid, acknowledged his lack of financial resources. In such circumstances, the Court considers that the applicant should not therefore have been required to embark on further attempts to obtain legal assistance with a view to lodging a cassation appeal.

Accordingly, the Court confirms that, for the purposes of Article 35 § 1 of the Convention, the applicant has exhausted domestic remedies. The Government's preliminary objection must therefore be rejected.

48. 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

49. The Government submitted that the applicant had attended the hearing when the judgment of the first-instance court had been pronounced. He had therefore had an opportunity to agree with his legal-aid lawyer the arguments to be submitted in an appeal against that judgment. Moreover, the applicant was aware of the fact that he could have submitted the appeal himself as legal representation in the appellate proceedings was not mandatory, but he did not avail himself of that right.

50. They further argued that after the first-instance judgment had been given the Łódź Regional Court had informed the applicant by letter about the replacement of his legal-aid lawyer (see paragraph 8 above). The applicant had neither been deprived of legal assistance nor had the latter been ineffective, given that the first legal-aid lawyer had lodged an appeal against the judgment given by the trial court. Had the applicant been dissatisfied with the assistance of that lawyer, he should have requested that

he be replaced by another lawyer. Moreover, the appellate court was under no legal obligation to send a copy of the appeal prepared by the legal-aid lawyer to the applicant.

51. They concluded that the proceedings were fair and the applicant's defence rights had not been breached. As he had at that time been involved in approximately twenty different sets of criminal proceedings, he could have been aware of the procedural steps to be taken in order to ensure effective service of the court summons on him.

52. The applicant submitted that the Kutno District Court, when sending him the letter informing him that his appeal had been accepted for examination, had acted on the assumption that he was living at home at the time. Likewise, later on, the Łódź Regional Court had not been aware that the applicant had been detained throughout the proceedings and had sent the letter informing him of the replacement of the legal-aid lawyer to the same address. As a result, the applicant had never been informed of these developments and had no opportunity of taking any steps in connection with his defence before the appellate court.

53. He further argued that the second legal-aid lawyer had never contacted either the applicant or his family and had not taken any measures to determine whether his client had been informed about his right to participate in the hearing before the appellate court. Similarly, he had failed to establish whether the applicant had wished to attend that hearing. As a result, the applicant's defence rights had been breached. The applicant referred to the Court's judgment in the case *Belziuk v. Poland*, 25 March 1998, *Reports of Judgments and Decisions* 1998-II where the Court had found a violation of the Convention because the applicant, who had not been represented by a lawyer, had not attended a hearing held before the appellate court.

2. The Court's assessment

(a) General principles

54. The Court reiterates that the object and purpose of Article 6 taken as a whole show that a person "charged with a criminal offence" is entitled to take part in a hearing. Moreover, sub-paragraph (c) guarantees to "everyone charged with a criminal offence" the right "to defend himself in person" and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 27, and *Sejdović v. Italy* [GC], no. 56581/00, § 81, ECHR 2006-...).

55. Nonetheless, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings

involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, § 27, and *Monnell and Morris v. the United Kingdom*, cited above, § 56). Proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance (see, among other authorities, *Monnell and Morris*, cited above, p. 22, § 58, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, p. 13, § 30, as regards the court of cassation).

56. Even where the court of appeal has jurisdiction to review the case both as to the facts and the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, judgment of 29 October 1991, Series A no. 212-C, p. 68, § 31). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see *Belziuk v. Poland*, referred to above, § 37, and *Hermi v. Italy* [GC], no. 18114/02, § 60, ECHR 2006-...). However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004). The wider concept of a fair trial also includes the fundamental right that criminal proceedings should be adversarial. The latter means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see, among other authorities, *Brandstetter v. Austria*, 28 August 1991, §§ 66 and 67, Series A no. 211).

57. Lastly, the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantee of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2001, and *Hermi*, *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-...). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A).

(b) Application of the above principles to the facts of the case

58. The Court notes at the outset that it is not in dispute that in the proceedings before the first-instance court the applicant, who was legally represented, was present in the courtroom and gave evidence.

59. The Court further observes that the appellate court had full jurisdiction to examine the case as to the facts and law and to make a full assessment of the applicant's guilt or innocence. The appellate proceedings were limited to a single hearing and to the examination of pleadings submitted to the appellate court. The court reviewed the findings of the trial court on the basis of the material in the case file and considered the pleadings submitted by the applicant's lawyer in support of the appeal as well as the counter-arguments of the prosecution. All the evidence gathered in the case was available to the defence. The Court notes that although the applicant was not present before the Court of Appeal, the presence of his legal-aid lawyer at that hearing was obligatory. As noted above, the lawyer attended the hearing and was given the opportunity to conduct the applicant's defence. The Court also notes that while the court of appeal was empowered under domestic law to accept new evidence in certain circumstances (see paragraph 27 above), it has not been shown or argued that the applicant's lawyer requested that new evidence be admitted and examined by the appellate court.

60. Nonetheless, the fact remains that the court correspondence concerning the proceedings before the court of appeal was sent by post to the applicant's home address. The courts were at all times unaware that the applicant had been arrested at some point during the proceedings and subsequently detained and that effective service of the court correspondence on him was only possible at the detention centre. In this connection, the Court reiterates that in the context of criminal proceedings it is essentially the responsibility of the courts to ensure that a trial is fair (*Lala v. the Netherlands*, 22 September 1994, § 34, Series A no. 297-A). It is therefore essentially the responsibility of the State to make available to the courts effective access to information about persons deprived of their liberty at the time of the trial. It was also for the court to ensure, by making the necessary administrative arrangements, that the court correspondence was served on the applicant who at the time of the trial remained in custody.

The applicant asserts that his right to defend himself was, as a result, violated by the combination of the following facts: he had not been aware of the replacement of the legal-aid lawyer, he could not get in touch with him and he had not received a copy of the appeal prepared by that lawyer. Nor was he aware of the date of the hearing before the appellate court. As a result, he could not attend the hearing before the Łódź Regional Court, as he learned about it through unofficial channels only a few days before the hearing was to be held. The Court observes that in consequence the applicant was unable to address the court of appeal either through his

lawyer, personally or in writing, to submit any comments he wished to make on the observations made by the prosecution or to put forward any submissions on the matters which he regarded as relevant to the outcome of his case (compare and contrast *P.O. v. Poland*, (dec.), no. 42618/98, 14 January 2003).

61. Furthermore, the Court attaches importance to the fact that according to the case-law of the Polish courts the applicant had the right to attend the appeal hearing. The Polish Supreme Court stressed in a previous case that it was mandatory to bring a defendant to a hearing before the appellate court, regardless of whether he or she had made a relevant request (see paragraph 29 above). In a subsequent case, the same court emphasised that the right to a fair hearing demanded that a defendant convicted by a first-instance court should be informed of his procedural rights concerning his presence before the court of appeal (see paragraph 32 above). Ultimately, the Code of Criminal Procedure was amended so as to impose on the appellate court an unequivocal obligation to inform the defendant of his right to attend the hearing before that court (see paragraph 33 above). Hence, it is not open to doubt that the domestic legal system acknowledged that a defendant's personal participation in the appellate hearing was an integral part of fairness requirements.

62. The Court further notes the Government's submission that at the material time a number of different sets of criminal proceedings against the applicant were pending before various courts. The Court considers that in these circumstances the domestic court should have been particularly attentive to the need to establish his correct whereabouts. For the Court, it falls to the State to ensure that information on all persons deprived of liberty is collected and updated and made available to courts conducting criminal proceedings in order to ensure that correspondence and summonses are properly served on defendants and the latter's procedural rights thereby safeguarded.

63. The Court further observes that in the present case the applicant was ultimately not represented before the appellate court by the lawyer who had represented him before the trial court, but by a new one. In the absence of any communication between the new legal-aid lawyer and the applicant, who was deprived of the possibility of instructing the lawyer, the mere fact that the lawyer prepared the appeal and attended the hearing was not sufficient, in the Court's view, to ensure that the proceedings complied with the requirements of fairness.

64. There has accordingly been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

65. The applicant complained under Article 6 of the Convention that he had been denied the right to a fair hearing in that the courts dealing with his case had lacked impartiality and had not given enough consideration to the facts in the applicant's favour. He further complained of ill-treatment during his arrest and the search of his property. He also argued that no search warrant had been shown to him and that the search had been conducted at night, contrary to the applicable legal provisions. The applicant further complained that he had been remanded in custody for ten months without any justification.

66. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 100,000 Polish zlotys (PLN) in respect of pecuniary and non-pecuniary damage.

69. The Government contested his claim.

70. The Court finds no link between the violation complained of and the pecuniary damage alleged. It cannot speculate about the outcome of the proceedings had the applicant participated in the hearing before the court of appeal. The Court therefore rejects the claim in its entirety.

71. On the other hand, the Court considers that the applicant must have suffered distress and frustration from the violation of his right to a fair hearing. However, the amount claimed appears to be excessive. Making its assessment on an equitable basis, the Court awards the applicant 1,500 euros (EUR) in that respect, plus any tax that may be chargeable on that amount.

B. Costs and expenses

72. The applicant did not claim reimbursement of the costs and expenses incurred before the Court over and above the amount which had been granted to him by the Court by way of legal aid.

C. Default interest

73. 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 alleged violation of the applicant's defence rights in the appellate proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) 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, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 21 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President