



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

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FOURTH SECTION

CASE OF ARCIŃSKI v. POLAND

(Application no. 41373/04)

JUDGMENT

STRASBOURG

15 September 2009

FINAL

15/12/2009

This judgment may be subject to editorial revision.

In the case of Arciński v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 25 August 2009,

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

PROCEDURE

1. The case originated in an application (no. 41373/04) 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 Wojciech Arciński (“the applicant”), on 15 November 2004.

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

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 1945. He is currently serving a prison sentence in Płock prison.

6. Since 1997 the applicant lived with his partner in her apartment in Płock. On 22 March 2002 she was found dead in the apartment. She had serious head injuries and broken ribs. The applicant protested his innocence. On 7 February 2003 the Płock District Prosecutor lodged a bill of indictment against the applicant with the Płock Regional Court. The applicant was charged with murder.

7. On 28 April 2003 the Płock Regional Court gave a judgment in the case. The court found the applicant guilty of murder and sentenced him to eleven years' imprisonment.

8. On 30 June 2003 the applicant appealed to the Warsaw Court of Appeal. He argued that the first-instance court had failed to examine all the relevant circumstances of the case.

9. On 7 October 2003 the appellate court quashed the judgment and remitted the case to the first-instance court for re-examination, having regard to certain procedural shortcomings in the proceedings.

10. On 16 December 2003 the Płock Regional Court gave a judgment and again convicted the applicant of murder. The applicant was sentenced to eleven years' imprisonment. The applicant appealed. On 16 April 2004 the appellate court upheld the contested judgment.

11. Throughout the judicial proceedings the applicant was represented by a legal-aid lawyer.

12. On 28 June 2004 the court served the written grounds of the judgment on the applicant and assigned a legal-aid lawyer for the purpose of cassation proceedings.

13. By a letter of 26 July 2004 the lawyer informed the court that he had not found any grounds on which to prepare a cassation appeal.

14. On 29 July 2004 the appellate court forwarded the lawyer's refusal to the applicant and informed him that the time-limit for lodging the cassation appeal was to expire on 30 July 2004.

15. On an unspecified date the applicant requested the court to assign a new legal aid lawyer. The court refused to do so.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic law and practice concerning the procedure for lodging cassation appeals with the Supreme Court against judgments of the appellate courts are stated in the Court's judgments in the cases of *Kulikowski v. Poland* and *Antonicelli v. Poland*.

17. In particular, on 26 February 2002 the Supreme Court 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 a legal-aid lawyer's refusal had the right to take other measures to seek legal assistance necessary for 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 § 1 (c) OF THE CONVENTION

18. 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

19. 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.

20. They further argued that after the refusal of legal assistance from another legal-aid lawyer the applicant should have lodged his own cassation appeal. Under decisions of the Supreme Court adopted in April 2005 and in March 2007 (V KZ 12/2005 and III KZ 15/2007 respectively) the court would have been obliged to summon him to rectify the shortcomings of that appeal by submitting another one, prepared and signed by a lawyer. That would have opened the way for the applicant to have his case examined by the Supreme Court.

21. The applicant did not address this issue.

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

23. As regards the argument that the applicant should have submitted his own cassation appeal, the Court considers that the Government's preliminary objection under this head is closely linked to the merits of the applicant's complaint. Accordingly, it decides to join its examination to the merits of the case.

24. The Court notes that the application 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

25. The applicant submitted that the applicant had been granted legal aid for the purposes of lodging a cassation appeal. Under the applicable domestic law the lawyer could refuse to do so if he found no grounds on which to challenge the judgment of the second-instance court. The law provided for a thirty-day time-limit for lodging a cassation appeal, but there was no time-limit for a lawyer to formulate such a refusal. In order for an effective access to justice to be compatible with the requirements of Article 6 § 1 of the Convention, a balance should be struck between the possibility for a lawyer to refuse to lodge a cassation appeal and the opportunity for a party to the proceedings to request the court to replace that legal aid lawyer, fully respecting the independence of the legal profession.

26. The applicant further submitted that it was true that under Polish law a cassation appeal against a second-instance judgment of a criminal court was an extraordinary remedy, hence the grounds for such an appeal were limited. It was not possible to lodge such an appeal against each and every

judgment of the appellate court. Legal representation was mandatory for the lodging of a cassation appeal.

However, parties to criminal proceedings should have an effective access to the Supreme Court in the context of cassation proceedings. They should be promptly informed of the existence of grounds for an appeal, or that they have been refused a legal-aid lawyer. It was the courts' role to check whether the clients of legal-aid lawyers were kept promptly informed.

The applicant further submitted that in his case the appellate court had forwarded the lawyer's refusal to him only one day before the relevant time-limit expired. Moreover, the court had refused to assign a new legal-aid lawyer to the case. In consequence, the applicant had had no real chance of having his case brought before the Supreme Court.

27. The Government submitted that the applicant had been represented by a legal-aid lawyer from an early stage of the proceedings. Subsequently, the court of appeal had acknowledged the need for the applicant to obtain legal assistance for the purposes of the cassation proceedings, granted him legal aid and instructed him as to the relevant procedure. The lawyer had had thirty days to examine the prospects of success offered by a cassation appeal in the applicant's case. There had been no indications of any negligence on his part in that examination and the Court of Appeal, when examining the applicant's request to assign another legal-aid lawyer to the case, had confirmed it. The applicable legal provisions in force at the material time had obliged the legal-aid lawyer to act diligently and failure to do so could be regarded as giving rise to his or her civil liability in tort.

28. The Government argued that the legal-aid lawyer's refusal had been notified to the applicant. 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 liability on the part of the State. 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 lawyers' working methods 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.

29. They further submitted that the applicant had not been denied access to a court nor had the refusal to prepare and lodge a cassation appeal been tantamount to 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.

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, and *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; and *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*, cited above, §§ 121-122; and *Siałkowska*, cited above, §§ 99-100).

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, and *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*, cited above, § 125; and *Siałkowska*, 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, and *Staroszczyk*, cited above, § 128).

36. The Court further notes that in the present case the appellate court sent its judgment with a written statement of reasons to the applicant on 28 June 2004. On the same date it assigned P.R. as legal-aid lawyer for the lodging of a cassation appeal. The judgment was served on the lawyer on 30 June and on the applicant on 2 July 2004. By a letter of 26 July 2004, received by the court on 28 July 2004, the lawyer informed the court that he had not found any legal grounds on which to prepare a cassation appeal in the applicant's case.

37. 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; and *Kemp and Others v. Luxembourg*, no. 17140/05, § 42, 24 April 2008, *mutatis mutandis*)

38. 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 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 the 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.

39. 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.

40. In the present case the applicant was served with the lawyer's refusal on 29 June 2004. The Court notes the Government's submission that under the case-law of the Supreme Court the time-limit for lodging of a cassation appeal started to run on the date on which the judgment of the appellate court with its written grounds had been served on the applicant's legal-aid lawyer. However, it observes that in the light of the decision of the Supreme Court summarised in paragraph 27 above the thirty-day time-limit started to run when the applicant himself was served with the lawyer's refusal. Moreover, the Court further notes that under the Supreme Court's decision of 22 February 2002 the Warsaw 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.

41. The Court observes that the Court of Appeal failed to comply with that obligation. The failure to inform the applicant, who was at that time no longer 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".

42. 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

43. 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.

44. 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).

45. 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contested his claim.

49. The Court accepts that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 1,000 under this head.

B. Costs and expenses

50. The applicant, who had received legal aid from the Council of Europe in connection with the presentation of his case, did not make any claim for reimbursement of costs and expenses.

C. Default interest

51. 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. *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 1,000 (one thousand 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 15 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Mijović is annexed to this judgment.

F.A.
N.B.

CONCURRING OPINION OF JUDGE MIJOVIĆ

As it was emphasised in my previous concurring opinions in two recent cases,¹ as well as in the joint dissenting opinion in *Smyk v. Poland*², I see the problem of the refusal of lawyers appointed under legal-aid schemes to represent legally-aided persons on the ground that the claim has no reasonable prospects of success, as the general one, related not only to criminal, but also to both civil and administrative proceedings³. To avoid repetition, I refer to the detailed reasoning of those opinions.

¹ *Kulikowski v. Poland* and *Antonicelli v. Poland*, May 19, 2009

² July 7, 2009

³ There are more than 120 such cases pending before the European Court of Human Rights