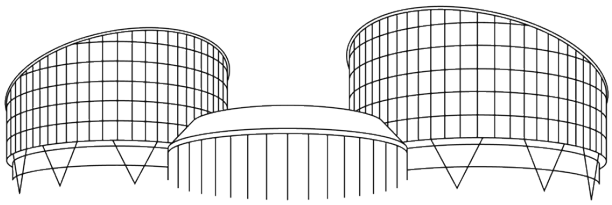

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF WERSEL v. POLAND

(Application no. 30358/04)

JUDGMENT

STRASBOURG

13 September 2011

FINAL

13/12/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wersel v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 23 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 30358/04) 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 Krzysztof Wersel ("the applicant"), on 4 August 2004.

2. The applicant was represented before the Court by Ms E. Korzydło, a lawyer practising in Brzeg. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant complained, in particular, under Article 6 of the Convention about the lack of access to a court in that a domestic court refused to appoint him a legal aid lawyer for the purpose of lodging a cassation appeal.

4. On 6 December 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Krzysztof Wersel, is a Polish national who was born in 1970 and is currently serving a prison sentence in Brzeg Prison.

A. Conditions of the applicant's detention

1. Period of the applicant's detention

6. The applicant has been in continuous detention from an unspecified date in September 2000 until the present day.

2. Description of the applicant's detention conditions

7. He was initially committed to Mysłowice Remand Centre.

8. In November 2000 he was transferred to Zabrze Remand Centre, where, as he submitted, he had been detained together with two or three other detainees in cells measuring 6 or 10 square metres.

9. In July 2001 the applicant was transferred back to Mysłowice Remand Centre, where he had been detained in overcrowded cells. In addition, the applicant, who was a non-smoker, had been exposed to cigarette smoke because smoking inside the cell was allowed.

10. From 31 December 2003 until an unspecified date in July 2005 the applicant was detained in Gliwice Remand Centre. He was assigned to a cell measuring 6 square metres which he had shared with two other detainees.

11. On an unspecified date in July 2005 the applicant was committed to Zabrze Remand Centre. He submitted that, initially, the conditions of his detention had been satisfactory. In his letter of 19 June 2006, however, he claimed that the establishment had become overcrowded just like all the other detention facilities.

12. The Government submitted that as of 26 November 2009 the applicant had been detained in Brzeg Prison, in a cell in which the statutory minimum space of 3 square metres per person had been respected.

B. The applicant's actions concerning the conditions of his detention

13. On 7 October 2004 the applicant complained to the remand centre's administration about overcrowding and bad living conditions. He did not complain to the penitentiary authorities in connection with the living conditions as regards the more recent period of his detention. Moreover, the applicant did not bring a civil action in tort to seek compensation for the infringement of his personal rights.

C. The applicant's criminal proceedings

14. On 27 October 2003 the Katowice District Court (*Sąd Rejonowy*) convicted the applicant of three counts of armed robbery and sentenced him to a prison term of three and a half years. During the first-instance proceedings the applicant was represented by a legal aid lawyer.

15. On 23 April 2004 the Katowice Regional Court (*Sąd Rejonowy*) upheld the above-mentioned judgment on appeal. During the

second-instance proceedings the applicant was also represented by a legal aid lawyer. To that effect the appellate court held that the applicant be exempted from all costs of the appellate proceedings, including legal assistance.

16. On 25 May 2004 the reasoned judgment was served on the applicant. On that date the time-limit of thirty days for lodging a cassation appeal began to run.

17. On 26 May 2004 the lawyer instructed the applicant that her mandate had expired when the appellate proceedings had come to an end. If the applicant wished to have a cassation appeal lodged with the Supreme Court, he should make a new request for legal aid.

18. On 30 May 2004 the applicant prepared an application for legal aid and deposited it as out-going mail with the authorities of the Gliwice Remand Centre. His legal aid application was received by the Katowice Regional Court on 3 June 2004.

19. By an official letter of 22 June 2004 the registry of the Katowice Regional Court notified the applicant that his appeal for legal aid had been rejected. The court's decision was not accompanied by any reasoned opinion.

20. On 24 June 2004 the applicant drafted his own cassation appeal and filed it with the Katowice Regional Court.

21. On 1 July 2004 the Katowice Regional Court requested the applicant to complete the procedural requirements by having his cassation appeal prepared and signed by a lawyer within 7 days. That request was served on the applicant on 5 July 2004.

22. On 6 July 2004 the applicant informed the Regional Court that he was unable to comply with the above-mentioned instruction because he had not been granted legal-aid. The applicant, once more, asked the court to grant him legal aid for the purpose of his cassation appeal proceedings.

23. On 16 July 2004 the registry of the Katowice Regional Court informed the applicant that his application for legal aid had been rejected. No formal decision was served on the applicant to that effect.

24. On 6 August 2004 the President of the Criminal Law Section of the Katowice Regional Court decided that the applicant's cassation appeal was not to be entertained (*odmówił przyjęcia kasacji*) for non-compliance with procedural requirements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Conditions of detention

25. A detailed description of the relevant domestic law and practice concerning general rules governing conditions of detention in Poland and domestic remedies available to detainees alleging that the conditions of their

detention were inadequate is set out in the Court's pilot judgments given in the cases of *Orchowski v. Poland* (no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) on 22 October 2009 (see §§ 75-85 and §§ 45-88 respectively). More recent developments are described in the Court's decision in the cases of *Łatak v. Poland* (no. 52070/08) adopted on 12 October 2010 (see §§ 25-54) and *Łomiński v. Poland* (no. 33502/09) adopted on 12 October 2010 (see §§ 17-49).

B. Legal representation in cassation appeal proceedings

26. Under the Law of 6 June 1997 - Code of Criminal Procedure ("the Code"), which entered into force on 1 September 1998, a party to criminal proceedings can lodge a cassation appeal with the Supreme Court against any final decision of an appellate court which had terminated criminal proceedings. The cassation appeal has to be lodged and signed by an advocate, on pain of being declared inadmissible. The relevant part of Article 523 § 1 of the Code provides:

> "A cassation appeal may be lodged only on the grounds referred to in Article 439 [these include a number of procedural irregularities, such as, for instance, incorrect composition of the trial court; lack of legal assistance in cases where such assistance was compulsory; breach of the rules governing jurisdiction in criminal matters; trying a person *in absentia* in cases where his presence was obligatory and thus depriving him of an opportunity to defend himself, etc.] or on the ground of another flagrant breach of law provided that the judicial decision in question was affected as a result of that breach. A cassation appeal shall not lie against the severity of the penalty imposed (*niewspółmierności kary*)."

27. Pursuant to Article 524 § 1 of the Code, a cassation appeal has to be lodged with the appellate court competent to carry out an initial examination of its admissibility within thirty days from the date of service of the judgment of the appellate court with its written grounds on the party or, if the party has been represented, on his or her lawyer.

Under Article 83 of the Code, an accused may appoint a lawyer to represent him or her in criminal proceedings. If he or she cannot afford lawyers' fees, a request for legal aid may be made under Article 78 of the Code.

28. A grant of legal aid expires upon a judgment of an appellate court. A new decision on legal aid has to be made if the convicted person wishes to institute further proceedings in order to lodge a cassation appeal with the Supreme Court. The relevant part of Article 84 § 3 of the Code provides:

> "A defence counsel appointed under the legal aid scheme in the cassation proceedings ... shall prepare and sign a cassation appeal ... or shall inform the court, in writing, that he or she has not found any grounds for lodging a cassation appeal ... If a cassation appeal ... is lodged, the defence counsel is entitled to represent the defendant in the subsequent proceedings."

29. Under Article 528 of the Code an interlocutory appeal (*zażalenie*) is not available against a refusal of legal aid for cassation appeal proceedings.

Article 530 § 2 of the Code provides that the president of the court which had given the decision appealed against is competent to decide whether the formal requirements for a cassation appeal had been complied with. If an accused's appeal is not filed and signed by an advocate, it must be rejected on formal grounds. If such an appeal complies with the formal requirements, the case is referred to the Supreme Court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant alleged a breach of Article 3 of the Convention in that he had been detained in overcrowded cells and that the State had failed to secure to him throughout his entire detention adequate living conditions, in particular the statutory minimum cell space of 3 square metres per person, as required by national law.

A. The Government's objection on exhaustion of domestic remedies

1. The Government

31. The Government submitted that as of 26 November 2009 the applicant had been detained in a cell in which the statutory minimum space of 3 square metres per person had been respected. In these circumstances, the situation giving rise to the alleged breach of Article 3 of the Convention no longer existed and the applicant should bring a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code in order to seek compensation for the past violation.

In that regard they relied, in particular, on the above-mentioned *Orchowski* judgment, reiterating that the Court, having regard to the principle of subsidiarity, had held that in cases where the alleged violation of Article 3 no longer continued and could not be eliminated with retrospective effect, the only means of redress for the applicant was pecuniary compensation.

In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

2. The applicant

32. The applicant in general disagreed with the above arguments and maintained that the remedy suggested by the Government could not

be considered "effective" for the purposes of Article 35 § 1 of the Convention.

3. The Court

33. The Court has already examined a similar objection based on exhaustion of domestic remedies raised by the Government in the above-mentioned cases of *Łatak v. Poland* and *Łomiński v. Poland* and considered their arguments not only in the context of those two particular applicants but also in respect of other actual or potential applicants with similar complaints. (see *Łatak v. Poland* no. 52070/08 and *Łomiński v. Poland* no. 33502/09 (dec.), 12 October 2010, §§ 71-85 and §§ 62-76 respectively).

In so doing, the Court had regard to the fact that on the date of the adoption of its decisions there were 271 cases pending before it where the applicants had raised complaints similar in substance, alleging a violation of Article 3 in that at various times and for various periods they had been adversely affected by the same structural problem, having been detained in overcrowded, insanitary cells (ibid. § 84 and § 75 respectively).

34. Having found that a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code could be considered an "effective remedy" for the purposes of Article 35 § 1 of the Convention as from 17 March 2010 and having regard to the 3-year limitation period for lodging such an action, the Court held that essentially in all cases in which in June 2008 the alleged violation had either been remedied by placing the applicant in Convention-compliant conditions or had ended *ipso facto* because the applicant had been released, the applicants concerned should bring a civil action for the infringement of personal rights and compensation (ibid. § 85 and § 76 respectively).

35. It appears that in the present case the situation giving rise to the alleged violation of Article 3 ended, at the latest, on 26 November 2009 when the applicant was placed in a cell in which the statutory minimum space of 3 square metres per person was respected. That being so and having regard to the fact that the applicant still has adequate time to prepare and lodge with the Polish civil courts an action under Article 24 taken in conjunction with Article 448 of the Civil Code, he should, before having his Convention claim examined by the Court, be required to seek redress at domestic level.

36. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 READ IN CONJUNCTION WITH ARTICLE 6 § 3 (c) OF THE CONVENTION

37. The applicant complained that the Katowice Regional Court's refusal to grant him legal assistance in connection with the preparation of a cassation appeal – a refusal given regardless of the fact that such assistance was compulsory – had infringed his right to defend himself and resulted in his irrevocably losing an opportunity to institute cassation proceedings. He alleged a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention, which read, in so far as relevant:

> "1. 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. The parties' arguments

1. The applicant

38. The applicant complained that the Katowice Regional Court's refusal to grant him legal assistance in connection with the preparation of a cassation appeal had infringed his right to defend himself and resulted in his irrevocably losing an opportunity to institute cassation proceedings. That, in turn, constituted a breach of Article 6 § 1 of the Convention.

The applicant also considered that the refusal to grant him free legal assistance had not pursued the "interests of justice" within the meaning of Article 6 § 3 (c). The Regional Court's decision not to grant him such assistance was not accompanied by any reasoning and could not be the subject of any further appeal.

He argued that, even though the grounds of the decision in question were unknown, the decision was unjustified in the light of the fact that already at the beginning of his trial he had presented documentary evidence in support of his application for free legal assistance. On that basis a lawyer had been appointed under the legal aid scheme to represent him before the District Court and, subsequently, the Regional Court.

39. In conclusion, the applicant asked the Court to find a violation of Article 6 §§ 1 and 3 (c), pointing out that the refusal to grant him further

free legal assistance in cassation proceedings not only had affected his defence rights in a manner contrary to the requirements of a "fair trial" but had also made it impossible for him to have his case heard by a cassation court.

2. The Government

40. The Government refrained from making comments in respect of the applicant's Article 6 complaint.

3. The Court

(a) General principles

41. The Court 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; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001-VIII, *mutatis mutandis*).

42. 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, including the right to free legal assistance. 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). However, the Court must satisfy itself that the method chosen by the domestic authorities in a particular case is compatible with the Convention (see, *mutatis mutandis*, in criminal law proceedings, *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001; *Kulikowski v. Poland*, no. 18353/03, §§ 58 and 59 ECHR 2009-... (extracts); *Antonicelli v. Poland*, no. 2815/05, §§ 33 and 34, 19 May 2009 and, in civil law proceedings, *Tabor v. Poland*, no. 12825/02, §§ 39-43, 27 June 2006).

43. Moreover, the Court reiterates that the right of an accused to free legal assistance, laid down in Article 6 § 3 (c) of the Convention, is one of the elements inherent in the notion of fair trial. That provision attaches two conditions to this right. The first is lack of "sufficient means to pay for legal assistance", the second is that "the interests of justice" must require that such assistance be given free (see, among many other authorities, the *Pham Hoang v. France* judgment of 25 September 1992, Series A no. 243 p. 23, § 39).

(b) Application of those principles to the instant case

44. The Court notes at the outset that the facts of the instant application are similar to those in the case of *R.D. v. Poland* (see *R.D. v. Poland,* nos. 29692/96 and 34612/97, 18 December 2001), in which a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention was found by the Court.

(i) "Sufficient means to pay for legal assistance"

45. The Court must first determine whether the applicant, who had been exempted from the costs of legal assistance throughout the proceedings at first and second instance, should, given his financial means, have obtained further free assistance for the preparation of a cassation appeal.

In resolving that issue, the Court cannot substitute itself for the Polish courts in order to evaluate the applicant's financial situation at the material time but must review whether those courts, when exercising their power of appreciation in respect of the assessment of evidence, acted in accordance with Article 6 § 1 (see, *mutatis mutandis*, *Kreuz v. Poland* no. 28249/95, § 64, ECHR 2001-VI).

46. In that connection, the Court notes that in its judgment of 23 April 2004 the Katowice Regional Court held that the applicant should be exempted from all the costs of the appellate proceedings, including legal assistance. That finding implies that the court had a sufficient basis to consider that bearing those costs would constitute a "disproportionate burden" for the applicant, within the meaning of Article 556 of the Code (see paragraph 15 above).

Two months later, on 22 June 2004 and again, three months later, on 16 July 2004, the applicant was informed that the same court had refused to

grant him further free legal assistance in connection with his intended cassation appeal (see paragraphs 20 and 24 above). It does not appear that the applicant's financial situation had in the meantime improved. Nor does it emerge from the relevant decisions on what concrete circumstances the Regional Court had based its opinion that the applicant could afford such costs in cassation proceedings, despite the fact that he had previously been exempted from the costs of his legal representation at first instance and on appeal.

47. Against that background, the Court finds that in the present case there were reasonable grounds to consider that the applicant's financial means were limited. Hence, there were strong indications that he did not have "sufficient means to pay for legal assistance" within the meaning of Article 6 § 3 (c) (see *R.D. v. Poland,* ibid. §§ 45 and 46).

(ii) The requirement of the "interests of justice"

48. It remains for the Court to ascertain whether, having regard to the particular circumstances of the case and the criteria emerging from its case-law, the "interests of justice" required that the applicant be granted such assistance.

49. In previous cases before it, the Court has set out the applicable criteria. It has, for instance, held that the nature of the charges against the applicant, the need to develop appropriate arguments on complicated legal issues or the complexity of the cassation procedure may, from the point of view of the interests of justice, necessitate that he be granted free legal assistance (see the *Pham Hoang* cited above, ibid. § 40 *in fine*; and the *Twalib v. Greece* judgment of 9 June 1998, *Reports* 1998-IV, pp. 1430-31, §§ 52-53).

50. There is, however, a primary, indispensable requirement of the "interests of justice" that must be satisfied in each case. That is the requirement of a fair procedure before courts, which, among other things, imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire trial. In the context of cassation proceedings, that means that the authorities must give an accused the opportunity of putting his case before the cassation court in a concrete and effective way (see the *Vacher v. France* cited above, ibid. § 30).

51. In that regard, the Court notes that Polish law did not (and still does not) give a convicted appellant the choice between appointing a lawyer or preparing his cassation appeal himself. A defendant has to be assisted by an advocate in the preparation of a cassation appeal, an appeal filed by himself being rejected (see paragraphs 27-29 above).

The applicant could, accordingly, have obtained access to the cassation court only through a lawyer – either one of his choice (Article 83 of the Code) or one appointed by the relevant court (Article 78 of the Code). He should moreover have had his appeal filed within thirty days after the

appellate court's judgment had been served on him (see paragraphs 27 and 29 above).

52. The Katowice Regional Court could not have been unaware of those legal prerequisites. It was, therefore, incumbent on that court to handle the applicant's application for legal assistance in a way that would have enabled him to prepare his cassation appeal properly and to put his case before the Supreme Court.

However, not only did the Regional Court refuse to grant the applicant further free assistance but it also communicated its first refusal to him two days before the expiry of the time-limit for the submission of his cassation appeal (see paragraphs 17, 19 and 20 above).

53. In the Court's view, the shortness of the time left to the applicant for appointing a lawyer of his choice and for preparing the intended cassation appeal did not give him a realistic opportunity of having his case brought to and defended in the cassation court in a "concrete and effective way" (see *R.D. v. Poland,* ibid. §§ 47 and 51).

54. There has, accordingly, been a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 10,000 EUR in respect of non-pecuniary damage for the alleged violation of Article 6 of the Convention.

57. The Government submitted that the applicant's claim was excessive.

58. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration resulting from the impossibility of defending himself effectively in cassation proceedings. Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 under this head.

B. Costs and expenses

59. The applicant did not claim any costs and expenses.

C. Default interest

60. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 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 13 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President