



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF ZAPADKA v. POLAND

(Application no. 2619/05)

JUDGMENT

STRASBOURG

15 December 2009

FINAL

15/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zapadka 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 24 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 2619/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Witold Zapadka (“the applicant”), on 10 December 2004.

2. The applicant was represented by Ms W. Kownacka, a lawyer practising in Ostróda. 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 deprived of access to the Supreme Court.

4. On 9 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 1949 and lives in Ostróda. In the 1990s the applicant was suffering from lung cancer. During his treatment he was infected with type B hepatitis.

6. On 17 February 1998 the applicant lodged a claim for compensation against the hospital. He was represented by counsel, Z.K. On 22 September 1998 the Olsztyn Regional Court awarded the applicant compensation in the amount of twenty percent of his claim. The applicant appealed.

7. On 24 August 1999 the court issued a supplementary judgment declaring that in view of the reform of the health care system the State Treasury was liable jointly with the hospital for damage suffered by the applicant.

8. By a judgment of 29 December 1999 the Warsaw Court of Appeal held that the amount of compensation did not correspond to the damage which the applicant had suffered. Nevertheless, it dismissed the appeal. It pointed to the fact that the applicant had wrongly named one of the defendants, namely the hospital.

9. Subsequently, the applicant asked Z.K. on several occasions, including by letter, to take further steps and to lodge another appeal. He also contacted the local Bar, complaining about the lawyer's conduct. Finally, he authorised Z.K. to represent him in the cassation proceedings.

10. The cassation appeal was lodged on 4 August 2000.

11. On 27 April 2001 the Supreme Court dismissed it, partly because the lawyer had wrongly challenged the first-instance court judgment instead of the judgment of the appellate court and partly because the statement of appeal had not fulfilled the applicable formal requirements.

12. The decision was served on Z.K. on 30 May 2001 but he failed to inform the applicant of this. As a result, the applicant only learned about the outcome of the proceedings on 9 July 2002 when he contacted the registry of the Supreme Court directly.

13. On 24 June 2002 the applicant terminated his contract with Z.K.

14. On 14 November 2002 the applicant lodged a claim for compensation against Z.K. with the Elbląg Regional Court. In a judgment delivered on 4 June 2003 the Elbląg Regional Court awarded compensation for non-pecuniary damage sustained by the applicant as a result of Z.K.'s failure to represent his interests in the proceedings diligently.

15. On 7 October 2003 the applicant lodged an appeal against this judgment which was dismissed by the Gdańsk Court of Appeal on 9 March 2004. The decision was served on the applicant on 19 April 2004.

16. On 20 April 2004 the applicant requested legal aid for the purposes of preparing a cassation appeal. On 30 April 2004 the Gdańsk Court of Appeal allowed his request and requested the Gdańsk Bar Association to assign a lawyer to the case. On 13 May 2004 the Bar assigned the case to M.K. On an unspecified date between 14 and 17 May 2004 M.K. was served with a copy of the second-instance judgment.

17. On 19 May 2004 the applicant was served with a legal opinion prepared by M.K. and dated 17 May 2004 by which M.K. explained why he had found no grounds to prepare a cassation appeal.

18. On 27 July 2004 the applicant complained to the Ministry of Justice about the refusal.

19. As a result of this intervention with the Ministry, on 3 September 2004 the Gdańsk Court of Appeal requested M.K. to prepare the cassation appeal within seven days. In a written opinion of 6 September 2004 M.K. maintained his view that there were no grounds for a cassation appeal in this case.

20. On 9 September 2004 the applicant asked the local Bar to assign another legal-aid lawyer to the case.

21. The Bar replied on 7 October 2004 that, having regard to the opinion expressed by the first lawyer, it saw no grounds for assigning new counsel to the applicant. It also reminded him that pursuant to the case-law of the Supreme Court it was permissible for a legal-aid lawyer to refuse to prepare a cassation appeal if he or she considered that it offered no prospects of success.

22. On 27 September 2004 the applicant asked for retrospective leave to lodge a cassation appeal out of time. On 28 October 2004 that request was rejected.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legal aid

23. 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.

24. 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 or she submits a declaration to the effect that the fees required would entail a substantial reduction in his and his family's standard of living.

25. Pursuant to Article 117 of the Code, persons exempted from 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.

B. The cassation appeal

26. 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.

27. Under Article 393⁴ § 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.

28. Article 393¹ 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.”

29. Article 393³ 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.”

30. Article 393⁴ read as follows:

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

31. 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

32. 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 organised as a self-governing association.

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

33. 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.”

34. 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 of the 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.”

35. 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 their office.

36. 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 proceedings before the bar disciplinary court.

37. 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 the 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)

38. 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.

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

40. 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 a cassation appeal had been introduced in 1996, when this new kind of appeal had been created.

41. 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 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 the relevant provisions had given rise to serious difficulties of interpretation and discrepancies in the case-law of the Polish courts.

42. 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.

43. The constitutional role of the Supreme Court, the highest judicial authority, was also an argument in favour of the 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 rejected such requests and in others it had accepted them. However, it did not prevent the parties from having recourse to this course of action.

E. Retrospective leave to submit a cassation appeal out of time

44. Pursuant to Article 169 of the Code of Civil Procedure, a party to 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.

45. Article 133 § 3 of the Code of Civil Procedure reads, in so far as relevant:

“If a legal representative ... has been appointed in a case, the court correspondence shall be served on [him or her].

However, in a number of decisions the civil courts have held that the running of the time-limit for lodging a cassation appeal is not affected in any way by a request for legal aid submitted by a hitherto non-represented party and its subsequent grant or refusal. That time-limit starts to run on the date when the party was served with the judgment of the appellate court together with its written grounds, also where the request for legal aid has subsequently been granted (the Supreme Court's decisions of 15 April 1997, II CZ 35/97; 18 April 1997, I PKN 120/97; 10 September 1998, II UZ 101/98; 6 July 1999, II UKN 332/99; 9 August 2000, I CKN 747/00; 23 March 2001, II UZ 17/01; 19 June 2001, I PZ 33/01; 27 September 2001, II UZ 51/01; 28 November 2001, II UZ 85/01, 15 December 2005, I UZ 33/05).

46. The Supreme Court has repeatedly held that a request for leave to appeal out of time was the only method by which a cassation appeal submitted after the expiry of the time-limit could be admitted for examination (21 April 1997, II CZ 38/97; 27 September 2001, II UZ 51/01). In a further series of decisions the Supreme Court considered that it would

be unfair for the legally-aided party to be penalised for the fact that legal-aid applications could not be processed quickly enough to make it possible for a cassation appeal to be lodged within a period of thirty days counted from the day of service of the judgment on the party. The parties waiting for legal-aid services cannot be held at fault for shortcomings in the system. A party who was obliged to have recourse to legal aid should not be put in a worse situation than that of a person who did not seek it. A request to appeal out of time should therefore be submitted within seven days from the date on which the lawyer could obtain effective access to the case file or had an effective possibility of drafting an appeal (4 March 2005, II UZ 72/04; 27 June 2000, I CZ 62/00), or from the date when the lawyer was informed that he had been assigned to the case by the local Bar Association (11 October 2001, IV CZ 163/01; 17 November 1998, II UZ 122/98; 11 October 2001, IV CZ 163/01;

47. In a resolution adopted by a bench of seven judges of the Supreme Court on 17 February 2009 (III CZP 117/08) that court acknowledged that there had been discrepancies in the manner in which the beginning of the seven-day time limit for submitting an application for leave to appeal out of time by legally-assisted parties had been determined. The court was of the view that applications for leave served the purpose of making access to the Supreme Court for legally-aided parties genuine and effective. Hence, the beginning of the time-limit could not be determined in a mechanical manner in all cases. The courts should instead examine the circumstances of individual cases as a whole and determine that date bearing in mind the genuine possibility for a lawyer to examine the case and prepare a cassation appeal.

THE LAW

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

48. 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

49. 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 a civil action was an effective remedy in cases 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.

50. 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.

51. 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

52. The applicant submitted that he had been denied access to the Supreme Court.

53. 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.

54. 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.

55. They further referred to the resolution of the Supreme Court given in September 2000 (see paragraphs 38–43 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 the role of the State to compel lawyers to do so. Hence, the lawyer's refusal in the instant case 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 non-meritorious cassation appeals.

56. In the present case the applicant's request for legal aid had been granted promptly and subsequently the court had speedily forwarded his case to the local Bar Association with the request that a lawyer be assigned to the case. The lawyer had been assigned to represent the applicant on 13 May 2004. That lawyer had examined the case file within five days and submitted a well-motivated written opinion both to the applicant and to the court, indicating that there were no grounds on which to prepare a cassation appeal. 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.

2. The Court's assessment

a. The principles established by the Court's case-law

57. 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).

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 v. Poland*, no. 12825/02, § 42, 27 June 2006; *Staroszczyk v. Poland*, no. 59519/00, § 129, 22 March 2007; *Siałkowska v. Poland*, no. 8932/05, § 106, 22 March 2007).

59. It is for the Contracting States to decide how they should comply with the fair hearing obligations arising under the Convention. 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 v. France*, no. 46800/99, § 21, ECHR 2002-II; *Staroszczyk v. Poland*, cited above, § 130, *Siałkowska v. Poland*, cited above, § 107, *Smyk v. Poland*, no. 8958/04, § 4, 28 July 2009; *Arciński v. Poland*, no. 41373/04, § 34, 15 September 2009 and *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001, *mutatis mutandis*).

60. The Court has already held that 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*, no. 2815/05, § 38, 19 May 2009, *Kulikowski v. Poland*, no. 18353/03, § 63, 19 May 2009). However, an adequate institutional framework should be put in place so as to ensure effective legal representation for entitled persons and a sufficient level of protection of their interests. In particular, the existence of regulations concerning the time-frame within which the lawyer should inform the party of a refusal to prepare a cassation appeal has been considered crucial for the assessment of whether the party's interests have been properly safeguarded (*Siałkowska v. Poland*, cited above, § 114-115).

61. The Court further reiterates that admissibility conditions for appeals are necessary to ensure legal certainty and the proper administration of justice and litigants should normally expect those rules to be applied.

However, a particularly strict interpretation of a procedural rule may deprive an applicant of the right of access to a court (see *Běleš and others v. Czech Republic*, no. 47273/99, § 60, 12 November 2002; *Zvolský and Zvolská v. Czech Republic*, no. 46129/99, 12 November 2002; *Kemp and Others v. Luxembourg*, no. 17140/05, § 42, 24 April 2008, *mutatis mutandis*)

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

62. Turning to the circumstances of the present case, the Court first observes that where 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 the lawyer (see paragraph 45 above; see also *Smyk v. Poland*, cited above, § 63). In such situations no difficulties arise in connection with establishing the date on which the thirty-day time-limit for lodging a cassation appeal, applicable at the material time, is to expire.

63. The situation is significantly different where a party does not have legal representation, as in the present case, and is granted legal aid only after the second-instance judgment has been given.

The case-law of the Supreme Court provides that the time-limit for lodging a cassation appeal starts to run from the date on which the judgment of the appellate court has been served on the non-represented party (see paragraph 45 above). A party who is subsequently granted legal aid is thereby put in a difficult position, because at the time of service the time-limit has already started to run. The courts have repeatedly held that his or her request for legal aid does not affect the running of the time-limit. A lawyer subsequently assigned to the case has therefore less time to examine the case and decide, still within the time-limit, whether a cassation appeal offers prospects of success and to prepare it.

64. The Court further notes that the applicable domestic regulations do not specify the time-frame within which the applicant should be informed about the refusal to prepare a cassation appeal (see *Siałkowska*, cited above, § 114, *Smyk v. Poland*, cited above, § 60). In the present case the second-instance judgment, together with its written grounds, was served on the applicant on 19 April 2004. It was on that date that the thirty-day time-limit for lodging the cassation appeal started to run. Subsequently, the applicant's request for legal aid, dated 20 April 2004, was granted on 30 April 2004. However, the decision on the grant of legal aid did not affect the running of the time-limit, which was to expire on 19 May 2004. The Court observes that the lawyer's refusal was served on the applicant on that day. He was therefore left with no realistic opportunity of having his case brought to and argued before the Supreme Court within the time-limit provided for by law (see *Siałkowska v. Poland*, no. 8932/05, §§ 115-116, 22 March 2007).

65. There has therefore been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicant complained that the courts had wrongly assessed the evidence and, as a result, had failed to establish the facts of the case correctly and had given erroneous judgments.

67. The Court reiterates that, 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 like the establishment of facts are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, ECHR 1999-I, § 28).

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant sought compensation for pecuniary and non-pecuniary damage in the amount of 30,000 euros (EUR).

71. The Government submitted that in so far as the applicant's claims related to alleged pecuniary damage, he had failed to adduce any evidence to show that he had suffered any actual loss. As to non-pecuniary damage, the Government submitted that the amount claimed by the applicant was excessive.

72. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of his right to a fair hearing. However, 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 2,000 under this head.

B. Costs and expenses

73. The applicant, who received legal aid from the Council of Europe in connection with the presentation of his case, also claimed a total of EUR 2,000 to be paid to his lawyer who had prepared observations on the admissibility and merits of the case. He failed to produce any documents or invoices to confirm that the amount claimed had been paid to the representative.

74. The Government indicated that the applicant had not shown that the expenses claimed for legal representation had actually been incurred.

75. The Court may make an award in respect of costs and expenses in so far as they were actually and necessarily incurred (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V). Given that the applicant failed to submit any evidence to justify his costs and expenses related to the legal representation, it makes no award under this head.

C. Default interest

76. 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 complaint concerning access to the Supreme Court and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two 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 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

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

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE MIJOVIĆ

As was emphasised in my previous concurring opinions in three recent cases (*Kulikowski v. Poland*, n°18353/03, 18 August 2009, *Antonicelli v. Poland*, n°2815/05, 18 August 2009 and *Arciński v. Poland*, 41373/04, 15 September 2009), as well as in the joint dissenting opinion in *Smyk v. Poland*, n°8958/04, 28 July 2009, I see the problem of the refusal of lawyers appointed under a legal-aid scheme 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 proceedings¹. For the purposes of the instant case, I would simply refer to the detailed reasoning of those opinions.

¹ There is a significant number of such cases pending before the European Court of Human Rights