



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF SMYK v. POLAND

(Application no. 8958/04)

JUDGMENT

STRASBOURG

28 July 2009

FINAL

28/10/2009

This judgment may be subject to editorial revision.

In the case of Smyk 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 7 July 2009,

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

PROCEDURE

1. The case originated in an application (no. 8958/04) 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 Andrzej Smyk (“the applicant”), on 24 February 2004.

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

3. The applicant alleged, in particular, that he had been denied access to the Supreme Court.

4. On 19 May 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 1977 and lives in Łuków.

1. Background to the case

6. On 9 August 1996 the applicant commenced his compulsory military service, which lasted until 20 October 1997. During his service he suffered a serious spinal injury. A series of medical tests carried out by military doctors showed that the applicant's disability had been caused by an ailment which he had had during his childhood. Difficult tasks which he had had to carry out during his military service had made his condition worse.

7. On 31 May 2000 the applicant requested the Social Security Authority (ZUS) to grant him a disability pension (*renta inwalidzka*). By a decision of 20 September 2000 the Social Security Authority refused. By a judgment of 13 March 2002 the Siedlce Regional Court dismissed the applicant's appeal. The applicant appealed.

8. By an order of 11 April 2002 the court, having regard to certain formal shortcomings in the applicant's appeal, requested him to rectify them. By a decision of 23 April 2002 the court rejected the appeal, finding that he had failed to indicate the grounds for his appeal despite having been summoned to do so. On 7 May 2002 the applicant lodged an interlocutory appeal against the decision, which was dismissed on 8 July 2002.

2. The civil proceedings

9. In January 1998 the applicant lodged an action with the Olsztyn Regional Court. He requested compensation for physical injuries and suffering which he had sustained during his military service and requested the court to grant him a permanent disability pension, having regard to the fact that he was now unfit to work. On 18 February 1998 the court exempted the applicant from court fees. In November 1998 a legal-aid lawyer was assigned to the case to represent the applicant.

10. A first series of medical tests carried out by experts confirmed the findings of the military doctors and the conclusions reached in the reports prepared for the first set of the proceedings. The applicant refused to participate in a second series of medical tests, ordered at the defendant's request.

11. The proceedings were subsequently stayed at the applicant's request on 15 May 2000. They were resumed on 25 November 2002.

12. By a judgment of 25 April 2003 the Olsztyn Regional Court dismissed the applicant's action. The applicant appealed.

13. By a judgment of 10 September 2003 the Appellate Court upheld the first-instance judgment. This judgment was served on the applicant's legal-aid lawyer on 9 October 2003.

14. By a letter of 15 October 2003 the legal-aid lawyer informed the applicant that he had not found any legal grounds on which to prepare a cassation appeal. The letter read:

“I hereby inform you that on 9 October I was served with a written grounds for the judgment of the Białystok Court of Appeal of 10 September 2003.

Having examined the written reasons for the judgment, I am obliged to state that there are no legal grounds on which to prepare a cassation appeal.

Cassation appeal is an extraordinary legal remedy which can be lodged where the court erred in the application of substantive or procedural law, if such an error could have affected the outcome of the case. In your case no such errors are disclosed.

In addition, for a cassation appeal to be accepted for examination by the Supreme Court, it is necessary to demonstrate that legal issues justifying such examination obtain in the case. In your case it is the establishment of the facts by the courts which is in issue.

Having regard thereto, I am forwarding to you a copy of the judgment as I cannot be of any further assistance in your case.”

15. On an unspecified later date the applicant requested the court to assign a new lawyer to the case for the purposes of lodging a cassation appeal. The court refused the request by a decision of 6 November 2003 which read:

“The court ... decided to dismiss the plaintiff’s request for a legal-aid lawyer to be assigned to the case.”

The decision did not contain reasons as under the relevant provisions of the Code of Civil Procedure no appeal was available against it and, in consequence, the court was not obliged to prepare any (see paragraphs 19 – 21 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legal aid

16. Pursuant to Article 5 of the Code of Civil Procedure, a court should give all necessary procedural instructions to a party acting without a lawyer and, in particular should indicate the consequences of that party’s acts or failures to act.

17. Article 113 § 1 of the Code of Civil Procedure provides that a party to the proceedings may ask the court competent to deal with the case to grant him or her an exemption from court fees provided that he submits a declaration to the effect that the fees required would entail a substantial reduction in his and his family’s standard of living.

18. Pursuant to Article 117 of the Code, persons exempted from the court fees may request that legal aid be granted to them. The court will then request the relevant District Bar Association or the District Chamber of

Legal Advisers to assign an advocate or a legal adviser to the claimant's case.

19. Decisions on legal aid are given in the form of interlocutory decisions. Article 394 of the Code of Civil Procedure guarantees a party to the proceedings the right to appeal against a decision of the first-instance court which terminates the proceedings. Such an interlocutory appeal (*zażalenie*) is also available against certain interlocutory decisions, specified in this provision. An appeal is available against a refusal of exemption from court fees and, likewise, against a refusal of legal aid, when such decisions were given by a first-instance court.

20. The Supreme Court held in a number of its decisions that no appeal to the Supreme Court is available against an interlocutory decision on legal aid given by a second-instance court (II CZ 9/97, 21 February 1997, unpublished; I CZ 27/97, 4 April 1997, OSNC 1997, No. 9, item 120; I CZ 14/97, 8 April 1997, OSN 1997 No. 9, item 120).

21. Pursuant to Article 357 of the Code of Civil Procedure, written grounds for interlocutory decisions shall be prepared by the court only if an appeal is available against such a decision.

B. The cassation appeal

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

23. Under Article 393 ⁴ § 1 of the Code of Civil Procedure a cassation appeal had to be lodged with the court that had given the relevant decision within one month from the date on which the decision with its written grounds was served on the party concerned. Cassation appeals which were not lodged by an advocate or a legal adviser would be rejected.

24. Article 393 ¹ of the Code as applicable at that time listed the grounds on which a cassation appeal could be lodged. It read as follows:

“The cassation appeal may be based on the following grounds:

1) a breach of substantive law by its erroneous interpretation or wrongful application;

2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case.”

25. Article 393 ³ specified the requirements of a cassation appeal. It read in its relevant part:

“§ 1. A cassation appeal should include:

1) an indication of the decision under appeal together with information as to whether the appeal is lodged against this decision in its entirety or in part only;

- 2) an indication of the grounds for the cassation appeal;
- 3) arguments showing that its examination would be justified;
- 4) a motion to have the decision under appeal quashed or amended, specifying also the scope of the motion.”

26. Article 393⁴ read as follows:

“A second-instance court rejects in a hearing held in camera a cassation appeal lodged after a prescribed time-limit or which is inadmissible on other grounds (...).”

27. The reasons justifying the examination of a cassation appeal by the Supreme Court could be inferred *a contrario* from Article 393 of the Civil Code of Procedure which, as applicable at that time, read, in its relevant part:

“1. The Supreme Court may refuse to entertain the cassation appeal, if:

- i) there is no appearance of any significant legal issue in the case,
- ii) there is no need for the interpretation of provisions raising serious doubts or causing discrepancies in the courts’ case law,
- iii) the appeal is manifestly ill-founded.

2. Paragraph 1 shall not apply if the judicial decision challenged manifestly breached the law or where the proceedings are invalid in law.”

C. Relevant provisions of the Bar Act

28. Article 1 of the Bar Act of 1982, as amended, reads, insofar as relevant:

“1. The Bar is established to provide legal assistance, co-operate in protecting a person’s rights and freedoms as well as to formulate and apply the law.

2. The Bar is organized as a self-governing association.

3. An advocate whilst executing his/her professional duties is accountable only to the law.”

29. Article 3 of the Act provides as follows:

“The general tasks of the professional Bar Council are as follows:

- 1) creation of conditions for the statutory performance of the Bar’s tasks,
- 2) representation of the Bar and protection of its rights,
- 3) supervision over the observance of the rules regulating the practice of the profession,

4) development of professional skills and training of advocates,

5) determination and promotion of professional ethics and ensuring their observance,

6) management (...) of the Bar's assets.”

30. Article 28 of the Act reads:

“1. An advocate may only refuse to provide legal assistance for important reasons of which he must notify the interested party. Any doubts as to whether to provide legal assistance or refuse to do so shall be resolved by the local Bar Council, and in situations where time is of the essence, by the Dean of that Council.

2. In cases where legal assistance is granted on the basis legal regulations concerning legal aid, only the entity appointing the advocate to represent the client may decide to relieve him or her from providing legal assistance.”

31. Under Article 21 § 3 of the Act, an advocate shall provide legal aid services in the jurisdiction of a court where he or she has its office.

32. Lawyers are bound to act in accordance with rules of professional and ethical conduct enacted by the Bar Association. They may be held accountable for professional misconduct or a breach of ethical principles in the proceedings before the bar disciplinary court.

33. Under Article 57 of the Body of Ethical Rules adopted by the National Bar Council on 10 October 1998, when an advocate, either privately hired by the client or appointed under legal aid scheme, considers that submission of an appeal in a case offers no reasonable prospect of success and the client disagrees with his or her view, the lawyer shall give notice of termination of the power of attorney terminate the representation, or notify the refusal to the body which appointed him or her.

D. Resolution of the Supreme Court of 2000 (III CZP 14/00)

34. In 2000 the Supreme Court issued a resolution in reply to a legal question whether a legal aid lawyer could refuse to lodge a cassation appeal. It replied to the question in the positive.

35. The court observed that issues involved in the legal aid concerned not only proper administration of justice, but also touched on human rights, and a right of access to a court in particular. Nevertheless, there was no comprehensive and coherent regulation of legal aid available under Polish law.

36. The mere fact that it was necessary for a cassation appeal to be lodged by a qualified representative was not open to criticism. However, a certain conceptual confusion was to be noted in the provisions governing legal aid as a whole, mostly because the legislator had failed to harmonise the relevant provisions of civil and criminal procedure. In particular, the scope of legal aid lawyers' obligations when legal representation was

mandatory was not directly addressed by provisions of civil procedure. This was so partly because the essential body of law concerning civil procedure had been enacted in 1964, while the provisions on mandatory legal representation for the purposes of the cassation appeal had been introduced in 1996, when this new kind of appeal had been created.

37. As a result, the scope of legal aid lawyers' obligations to provide a party to the proceedings with "legal aid" in civil proceedings was unclear. In particular, the provisions on the lawyers' legal aid obligations in connection with cassation proceedings before the Supreme Court lacked clarity. The court noted that the judicial practice regarding the application of relevant provisions had given rise to serious difficulties of interpretation and discrepancies in the case-law of the Polish courts.

38. The court observed that the issue of possible conflict between the opinion of a party granted legal aid and a lawyer assigned to represent him or her for the purpose of cassation proceedings had not been directly addressed by the applicable law. It further noted that the notion of legal assistance could not be identified with a simple obligation of a lawyer to act in accordance with the client's wishes. The role of a legal aid lawyer had rather to be understood as obliging him or her to provide legal advice to the party, including as to the prospects of success offered by a cassation appeal against a given judgment.

39. The constitutional role of the Supreme Court, the highest judicial authority, was also an argument in favour of a conclusion that a legal aid lawyer was not compelled by the will of the party to have a cassation appeal lodged if such an appeal was bound to fail. In case of a disagreement between the party and the lawyer, it was open to the party to complain to the local Bar under Article 28 of the Bar Act. The Bar could then appoint a new lawyer who could lodge a cassation appeal, requesting at the same time to be granted leave to appeal out of time under Article 169 of the Code of Civil Procedure. It was true that the practice of the Supreme Court was not coherent in that in some cases it had been rejecting such requests and in other it accepted them. However, it did not prevent the parties from having recourse to this course of action.

E. Retrospective leave to appeal out of time

40. Pursuant to Article 169 of the Code of Civil Procedure, a party to the proceedings may ask for retrospective leave to perform a procedural measure outside the prescribed time-limit; this measure shall be performed simultaneously with lodging the request.

F. Service of court correspondence

41. Article 133 § 3 of the Code of Civil Procedure reads, insofar as relevant:

“3. If a legal representative or a person authorised to receive court correspondence on behalf of a party has been appointed in a case, the court correspondence shall be served on these persons.”

42. Pursuant to the case-law of the Supreme Court, if a party to civil proceedings is represented by a lawyer, the procedural time-limits set by the Code of Civil Procedure start to run on the date of the service of judicial decisions on him or her (III CRN 324/72; I UZ, 65/04).

THE LAW

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

43. The applicant complained under Article 6 § 1 of the Convention that he had been denied access to the Supreme Court.

Article 6 § 1 reads, in so far as relevant:

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

A. Admissibility

44. The Government submitted that the applicant had failed to exhaust relevant domestic remedies. He should have brought a civil action for compensation against the legal-aid lawyer. They were of the view that it was an effective remedy where a lawyer, either legal aid or privately hired, was negligent in carrying out his or her duties regarding legal representation in judicial proceedings. They also referred to a complaint to the local Bar Association under Article 28 of the Bar Act.

The applicant did not address this issue.

45. The Court observes that the remedies referred to by the Government were merely of a retrospective character. They could only, and if the applicant had been successful, have resulted either in the courts granting damages or in the Bar Association finding the lawyer at fault. Such retrospective measures alone were not sufficient to ensure effective access to a court competent to determine the applicant's civil rights and obligations. The Court therefore rejects the Government's objection.

46. 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

47. The applicant submitted that the aim of legal aid was to ensure effective access to justice for applicants who did not have sufficient means at their disposal to pay for their own legal representation. The procedure available under Polish law in connection with legal aid for the purposes of cassation appeals was cumbersome, unclear and the applicant had encountered considerable practical difficulties. The circumstances of the case, like those examined by the Court in the case of *Siałkowska v. Poland*, referred to above, had demonstrated a need for the authorities to review the legal-aid system and to improve its efficiency. A thorough analysis of the reasons for the malfunctioning of the present system, in particular in the context of cassation proceedings, and of possible reforms to be made to it should be carried out in a public debate involving all parties concerned. Any reform of the existing system should secure an adequate institutional and procedural framework to ensure that citizens represented in judicial proceedings by legal-aid lawyers had their interests properly safeguarded.

48. In particular, under the domestic law as it stood at the material time it had been unclear whether the grant of legal aid affected the thirty-day time-limit for lodging a cassation appeal. The examples of judicial practice referred to by the Government, according to which retrospective leave to appeal out of time could be granted by the courts, had exemplified the situation after 2003. It had only been then that the courts had become willing to alleviate the difficulties encountered by parties in the applicant's situation, by granting such leave for a cassation appeal to be lodged. However, at the material time the relevant judicial practice was unstable and unpredictable.

49. In the present case the final decision of the court refusing to assign a new legal-aid lawyer to the case had been served on the applicant after the expiry of the time-limit for lodging a cassation appeal. This was symptomatic of the difficulties encountered by parties in situations similar to that of the applicant in the present case. The court had not even given grounds for that refusal and had failed to give any information to the applicant about the course of action to be taken.

50. The Government argued that the applicant's case had been examined at two levels of jurisdiction. Neither the Convention nor domestic law guaranteed a right to have a civil case heard at three levels of jurisdiction. The right to a court was not absolute and could therefore be subject to certain limitations, in so far as they did not impair the very essence of that

right. In particular, the criteria of admissibility of appeals to be lodged with the highest courts could be strict and the procedure more formal than that before the lower courts, without the requirements of Article 6 of the Convention being breached thereby. The mere fact that it was necessary for a cassation appeal to be lodged by a qualified representative was not open to criticism.

51. The Government further submitted that in principle the grant of legal aid did not affect the running of the thirty-day time-limit for lodging a cassation appeal with the Supreme Court. However, the case-law of the Polish civil courts indicated that retrospective leave to appeal out of time could be granted where legal aid for the purposes of lodging a cassation appeal had been given, but the legal-aid lawyer could not comply with all the relevant formalities within that time-limit.

52. They further referred to the resolution of the Supreme Court given in September 2000 (see paragraphs 17-21 above). That court had held that a lawyer assigned to a case under a legal aid scheme was entitled to refuse to lodge a cassation appeal in civil proceedings, if he or she was of the view that this remedy offered no reasonable prospects of success. The Government stressed that the notion of legal aid was not to be understood as providing legal representation in proceedings in all cases. It also comprised provision of legal advice on the prospects of success offered by a given legal remedy in the particular context of each case. The lawyers' tasks could not be perceived as following their clients' instructions and wishes uncritically and lodging remedies against their better judgment. Nor was it a role of the State to compel lawyers to do so. Hence, the lawyer's refusal had served the purpose of securing the proper administration of justice by the Supreme Court, including ensuring that the caseload of that court would not be unreasonably increased by unmeritorious cassation appeals.

53. In the present case the applicant had been granted legal aid early on in the proceedings. After the second-instance judgment had been served on the lawyer he had promptly informed the applicant that he saw no grounds on which to prepare a cassation appeal. He had prepared a well-reasoned legal opinion. The assistance which the applicant received had therefore been genuine and effective, as he had obtained all information concerning his legal situation. His access to court had not therefore been restricted in a manner incompatible with the requirements of the Convention.

The Court's assessment

54. The Court notes at the outset that the responsibility of the Contracting Parties is incurred by the actions of their organs. A lawyer, even if officially appointed, cannot be considered to be an organ of the State. Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the party and his or her counsel, whether counsel be appointed under a legal-aid scheme or be privately

financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 30 May 1980, Series A no. 37, p. 18, § 36; *Daud v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 749, § 38; *Tuziński v. Poland* (dec), no. 40140/98, 30.03.1999; and *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI).

55. 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; and *Rutkowski*, cited above).

56. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, *Reports* 1996-V, pp. 1544-45, § 44, and *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 13-15). 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).

57. In this context, the Court points out that there is no obligation under the Convention to make legal aid available for disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which does not contain any reference to legal aid (see *Del Sol v. France*, no. 46800/99, § 20, ECHR 2002-II, and *Essaadi v. France*, no. 49384/99, § 30, 26 February 2002).

58. A requirement that an appellant be represented by a qualified lawyer before the court of cassation, such as in the present case, cannot in itself be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as a highest court examining

appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe (see *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A no. 109, § 69; *Vacher v. France*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2148-49, §§ 24 and 28; *Tabor*, cited above, § 42; *Staroszczyk v. Poland*, referred to above, § 129; *Siałkowska v. Poland*, referred to above, § 106). It is for the Contracting States to decide how they should comply with the fair hearing obligations arising under the Convention.

59. 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 proceedings with legal aid when it is provided by domestic law, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (see *Del Sol*, cited above, § 21, *Staroszczyk v. Poland*, cited above, § 130, *Siałkowska v. Poland*, cited above, § 107, and *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001; *mutatis mutandis*). In particular, an adequate institutional framework should be put in place so as to ensure effective legal representation for the entitled person and a sufficient level of protection of their interests.

The Court notes that under the domestic regulations a legal-aid lawyer may refuse to prepare a cassation appeal if she or he believes that legal grounds for lodging it do not obtain. As the Court has already observed:

“the mere fact that a legal-aid lawyer can refuse to represent a party 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 (*Siałkowska v. Poland*, cited above, § 113; *Antonicelli v. Poland*, § 38, *Kulikowski v. Poland*, § 63).”

60. However, the Court cannot overlook the risk of arbitrariness in legal-aid lawyers’ refusal to prepare and lodge a cassation appeals. In this respect, the Court has already held that:

“refusal of a legal-aid lawyer to prepare and lodge a cassation appeal should meet certain quality requirements (see *Staroszczyk v. Poland*, cited above, § 135; *Siałkowska v. Poland*, cited above, § 114).”

These requirements concern, in particular, the time-frame and the form of such a refusal. The former requirement has been set out in the *Siałkowska v. Poland* case, where the Court observed that:

“The applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation appeal. When the applicant was informed about the legal-aid lawyer’s refusal, the time-limit for lodging of a cassation appeal was to expire in three days (see *Siałkowska v. Poland*, §§ 114 – 115).”

The Court was of the view that in the circumstances it would have been impossible for the applicant to find a new lawyer under the legal-aid scheme. Consequently, she had so little time left to take any steps to have the cassation appeal in her case prepared. It could not therefore be said that she had had a realistic opportunity of having her case brought to and argued before the cassation court.

With respect to the form of the legal-aid lawyer's refusal, the Court has further held that:

"it must not be formulated in such a way as to leave the client in a state of uncertainty as to its legal grounds. The Court has observed that under the applicable domestic regulations the legal-aid lawyer was not obliged to prepare a written legal opinion on the prospects of the appeal. Nor did the law set any standards as to the legal advice he had to give to justify his or her refusal to lodge a cassation appeal."

As a result, it found a violation in a case where the lawyer only informed the applicants orally about his refusal to lodge a cassation appeal on their behalf. The Court expressed the view that:

"If requirements concerning the written form of refusal, including the reasons for it, to draw up a cassation appeal had existed, they would have rendered possible an objective *post-hoc* assessment of whether the refusal to prepare the cassation appeal in a given individual case had been arbitrary. The lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation appeal to be accepted by the Supreme Court. In the Court's opinion, the mere fact that the timing of the refusal seemed unobjectionable could not cure this deficiency (see *Staroszczyk v. Poland*, §§ 135 – 137)."

61. The Court is well aware that in the domestic judicial practice 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 automatically assigned to the case under the legal-aid scheme (see paragraph 39 above). However, the Court has already held, in the context of criminal proceedings, 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 (see *Antonicelli v. Poland*, § 43; *Kulikowski v. Poland*, § 68)."

The Court is of the opinion that the same principle holds true in the context of civil cassation. To hold otherwise would result in imposing on the State, for the purposes of civil proceedings, a more far-reaching procedural obligation in respect of legal aid than that applicable to criminal cases. This would be incompatible with its case-law (see *Del Sol v. France*, cited above, § 20).

62. Turning to the circumstances of the present case, the Court first notes that the legal-aid lawyer's refusal was prepared in writing. He explained in detail why a cassation appeal would not have offered reasonable prospects of success.

63. The Court further observes that the second-instance judgment was served on the applicant's legal-aid lawyer on 9 October 2003. At the material time, under the applicable provisions of the Code of Civil Procedure, the thirty-day time-limit started to run on that date. Subsequently, the lawyer informed the applicant on 15 October 2003 of his refusal to prepare a cassation appeal. On that date, the time-limit for lodging the appeal was to expire in twenty-four days. It cannot therefore be said that the applicant was left with so little time to have a cassation appeal prepared in his case as to be deprived of 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). Moreover, it has not been shown or argued that before the expiry of the time-limit the applicant took any steps with a view to obtaining legal assistance from a privately hired lawyer.

64. The foregoing considerations are sufficient to enable the Court to conclude that the applicant was not put in a position in which he was left without adequate legal representation such as to impair his effective access to a court in breach of Article 6 § 1 of the Convention.

65. There has accordingly been no violation of this provision.

III. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

66. The applicant further complained of a violation of his right to have his case heard within a reasonable time. He relied on Article 6 § 1 of the Convention.

67. The Court notes that these proceedings started in January 1998. They were stayed, at the applicant's request, between 15 May 2000 and 25 November 2002. The decision as a result of which the second-instance judgment of 10 September 2003 became final was given on 6 November 2003 (see paragraph 15 above). They have therefore lasted three years and eleven months at two levels of jurisdiction. There is no indication of any periods of inactivity on the part of the domestic courts in the proceedings. However, it is to be noted that the applicant requested a stay in the proceedings on 15 May 2000, and only requested that they be resumed in November 2002.

68. 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 finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the applicant's complaint concerning lack of access to a court and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 28 July 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 dissenting opinion of Judge Bonello joined by Judge Mijović is annexed to this judgment.

N.B.
T.L.E.

DISSENTING OPINION OF JUDGE BONELLO JOINED BY JUDGE MIJOVIĆ

1. In our separate concurring opinions in two recent cases,¹ Judge Mijović and I have placed on record what we think of the Polish legal-aid system relating to cassation appeals to the Supreme Court.

2. In those cases which concerned the failure of legal-aid lawyers to file cassation appeals, the Court had found a violation of Article 6 § 1 in conjunction with Article 6 § 3 c. The reasons stated in those concurring opinions apply even more compellingly to the present case in which the Court failed to find any violation of the Convention. To avoid repetition, I refer to the detailed reasoning of those two concurring opinions.

3. I find the new argument included in paragraph 63 of the present judgement additionally objectionable: “Moreover it has not been shown or argued that before the expiry of the time limit (for appeal) the applicant took any steps with a view to obtaining legal assistance from a privately hired lawyer”.

4. In the view of the majority, applicants who have been certified by the domestic court to be entitled to legal aid *because they cannot afford to hire a private lawyer*, have themselves to blame for not having hired a private lawyer when the legal-aid lawyer fails them.

5. Applicants are granted legal aid only because the domestic court is satisfied they do not have the means to hire a paid lawyer. Then, after being officially certified indigent by the state, they lose the right to appeal to the Supreme Court because they have not hired and paid for a lawyer the State is satisfied they are not in a position to pay. They are penalised for not having done what the State has accepted they are unable to do.

¹ *Kulikowski v. Poland*, n° 18353/03, 19 May 2009 and *Antonicelli v. Poland*, n° 2815/05, 19 May, 2009