

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

FOURTH SECTON

CASE OF NOWASZEWSKI v. POLAND

(Application no. 7272/09)

JUDGMENT

STRASBOURG

27 March 2012

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



In the case of Nowaszewski v. Poland,

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

Päivi Hirvelä, *President,*
Ledi Bianku,
Zdravka Kalaydjieva, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 6 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 7272/09) 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 Leszek Henryk Nowaszewski ("the applicant"), on 2 April 2008.

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

3. On 31 May the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1963 and lives in Rutki Kossaki.

5. The facts of the case, as submitted by the parties, can be summarised as follows.

A. Domestic proceedings

6. By a judgment of 19 February 2007 the Gliwice District Court found the applicant guilty of fraud and sentenced him to one year and three months' imprisonment.

7. The applicant appealed against the judgment, arguing, *inter alia*, that the first instance court had not examined his request for the questions put to the witnesses to be written down in the minutes. He further complained that he had not had a possibility to have his questions put to certain witnesses that he had called.

8. On 26 September 2007 the Gliwice Regional Court dismissed the appeal. While examining the applicant's particular complaints, the court noted that there was no indication in the minutes of the hearings held by the first-instance court to the effect that the applicant had ever requested this court to note down the questions put to the witnesses. In this connection, the court noted that the applicant had not sought to challenge the content of the minutes of the relevant court hearings, although he had had such a possibility. Moreover, the court observed that the testimonies of the witnesses called by the applicant had been read out in the applicant's presence and that neither the applicant nor his lawyer had raised any complaint concerning the manner in which the witnesses had been heard.

9. On 28 September 2007 the applicant requested to be granted legal aid with a view to having a cassation appeal lodged in his case.

10. On 11 October 2007 the Gliwice Regional Court allowed the applicant's request.

11. By a letter of 15 November 2007 the applicant's legal-aid lawyer informed the Gliwice Regional Court that he would not lodge a cassation appeal in the applicant's case for lack of reasonable prospects of success. This letter was forwarded to the applicant by the Gliwice Regional Court on 19 November 2007. The correspondence, served on the applicant on 27 November 2007, did not contain any information concerning his procedural rights.

12. In a letter of 2 December 2007 sent to the Gliwice Regional Court the applicant challenged the legal-aid lawyer's refusal to lodge a cassation appeal and requested the court to appoint another lawyer. At the same time, he enquired whether the time-limit for lodging a cassation appeal in his case was still running.

13. By a letter of 13 December 2007 the Gliwice Regional Court informed the applicant, *inter alia*, that the time-limit for lodging a cassation appeal had already expired.

B. Proceedings before the Court

14. On 2 April 2008 the applicant lodged his application with the Court. The President of the Fourth Section decided to communicate the case.

15. By a letter of 21 July 2010 the Registrar requested the applicant to inform him whether he accepted the terms and conditions of a friendly settlement proposal.

16. In reply, the applicant submitted two letters, both dated 12 August 2010, of which one was prepared in Polish and the other in English, apparently supposed to serve as a translation. The content and the register of the two texts were more or less equivalent.

17. In the letters, the applicant informed the Registrar that he did not accept the friendly settlement proposal. He also made vague references to various sets of domestic proceedings, expressing his disapproval of the manner in which certain of his cases had been handled by unspecified "Polish judges". The English version of the applicant's submissions contained, *inter alia*, the following sentence:

> "I had realized how insolently ignorant Polish judges were when it came to European Court's judgments and how irresponsible they were for their swindles."

In the equivalent part of the Polish text, the applicant referred to the Polish judges as being "brazen ignorants" (*bezczelni ignoranci*) and "completely irresponsible for their swindles" (*bezgranicznie nieodpowiedzialni za swe szachrajstwa*).

18. On 14 September 2010 the Government submitted observations on the admissibility and merits of the application. They argued that the application should be declared inadmissible on grounds of abuse of the right of application. In this connection, the Government referred to the statements used by the applicant in his letters of 12 August 2010. A copy of the Government's observations was sent to the applicant.

19. By a letter of 28 October 2010, written in English, the applicant submitted, *inter alia*, his comments on the Government's observations. He contested the Government's submissions and went on to criticise the authorities of the respondent State, using, *inter alia*, the following statement:

> "It is obvious that former and present members of the government elite apply the rules and regulations of the Communist Regime, by whose standards it is the citizens who should abide by the legal system while the government agencies and institutions are not accountable towards citizens."

Further, referring more specifically to the Government's objection, the applicant stated as follows:

> "Truly if the Government feels offended why not take civil action against me or issue a warrant of arrest to be executed by the Polish court. Surely if this were the case they would prosecute and punish me easily as the Polish court is not independent but acts as a pro-government agency."

The applicant then explained that the words that he had used in his letter of 12 August 2010 had been caused by his frustration over the manner in which his cases had been handled by the domestic authorities and expressed his apology. The relevant part of the letter read as follows:

> "(...) I do apologize the Polish Government for my wording used to describe the Government and the Polish judges as they seem to be irritated, especially I regret before the High Court for my irrelevant expressions in the correspondence".

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The relevant domestic law and practice concerning the procedure for lodging cassation appeals with the Supreme Court against judgments of the appellate courts are stated in the Court's judgments in the cases of *Kulikowski v. Poland*, no. 18353/03, §§ 19-27, and *Antonicelli v. Poland*, no. 2815/05, §§ 14-22.

21. In particular, on 26 February 2002 the Supreme Court examined a situation where a legal-aid lawyer had refused to represent a convicted person for the purposes of cassation proceedings, finding that a cassation appeal would offer no prospects of success. It held that in such a situation the appellate court was obliged to instruct the defendant that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the lawyer's refusal and not on the earlier date when the judgment of the appellate court was served on the defendant himself. It stated that it was not open to doubt that a defendant faced with a legal-aid lawyer's refusal had the right to take other measures to seek legal assistance necessary for effective lodging of a cassation appeal (case no. III KZ 87/01). The Supreme Court reiterated its position in a decision of 6 May 2008 (case no. II KZ 16/08) and in a number of similar decisions given in 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF DENIAL OF ACCESS TO THE SUPREME COURT

22. The applicant complained that he had been denied effective access to the Supreme Court, in that his legal-aid lawyer had refused to lodge a cassation appeal in his case and he had not had a possibility to have a cassation appeal lodged by another lawyer. He relied on Article 6 of the Convention, the relevant parts of which read as follows:

"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. Admissibility

23. The Government argued that the application was inadmissible on grounds of abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention. They indicated that the statements used by the applicant in his letter to the Court of 12 August 2010 (see paragraph 17 above) were groundless, offensive and defamatory in nature. Further, the Government argued that the applicant's subsequent apology was not sincere, as in his letter of 28 October 2010 he did not refrain from offending the Polish authorities.

24. The Court reiterates that, in principle, an application may only be rejected as abusive if it was knowingly based on untrue facts, even if it uses offensive language (see *Řehák v the Czech Republic* (dec.), no. 67208/01, 18 May 2004; *Varbanov v. Bulgaria*, judgment 5 October 2000, no. 31365/96, § 36, ECHR 2000-X; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 53-54). However, the persistent use of insulting or provocative language by an applicant may be considered an abuse of the right of application within the meaning of Article 35 § 3 of the Convention (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002; *Duringer and Others v. France* (dec.), nos. 61164/00 and 18589/02, 4 February 2003).

25. The Court observes that the applicant's letter of 12 August 2010, to which the respondent Government made reference, contained certain remarks which could be regarded as inappropriate or to a certain extent offensive. Nevertheless, the Court is satisfied that in his subsequent correspondence the applicant, still criticising the authorities, in fact refrained from using offensive and provocative language. Although the statements relied on by the Government were far from being relevant, the Court finds that they were not of such a nature as to justify the finding that the applicant abused his right of application. Furthermore, it must be noted that the applicant offered an apology to the Court and to the Government for the statements used in his letter of 12 August 2010. Therefore, even if these statements could by themselves be considered as being so inappropriate as to amount to an abuse of the right of application, they may be considered to have been withdrawn.

26. In these circumstances, the Court finds that the applicant's conduct in the present case has not amounted to an abuse of the right of application, within the meaning of Article 35 § 3 (a) of the Convention. Accordingly, it dismisses the Government's request to declare the application inadmissible on this ground.

27. The Court further notes that the relevant part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Moreover, it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The applicant submitted that he had been deprived of effective access to the Supreme Court, as his legal-aid lawyer had refused to lodge a cassation appeal in his case and he had not had a possibility to have a cassation appeal lodged by another lawyer.

29. The Government refrained from making comments on the merits of the case.

30. The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, § 52, and *Bobek v. Poland*, no. 68761/01, § 55, 17 July 2007).

31. Furthermore, the Court has already had occasion to set out at length the relevant principles derived from its case-law in the area of effective access to the Supreme Court in the context of criminal proceedings (*Kulikowski v. Poland*, no. 18353/03, *Antonicelli v. Poland*, no. 2815/05, 19 May 2009; *Arciński v. Poland*, no. 41373/04, 15 September 2009). It adopts those principles for the purposes of the instant case.

32. In the present case the Gliwice Regional Court informed the applicant about the legal-aid lawyer's refusal to lodge a cassation appeal in his case by a letter of 19 November 2007. This letter did not contain any information concerning the applicant's procedural rights. In particular, the court did not inform him that under the case-law of the Supreme Court, adopted in 2002, the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the legal-aid lawyer's refusal.

33. Moreover, the Court notes that the applicant, while requesting the Gliwice Regional Court to appoint another lawyer in his case, enquired whether the time-limit for lodging a cassation appeal was still running. The Gliwice Regional Court therefore had an opportunity, despite its initial omission, to put the matter right by informing the applicant that the relevant time-limit had begun to run anew on the date on which he had been served with its previous letter. However, in its reply of 13 December 2007, the Gliwice Regional Court informed the applicant that the relevant time-limit had already expired, while in the light of the Supreme Court's case-law (see paragraph 20 above) it was still running, to expire only on 27 December 2007. Therefore, the applicant had no way of knowing when the time-limit for lodging a cassation appeal started to run and what steps, if any, he had at his disposal to pursue the cassation proceedings, for instance by trying to find another lawyer who might be persuaded to file a cassation appeal on his behalf.

34. The Court observes that the procedural framework governing the availability of legal aid for a cassation appeal in criminal cases, as described above, is within the control of the appellate courts. When notified of a legal-aid lawyer's refusal to prepare a cassation appeal, it is entirely appropriate and consistent with fairness requirements, that an appeal court indicate to an appellant what further procedural options are available to him or her (see *Kulikowski v. Poland*, cited above, § 70; *Antonicelli v. Poland*, cited above, § 45; *Jan Zawadzki v. Poland*, no. 648/02, § 16, 6 July 2010). However, in the instant case this requirement was not complied with, with the result that the applicant's right of access to the Supreme Court was not secured in a "concrete and effective manner".

35. Accordingly, having regard to the above deficiency, there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

36. The applicant also complained under Article 6 of the Convention that his trial had been unfair in that the first-instance court had not examined his request for the questions put to the witnesses to be written down in the minutes and that he had not had a possibility to have certain witnesses examined in his presence.

37. However, in the light of all the material in its possession, in particular the findings of the Gliwice Regional Court (see paragraph 8 above), the Court finds no appearance of a violation of the applicant's rights guaranteed by Article 6 of the Convention arising from these complaints. It follows that these complaints are 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

38. 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

39. The applicant claimed 450,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

40. The Government submitted that the claims should be rejected as exorbitant and irrelevant.

41. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court.

43. The Government contested these claims, arguing, *inter alia*, that the applicant had not provided any documents to support them.

44. Having regard to the documents in its possession and to its well established case-law, the Court considers it reasonable to award the sum of EUR 100 in respect of costs and expenses.

C. Default interest

45. 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. *Declares* the complaint concerning the denial of access to the Supreme Court admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 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, the following amounts, to be converted into Polish zlotys (PLN) at the rate applicable at the date of settlement:
      (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage;
      (ii) EUR 100 (one hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 27 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Päivi Hirvelä
Deputy Registrar	President