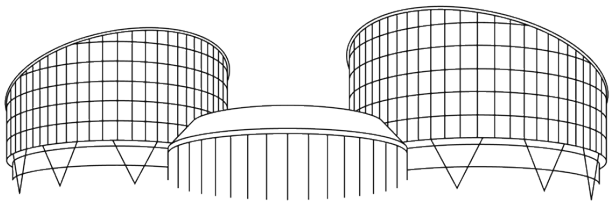

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOWALSKI v. POLAND

(Application no. 43316/08)

JUDGMENT

STRASBOURG

11 June 2013

This judgment is final but it may be subject to editorial revision.

In the case of Kowalski v. Poland,

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

Päivi Hirvelä, *President,*
Ledi Bianku,
Paul Mahoney, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 21 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 43316/08) 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 Daniel Kowalski ("the applicant"), on 28 August 2008.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant complained, in particular, that he had been deprived of access to the Supreme Court.

4. On 13 January 2011 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).

5. In accordance with Protocol No. 14, the application was allocated to a Committee.

6. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1975 and lives in Łódź.

8. On 16 October 2007 the applicant was convicted by Sieradz District Court of extortion and sentenced to one year and six months imprisonment.

On an unspecified date the applicant appealed against the first-instance judgment.

9. On 23 January 2008 the Sieradz Regional Court dismissed the appeal. The judgment was sent to the applicant on 12 February 2008. On an unspecified date it was served on the applicant.

10. The applicant requested the District Court to appoint a legal-aid lawyer with a view to filing a cassation appeal. On 12 March 2008 his legal-aid application was received by the Sieradz Regional Court.

11. On 18 March 2008 the Sieradz Regional Court refused to examine the applicant's request for the appointment of a legal-aid lawyer. The court stated that the time-limit for lodging a cassation appeal had expired on 14 March 2008. The court also informed the applicant that the refusal was final and could not be appealed against.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. The cassation appeal in criminal proceedings in Poland is an extraordinary remedy that enables to challenge final judgments on the grounds of serious violations of law which might have affected the outcome of the proceedings. The cassation appeal may be lodged only if the different conditions defined by the Code of Criminal Proceedings ("the Code") are met. It may be lodged not only by the parties but also by the Attorney General, the Ombudsman and, if the rights of a child were infringed, by the Ombusdman for Children. The aim of the cassation proceedings is to ensure a protection against the most serious violations of law. Under Polish law, a party to criminal proceedings has no subjective right to access a third instance court.

The relevant domestic law and practice concerning legal representation in cassation appeal criminal proceedings before the Supreme Court are stated in the Court's judgment in the case of *Wersel v. Poland*, no. 30358/04, §§ 26-29, 13 September 2011.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 6 § 3 (c) OF THE CONVENTION

13. The applicant complained that the court's refusal to grant him legal assistance in connection with the preparation of a cassation appeal to the Supreme Court 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 s 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

14. The Government argued that the applicant had failed to avail himself of the applicable domestic remedies. Had the applicant decided to lodge a cassation appeal when the time-limit for doing so had already expired, it would have been open to him to request retrospective leave to appeal out of time. Thus, the applicant should have hired a lawyer with a view to submitting a cassation appeal on his behalf within the new time-limit.

15. The applicant disagreed. In particular, he stressed that he had not been informed by the court about his right to request retrospective leave to appeal out of time.

16. The Court considers that the Government's preliminary objection is closely linked to the merits of the applicant's complaint. Accordingly, it decides to join its examination to the merits of the case.

17. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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' arguments

18. The applicant submitted that as a result of the refusal to grant him legal assistance in connection with the preparation of a cassation appeal he had been deprived of the right to defend himself.

19. He stated that although he had filed his request for legal aid in good time the court refused it, justifying its decision on the erroneous ground that the time limit for lodging the cassation appeal had already expired.

20. He also emphasised that the court failed to inform about his procedural rights and the possibility to request the reinstatement of the time limit.

21. In conclusion, the applicant asked the Court to find a violation of Article 6. The refusal to grant him 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.

22. The Government admitted that the Sieradz Regional Court based its refusal to grant the applicant legal assistance on an erroneous premise. However, the applicant had failed to exhaust domestic remedies. He could have requested retrospective leave to appeal out of time. Such leave will only be granted if the non-compliance with a time limit was "outside the applicant's power" within the meaning of Article 126 § 1 of the Code. The Government submitted that there was well-established case-law of the domestic courts. According to it not lodging a cassation appeal by a party due to lack of instruction or false instruction from the trial court on the renewed time limit is to be regarded as "outside the applicant's power" in the meaning of Article 126 § 1 of the Code. The Government referred, in particular, to two decisions of the Supreme Court, of 26 February 2009 (IV KZ 5/09) and 16 July 2009 (III KZ 58/09).

2. The Court

23. 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).

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, *Wersel v. Poland*, cited above, § 43). In discharging that obligation, 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, among many other authorities, *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001).

24. According to the established case-law of the Court, the manner in which Article 6 is to be applied to courts of appeal or of cassation depends on the special features of the proceedings in question. 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 extraordinary remedies such as cassation 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; *Staroszczyk v. Poland*, no. 59519/00, § 128, 22 March 2007). On the other hand, there can be no doubt that a State which does institute such courts is required to ensure that the lack of sufficient means will not be an obstacle for the parties to lodge available remedies to these courts.

25. 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 and therefore has become final should be assisted by a lawyer in the preparation of his or her cassation appeal against the final judgment given by that court.

26. The Court notes that in the instant case the provisions of the Code made it possible for the applicant to apply for free legal assistance. The relevant decision was dependent on the court's assessment as to whether in the circumstances of the case legal representation was necessary. When examining whether the decisions on legal aid, seen as a whole, were in compliance with the fair hearing standards of the Convention, it is not the Court's task to take the place of the Polish courts, but to review whether those courts, when exercising their power of appreciation in respect of the assessment of evidence, acted in accordance with Article 6 § 1 (*Wersel*, cited above, § 45).

27. The Court observes in this connection that on 18 March 2008 the Sieradz Regional Court refused the applicant's request to appoint a legal-aid lawyer in the cassation appeal proceedings on the ground that the time limit for lodging the cassation appeal had already expired. The court did not examine the merits of the request or of the applicant's financial situation in any way.

28. The Government admitted that the Sieradz Regional Court's refusal to provide the applicant with the assistance of a lawyer was a violation of law. The request to grant the legal aid was lodged within the applicable time-limits and should have been examined on the merits. Whereas, in principle a cassation appeal has to be lodged within 30 days from the day on which the judgment with its motivation was served, a party may request a reinstatement of the time-limit if the non-compliance occurred outside the party's power. Therefore, the ground given by the Regional Court to justify the refusal was erroneous. In these circumstances, the Court is of the view that the Regional Court failed in its duty to give proper examination to the applicant's request for legal assistance.

29. The order of the Court of 18 March 2008 stated that it was final and not subject to an appeal. This information, taken together with the ground invoked erroneously to justify the refusal to consider the merits of the request for legal aid (namely the expiration of the time-limit), might have misled the applicant about the applicable law, especially about what steps, if any, he had at his disposal to pursue the cassation proceedings.

30. The Court noted in its earlier judgments that the procedural framework governing the making available of legal aid for a cassation appeal in criminal cases is within the control of the appellate courts. When notified of a refusal to grant legal aid, 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 (see among others *Jan Zawadzki v. Poland*, no. 648/02, § 16, 6 July 2010). However, in the instant case not only this requirement was not complied with, but the whole order could have misled the applicant about the applicable law.

31. In so far as the Government argued that the applicant should have requested leave to appeal out of time, the Court notes, firstly, that the applicant might have not been aware of the possibility to request retrospective leave to appeal out of time. Secondly, the leave of appeal out of time is granted if at the same the cassation appeal is lodged by a qualified lawyer. This means that the applicant would have had to bear himself the costs of legal aid whereas the competent domestic court did not establish whether he was able to meet such costs.

32. Accordingly, having regard to the circumstances of the case seen as a whole, the Court concludes that there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention and the Government's objection based on non-exhaustion of domestic remedies (see paragraphs 14–16 above) must be rejected.

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

33. The applicant complained, relying on Article 6 of the Convention, that the proceedings had been unfair in that the courts had wrongly assessed evidence and erred in establishing the facts of the case.

34. 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).

35. 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

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

40. 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

41. The applicant also claimed for reimbursement of costs and expenses before the domestic courts in an unspecified amount.

42. The Government argued that the applicant failed to attach any bills to prove his expenses.

43. Regard being had to the documents in its possession and to its case-law, the Court rejects the claim for costs and expenses.

C. Default interest

44. The Court considers it appropriate that the default interest rate 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. *Joins* to the merits the Government's preliminary objection and *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) and *dismisses* in consequence the Government's above-mentioned objection;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 2,000 (two thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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 11 June 2013 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Päivi Hirvelä
Deputy Registrar	President