



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

FOURTH SECTION

CASE OF BUGAJNY AND OTHERS v. POLAND

(Application no. 22531/05)

JUDGMENT
(revision)

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 Bugajny and Others v. Poland (request for revision of the judgment of 6 November 2007),

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Ledi Bianku, *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. 22531/05) against the Republic of Poland lodged with the Court on 31 May 2005 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Polish nationals, Mr Paweł Bugajny, Mr Tadeusz Ratajczak and Mr Jarosław Słuja (“the applicants”). The applicants were represented before the Court by Mr A. Zielonacki, a lawyer practising in Poznań.

2. In a judgment delivered on 6 November 2007 the Court held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. The Court also decided to award the applicants jointly EUR 247,000 under the head of pecuniary damage and EUR 18,725 covering the costs incurred in the civil proceedings before the Polish courts. It dismissed the remainder of the claims for just satisfaction.

3. On 5 February 2008 the Government requested referral of the case to the Grand Chamber. On 25 February 2008 the Government also requested revision of the judgment within the meaning of Rule 80 of the Rules of Court.

4. On 6 May 2008 the Court considered the request for revision and decided to request the parties to submit their comments.

5. On 24 November 2009 the Court, sitting as the Chamber in its original composition (Rule 80 § 3), considered the request for revision.

THE LAW

I. THE JUDGMENT OF 6 NOVEMBER 2007

6. In its judgment of 6 November 2007 the Court (Fourth Section) summarised the Government's submissions as follows:

“48. The Government averred that the assessment of the case had hinged on whether the roads concerned were public or not. They noted that the administrative authorities had found that, under systemic rules of interpretation, section 98 of the Land Administration Act 1997 as applicable at the material time concerned public roads only. There were no grounds on which to accept that this provision concerned all roads, regardless of whether they were public or not.

This approach was later specified in the amendment of February 2000 to that Act. In addition, the Supreme Administrative Court had also held, in its judgment of 16 October 2001 (see paragraph 17 above) that the roads on the applicants' land were not public because they had not been provided for in the local land development plan. Had that been the case, they would have been expropriated and compensation would have been paid.

The applicants' case could not be likened to the case of *Papamichalopoulos v. Greece* as in that case the applicants had lost all ability to make use of their property, to sell, bequeath, mortgage or make a gift of it. In the present case the applicants could use and dispose of the land concerned and no public authority had ever deprived them of possession of it.

49. The Government concluded that there had been no interference with the applicants' possessions as they remained the lawful owners of the land and could still use it. The mere fact that the land served public purposes in that it had been used for the construction of roads accessible to the general public and that the applicants had had to finance the construction of these roads themselves was insufficient for finding that their possessions had been interfered with.

50. In the absence of any interference, the Government stated that they would abstain from making any submissions as to the public interest, lawfulness and proportionality of the interference alleged by the applicants.”

7. The Court held:

“69. The Court observes that the Supreme Administrative Court found, in its judgment of 16 October 2001, that the Land Administration Act, in so far as it provided for *ex lege* expropriation on the date on which the division of the property became final, was not applicable to the applicants' case. Therefore, the authorities refused to formally expropriate the plots belonging to the applicants and refused to determine the amount of compensation.

70. In this context, the Court notes that, following the division of the land owned by the applicants into smaller plots, the plots of land concerned in the present case were subsequently used for road construction purposes at the expense of the applicants. The applicants built also a housing estate on the remaining plots (see § 7 above). The

Court observes that under the applicable provisions of the Land Administration Act, the division of the estate into smaller plots was possible because the division proposed by the owners was compatible with the local land development plan (see § 36 above). It further notes the applicants' argument that the roads built on the estate are connected to the network of public roads. They currently serve both the general public and the housing estate which the applicants developed and are open both to public and private transport of all kinds (see § 52 above). Given that the entire area of the housing estate covers nine hectares which were divided into as many as thirty-six plots of land designated for the construction purposes, it is reasonable to accept that a considerable number of people can be said to use these roads. It has not been shown or even argued that the access to the estate or the use of these roads is restricted or limited in any way. The situation examined in the present case must therefore be distinguished from that of 'fenced' housing estates to which the public access is restricted by a decision of its inhabitants.

71. The only way in which the land in question can now be used is as roads. The applicants are also currently obliged to bear the costs of their maintenance. The Court emphasises that the burden which the applicants were made to bear is not limited in time in any way.

72. The Court observes that one of the arguments on which the authorities relied when refusing to expropriate the applicants' property was that the roads to be constructed on the estate had not been included in the local land development plan. However, it reiterates that it was not in dispute that the decision on the division could be issued only when the division plan submitted by the owners was compatible with the land development plan. The Court considers that by adopting such an approach the authorities could effectively evade the obligation to build and maintain roads other than major thoroughfares provided for in the plans and shift this obligation onto individual owners.

73. The Court finally notes that the Poznań Regional Court expressed serious doubts as to whether the applicants' situation was compatible with the requirements of Article 1 of Protocol No. 1. This court expressly compared the applicants' position to that of the applicant in the *Papamichalopoulos v. Greece* case cited above and considered it to be 'even worse'. In the Court's view, the applicants' situation in the present case was less serious than the situation examined in the *Papamichalopoulos* judgment, because they were not divested of all possibility of using their property. Nonetheless, such a critical assessment on the part of the domestic court is certainly, in the Court's view, of relevance for the overall assessment of the case.

74. Having regard to the above considerations, the Court is of the view that a fair balance was not struck between the competing general and individual interests and that the applicants had to bear an excessive individual burden."

II. RELEVANT DOMESTIC LAW

8. Information pertaining to the legal status of land, including its ownership and rights *in rem*, is collated in land registers. The registers are kept by the Land Register Divisions of the District Courts. Under section 1 of the Land Registers and Mortgage Act of 1982, land registers are opened

in order to establish and make available to the public information on the legal status of immovable properties.

Section 24 of the Act provides that a separate file is to be opened for each property. Pursuant to section 25, the files are divided into four chapters. The first chapter identifies the real property. The second chapter identifies its owner or owners. The third chapter lists rights *in rem* and other rights of third parties encumbering the property, and the fourth chapter contains entries concerning mortgages.

9. Section 2 of the Act reads:

“Land registers are open to the public. No one can validly rely on his or her lack of knowledge of entries made in the land register, or of registered requests to have such entries made, to justify his or her legal position.”

Under section 28, for each property listed in the land register a separate file is kept containing documents and applications to the courts, concerning the entries made in respect of the property.

Section 36¹ provides that the land register must at all times remain at the registry of the district court. All persons who have shown that they have a legal interest in the legal status of the property can consult relevant entries in the presence of a court clerk. Section 36² provides that copies of the current entries in the register can be obtained on a request submitted by persons who have shown that they have a legal interest in the legal status of the property, or by a court, a prosecutor, a notary, or governmental or local authorities.

10. In Polish legal opinion the notion of legal interest is understood as a request to obtain information of legal relevance, or an interest in a given outcome of a civil or administrative case, even before such a case has been lodged with a court or with an administrative body, which can be said, at least on arguable grounds, to be protected by law.

11. Section 3 of the Land Register Act enacts a legal presumption that the rights registered in the land register correspond to the actual legal status of the property.

12. Under section 5 of the Act, if there is a discrepancy between the title as registered in the register and the actual legal status of the property, the person who acquired title from a person whose title had been registered is regarded as having acquired it validly (*rękojmia wiary publicznej ksiąg wieczystych*).

13. Section 10 of the Act reads:

“If there is a discrepancy between the title or right as registered in the register and the actual legal status of the land, a person whose title or right is not registered or is registered is entitled to request a rectification of the relevant entries.

A claim for rectification of entries can be made public by registering a warning in the register. Such an entry shall be made on the basis of either a non-final judicial decision, or a judicial temporary order.”

III. THE REQUEST FOR REVISION

14. Rule 80 of the Rules of Court provides, in so far as relevant:

“A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court ... to revise that judgment. ...”

15. The Government disagreed with the Court's conclusion that there had been a violation of Article 1 of Protocol No. 1. They reiterated that there had been no interference with the applicants' possessions as they remained the lawful owners of the land and could still use it (see paragraph 49 of the judgment).

16. The Government further argued that the applicants could not be said to have sustained any damage because they had tried to offset the damage suffered by them by concluding easement contracts with the buyers of the flats which their company had built on the plots. These contracts had imposed on the owners an obligation to pay the company 200 Polish zlotys (PLN)¹ per year. The Government had been informed of these contracts only after the Court's judgment had been delivered, by an unspecified number of owners of plots sold to them by the applicants' company. The Government submitted a copy of one such contract, concluded in 2000. The charge for the easement to be paid by the purchaser was fixed, until 31 January 2001, at PLN 1 and 1/250 of the amount equal to the real property tax due for the property concerned, and at PLN 200 and 1/250 of the same tax for the subsequent period, payable until 31 December 2039.

17. The Government concluded that the Court's finding of a violation of the applicants' right to the peaceful enjoyment of their property was therefore incorrect, because the applicants had not suffered any pecuniary damage.

18. The Government submitted that when the case had been pending before the Court they had had no legal interest on the basis of which they could have asked for access to the land register concerned or to the documents filed with the registry under section 28 of the Land Register and Mortgage Act. They submitted that they had not exercised their right to request copies of the entries in the register, because they related to the proceedings before the court that kept the register, to which they had not been a party. The courts were independent of the Government and they had had no right to exert any control over them.

19. The Government lastly submitted that they were applying for the judgment to be revised on the ground that the contracts concerned had to be regarded as “the discovery of a fact which might by its nature have a decisive influence on the outcome of the case and which, when the

¹ Approximately EUR 50

judgment had been delivered, had been unknown to the Court and could not reasonably have been known to the Government”.

20. The applicants first challenged the Government's submission that they had concealed any facts from the Court. The administrative decision of 15 November 1999, submitted to the Court and approving the division of the estate into smaller plots, including the plots designated for the roads, expressly obliged them to establish an easement in respect of the plots designated for the roads. In so far as the Government relied on the alleged profits which the applicants received on the basis of the easement contracts, they first submitted that for the first two years the annual charges to be paid by the owners had amounted to PLN 1. The contracts provided that the easement would become free of charge if the municipality took over the ownership of the roads. When concluding the contracts, the applicants had been certain that this would ultimately happen.

The applicants submitted that they received approximately EUR 3,000 per year on the basis of the easement contracts concluded with the thirty-six owners of the plots concerned, while the tax charged by the municipality in respect of the plots used as roads alone amounted to EUR 1,000. The remaining amount of EUR 2,000 was insufficient to cover all costs connected with the maintenance of the roads in question.

21. The applicants emphasised that there had been no new circumstances in the case such as to fall within the ambit of Rule 80. In so far as the Government were of the view that the easement contracts amounted to such new circumstances, they averred that there had been nothing to prevent the Government from consulting the land register when the case had been pending before the Court. The contracts by which the easement of passage had been created had duly been listed in that register. Under the provisions of the Land Register and Mortgage Act the land register was open to the public. The Government could and should have relied on the legal interest they had in consulting its entries, referring to the case which had been pending before the Court. The Government's submissions that they allegedly could not consult the relevant entries or that the information contained therein would have been irrelevant to the outcome of the case, or insufficient for its purposes, were clearly incompatible with the legal status of the land registers provided for by Polish law and with the purpose for which they had been created.

22. The Court considers that at the present stage of the proceedings before it the crucial question to be examined is whether in the specific factual context of the present case the circumstances relied on by the Government, namely the easement contracts concluded with the buyers of accommodation built by the applicants, can be regarded as constituting facts which “when a judgment was delivered, w[ere] unknown to the Court and could not reasonably have been known to that party” within the meaning of Rule 80.

23. The Court considers that it is relevant in this connection to have regard to the legal character and the purpose of land registers as envisaged by Polish law. It observes that the registers are run by the district courts in order to establish the legal status of immovable properties and make it known to the public. They are open to the members of the public and can be read at the registry of the courts responsible for them. Copies of the entries in the register can be obtained by persons who have a legal interest in them. In addition, the Land Registers and Mortgage Act expressly provides that lack of knowledge of entries made in the land registers cannot be used to provide a valid justification for a legal argument.

24. The Court notes that when the judgment was adopted the applicants must have been aware of the existence of the easement contracts between their company and the owners of the plots on which the houses had been built. They had chosen not to inform the Court of these contracts. The Court finds the applicants' conduct in this respect improper.

25. However, the Court observes that in their submissions the Government have not referred to any information about the legal status of the properties concerned which could at that time have been recorded in the relevant land registers (see paragraph 6 above). It further observes that it has not been shown by the Government that they could not obtain access to the publicly available entries in the land registers. Even assuming that the Government could not demonstrate that at that time they had a legal interest in consulting the entries and files, it should be noted that under section 36² of the Land Register and Mortgages Act copies of the current entries in the register can be obtained further to a request by the governmental authorities.

Moreover, it has not been shown or even argued that before the Court's judgment was adopted the Government had tried to consult the relevant registers, but without success.

26. Hence, it has not been shown that in the circumstances of the case the entries in the register, which the Government regard as relevant for the finding of a violation of Article 1 of Protocol No. 1 to the Convention, constitute a fact "which could not have reasonably been known to the party" within the meaning of Rule 80 § 1.

27. The request for revision should therefore be refused.

FOR THESE REASONS, THE COURT

Decides by five votes to two to reject the Government's request for revision.

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 dissenting opinion of Judge Garlicki joined by Judge
David Thór Björgvinsson is annexed to this judgment.

N.B.
T.L.E.

**DISSENTING OPINION OF JUDGE GARLICKI JOINED
BY JUDGE DAVID THÓR BJÖRGVINSSON**

To our regret, we are unable to agree with the rejection of the Government's request for revision in this case.

We can accept the majority's position that the Government could have consulted the land register when the case was pending before the Court. It follows that the very existence of the easement contracts cannot be regarded as “a new circumstance” within the meaning of Rule 80.

However, while the existence of those contracts was not known to the Government, it was quite well known to the applicants, who, nonetheless, decided not to share this information with the Court. In effect, the Court was misled in the process of calculating the damages.

We believe that the applicants' “improper conduct” (to use the language of the majority decision – see paragraph 24 of the judgment) should not remain without reaction. In fact, it should be interpreted as a new circumstance that could not have been known to the Court when adopting its judgment.

We are therefore of the opinion that the judgment should be revised and the damages recalculated accordingly.