

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

FOURTH SECTION

CASE OF POTOCKA v. POLAND

(Application no. 1415/11)

JUDGMENT

STRASBOURG

25 September 2012

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



In the case of Potocka 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 4 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 1415/11) 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, Ms Anna Potocka ("the applicant"), on 1 December 2010.

2. The applicant was represented by Mr J. Forystek, a lawyer practising in Kraków. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. On 31 January 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1925 and lives in Montresor.

5. The applicant's predecessor owned property comprising also a park and a manor situated in Przecław. By virtue of the Decree of 6 September 1944 on Agrarian Reform ("the 1944 Decree") ownership of private agricultural properties exceeding 50 hectares was transferred *ex lege* to the State. In 1974 the State transferred ownership of the property to a State-owned company Delta-Mielec. In the same year an entry confirming that company's right of perpetual use in respect of the property was made in the land register. After the collapse of the communist regime the applicant and other legal successors of the former owners instituted proceedings seeking to have the ownership restored to them.

1. The administrative proceedings

6. On 23 November 2000 the applicant instituted administrative proceedings. She requested the Podkarpackie Governor (*Wojewoda Podkarpacki*) to give a decision declaring the expropriation null and void. She argued that the expropriation decision was unlawful in that the property concerned had not fallen within the scope of the criteria for nationalisation stipulated by the 1944 Decree.

7. On 3 April 2003 the Podkarpacki Governor held that the property was covered by the Decree and therefore the expropriation decision had been lawful. The applicant appealed.

8. On 19 December 2003 the Minister of Agriculture quashed the first-instance decision and remitted the case.

9. By a decision of 3 August 2004 the Governor held that the park and manor were covered by the 1944 Decree. The applicant appealed.

10. On 8 June 2005 the applicant submitted a complaint under Article 37 of the Code of Administrative Procedure about the Minister's failure to give a decision in the case within a reasonable time. She reiterated her complaint on 10 January 2007. There was no reply to these complaints.

11. On 5 November 2007 the Minister upheld the first-instance decision. The applicant appealed. On 18 September 2008 the Warsaw Regional Administrative Court quashed both the first- and second-instance decisions, finding that the first-instance authority had failed to inform the parties, including the applicant, about an administrative hearing it had held.

12. On 28 May 2010 the Podkarpacki Governor discontinued the proceedings. It had regard to a decision given by the Constitutional Court on 1 March 2010 (see paragraph 26 below). It held that in the light of that decision the administrative authorities had no jurisdiction to examine issues concerning the lawfulness of expropriation decisions given on the basis of the 1944 Decree.

13. The applicant appealed, referring to the resolution given by the Supreme Administrative Court on 5 June 2006 (I OPS 2/06; see paragraph 25 below). She argued that the authority had failed to provide the legal basis for the proceedings to be discontinued.

14. On 28 December 2010 the Minister upheld the contested decision. The applicant appealed. On 28 January 2011 the Minister noted that he was competent to quash his own decision if he found it to be unlawful. He accordingly quashed the decision of 28 December 2011, having regard to the judgment of the Supreme Administrative Court of 10 January 2011 (see paragraph 27 below). He held that the first-instance administrative authority had jurisdiction to deal with the applicant's case.

15. On 11 April 2011 the applicant again complained about the Governor's failure to give a decision. On 20 September 2011 the Minister found that the applicant's complaint was ill-founded.

16. On 29 July 2011 the Podkarpacki Governor held that the provisions of the 1944 Decree were not applicable to the park and manor and that therefore there were no legal grounds on which the property concerned could be expropriated.

17. On 28 March 2012 the Minister upheld this decision.

2. The civil proceedings

18. In 2006 the applicant, having regard to discrepancies in the case-law regarding the procedural situation of former owners and their legal successors, instituted civil proceedings with a view to having the ownership restored to her. She instituted proceedings against the State Treasury and against the Mielec-Delta public company before the Mielec District Court, seeking rectification of the land register so as to make it reflect the actual legal status of the land (*powództwo o uzgodnienie księgi wieczystej z rzeczywistym stanem prawnym*).

19. On 5 March 2009 the Mielec District Court dismissed her action. It noted, firstly, that under the 1944 Decree properties consisting of parks and manors (*zespół parkowo-pałacowy*) were not subject to expropriation. However, the applicant had failed to show that the property concerned had ever been formally separated from the agrarian property as a whole so as to constitute a separate subject of ownership. In any event, the applicant had failed to show that she had obtained a final administrative decision declaring the expropriation decision null and void. Such a decision was a necessary prerequisite for a civil court to hold that the ownership of the property had not been transferred to the State and to determine all consequences in the sphere of civil law resulting from such a decision.

20. The applicant appealed. She submitted that the court had erred in refusing to stay the proceedings until an administrative decision was given, because such a decision was a necessary prerequisite for the civil court to rule on the merits of the case. She further submitted that the court had thereby breached the Constitution by encroaching on the exclusive competences of the administrative authorities.

21. On 2 July 2009 the Tarnobrzeg Regional Court dismissed her appeal. It observed that it was obvious that a decision on whether the 1944 Decree was applicable to the property could only be given by the administrative authorities. It referred to a judgment of the Supreme Court of 30 January 2007 (see paragraph 25 below). It emphasised that the case-law of the administrative courts also indicated that only the administrative authorities were competent to determine this issue. In the applicant's case, as no such decision had ever been given, no other course of action was open to the civil court than to hold that the claim to have the entries in the land register rectified had to fail.

22. By a decision of 30 April 2010, served on the applicant's representative on 1 June 2010, the Supreme Court refused to entertain her

cassation appeal. It noted that the applicant had instituted civil proceedings in the absence of an administrative decision declaring the expropriation unlawful and therefore null and void. In such situation the courts had no choice but to dismiss her claim.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. Article 1 of the Decree on Agrarian Reform of 6 September 1944 provides that "the agrarian reform in Poland is a State and economic imperative and shall be realised ... pursuant to principles set forth in the manifesto of the Polish Committee of National Liberation".

Article 2 § 1 of the Decree, in so far as relevant, reads:

> "The following agricultural estates shall be designated for the purposes of the agrarian reform: ...
>
> e) being a property or a co-property of natural persons or legal entities, if the entire area of the estate exceeds either 100 hectares in total, or 50 hectares of arable land ...
>
> All real estate, referred to in items ... , e) above shall, with no delay and without compensation, be taken over by the State."

24. In 2001 the Constitutional Court discontinued proceedings instituted by an individual constitutional complaint concerning the alleged incompatibility of Article 2 of the 1944 Decree with the Constitution. It held that it could only examine the compatibility of binding legal provisions with the Constitution. Article 2 of the 1944 Decree had never been formally abrogated and it was referred to by courts and administrative authorities in their decisions. However, it was not a decisive factor in assessing whether this provision was still in force. The decisive factor was that it could no longer provide the basis for any substantive changes in ownership. The courts, when referring to this provision, did not apply it in the strict sense of that term; the reference to this provision was merely of a secondary nature and was used to decide whether that provision had been applied, during the expropriation proceedings conducted in the past, in a manner which had flagrantly violated the law (in which case an expropriation decision had to be declared null and void). The Constitutional Court concluded that this provision had therefore ceased to have legally binding force (SK 5/01, decision of 28th November 2001).

25. On 30 January 2007 the Supreme Court held that only administrative authorities could examine restitution cases (IV CSK 350/06). An identical resolution was adopted on 5 June 2006 the Supreme Administrative Court (I OPS 2/06).

26. On 1 March 2010 the Constitutional Court discontinued proceedings instituted as a result of a legal question (*pytanie prawne*) put to it by the

Warsaw Regional Administrative Court (P 107/08). It reiterated, referring to its decision given in 2001) that the provisions of the 1944 Decree could not be resorted to any more in order to confer substantive rights on individuals and that it had ceased to be binding law. It further noted discrepancies in judicial and administrative practice as to the jurisdiction to examine restitution cases. It further held that only civil courts had jurisdiction to examine such cases, despite the fact that in practice these cases were dealt with by the administrative authorities and, upon appeal, by the regional administrative courts and, in the last, resort, by the Supreme Administrative Court.

27. On 10 January 2011 the Supreme Administrative Court held in a resolution that that decision of the Constitutional Court was not universally binding, essentially because it was only of a procedural character. The court held that the administrative authorities had jurisdiction to examine restitution cases (I OPS 3/10).

28. The relevant domestic law and practice concerning remedies for the excessive length of administrative proceedings, in particular the applicable provisions of the Code of Administrative Procedure and the 2002 Act on Proceedings before Administrative Courts, are described in the cases of *Grabiński v. Poland* no. 43702/02, §§ 60-65, 17 October 2006; *Koss v. Poland*, no. 52495/99, §§ 21-25, 28 March 2006; and *Kaniewski v. Poland*, no. 8049/02, §§ 22-28, 8 November 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNREASONABLE LENGTH OF THE PROCEEDINGS

29. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

30. The Government refrained from submitting their observations on the merits of the case.

31. The period to be taken into consideration began on 23 November 2000 when the applicant requested the Podkarpackie Governor to declare the expropriation decision null and void.The proceedings ended on 28 March 2012 (see paragraph 17 above). The period concerned thus lasted

at approximately eleven years and four months for three levels of jurisdiction.

A. Admissibility

32. The Government submitted that the applicant had failed to pursue all effective domestic remedies with respect to her complaint about the length of the administrative proceedings. She had the following effective remedies at his disposal: a complaint to the Supreme Administrative Court under Article 17 of the Law of 11 May 1995 on the Supreme Administrative Court, a complaint provided for by Article 3 of the 2002 Act on the Proceedings before Administrative Courts; compensation claims under either Article 417 or Article 417[1] § 3 of the Civil Code as amended by the Law of 17 June 2004 on Amendments to the Civil Code and Some Other Laws for damage resulting from excessive length of administrative proceedings and from authorities' failure to issue a decision.

33. The Government further relied on a judgment given on 20 April 2009 by the Kraków Court of Appeal, which had awarded to the plaintiff just satisfaction in respect of the excessive length of civil proceedings on the basis of Articles 417 and 448 of the Polish Civil Code, concerning the protection of personal rights. In its judgment the Court of Appeal found that the excessive length of the civil proceedings for the distribution of inheritance, which had been pending for over twenty years, had caused the applicant considerable stress resulting in moral suffering and entitling her to non-pecuniary damages.

34. The applicant disagreed.

35. The Court has held in a number of cases against Poland that in order to comply with the requirement of exhaustion of domestic remedies in the context of lengthy administrative proceedings it was necessary to have recourse first to a hierarchical complaint about inactivity of an administrative authority and if this proved unsuccessful, to a subsequent complaint to the Supreme Administrative Court (see, e.g., *Zynger* (dec.), no. 66096/01, 7 May 2002; *Futro v. Poland* (dec.), no. 51832/99, 3 June 2003; *Beller v. Poland*, no. 51837/99, 1 February 2005; *Karasińska v. Poland*, no. 13771/02, 6 October 2009; *Puchalska v. Poland*, no. 10392/04, 6 October 2009). The Court notes that the applicant had on two occasions recourse to the hierarchical complaint (see paragraph 10 above). However, there was no reply to her complaints and no decisions determining the substance of her complaints were given by the competent administrative authority. In the absence of such decisions, it was not open to the applicant to have recourse to the subsequent hierarchical complaint to the Supreme Administrative Court. In addition, the applicant made another complaint on 11 April 2011. The Minister subsequently held that it was ill-founded (paragraph 15). In this connection, it is to be noted that the

excessive length of the proceedings in this particular case was not entirely due to inactivity on the part of the administrative authorities but was to a great extent caused by changes and discrepancies arising in the judicial practice as to jurisdiction competent to deal with restitution cases (see paragraphs 8 and 13 above). In these circumstances the Court does not consider that the applicant should have lodged a further complaint with the Supreme Administrative Court in order to fulfil her obligation under Article 35 § 1.

36. In so far as the Government rely on the complaint about excessive length of judicial proceedings available after 17 September 2004 when the 2004 Act came into force, the Court notes that the Act provides for the filing of a complaint about the unreasonable length of judicial proceedings. However, the Court observes that the proceedings complained of lasted over eleven years, from 1999 to 2012. Following the entry into force of the 2004 Act, the proceedings were pending before the Warsaw Regional Administrative Court from an unspecified date after 5 November 2007 until 18 September 2008 (see paragraphs 11 above). The Court cannot fail to notice that this period of ten months was of a relatively short duration in comparison to the bulk of the proceedings in the applicant's case. In any event, the Court notes, on the basis of the constant interpretation given to the provisions of the 2004 Act by the domestic courts, that a domestic court dealing with a complaint under the 2004 Act would not have been able to take into account the whole period of the administrative proceedings which began in 2000 and to find a violation of the applicant's right to a trial within a reasonable time. Consequently, the Court considers that, in the present case, a complaint under the 2004 Act cannot be regarded as an effective remedy (see *Wypukoł-Piętka v. Poland*, no. 3441/02, § 56, 20 October 2009).

37. In so far as it can be understood that the Government, referring to the judgment of the Kraków Court of Appeal, argued that an action for damages and compensation, on the basis of Articles 417 and 448 of the Civil Code was an effective remedy in respect of complaints about the length of administrative proceedings, the Court recalls that it has already examined that argument. It held that no persuasive arguments had been adduced by the Government to show that the above-mentioned provisions of the Civil Code could at that time be relied on for the purpose of seeking compensation for the excessive length of proceedings or that such an action offered reasonable prospects of success (see *Boszko v. Poland*, no. 4054/03, § 35, 5 December 2006). The Court sees no grounds on which to depart from those findings in the present case. The Court further recalls that, as it has recently found (*Iskrzyccy v. Poland*, no. 9261/02, § 55, 14 September 2010; *Mularz v. Poland*, no. 9834/08, § 46, 4 October 2011), the judgment given by the Kraków Court of Appeal on 20 April 2009 – the same as the one

submitted by the Government in the present case – did not reflect a well-established practice of the Polish courts.

38. With regard to the Government's submissions that the applicant had failed to institute civil compensation proceedings under either Article 417 or Article 417[1] § 3 of the Civil Code, the Court notes that it has already examined whether after 18 December 2001 a compensation claim in tort as provided for by Polish civil law was an effective remedy in respect of complaints about the length of proceedings. It notes that in the present case no examples of the domestic case-law have been adduced to show that these provisions of the Civil Code could at the material time be relied on for the purpose of seeking compensation for excessive length of proceedings or that such action offered reasonable prospects of success (see, *Boszko v. Poland*, cited above, § 35, 5 December 2006; *Mularz v. Poland*, cited above, § 47, 4 October 2011). In the absence of evidence that the domestic judicial practice has evolved, the Court sees no grounds on which to depart from these findings in the present case.

39. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

40. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It considers that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

41. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

42. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above; see also *Beller v. Poland*, no. 51837/99, 1 February 2005; *Bennich-Zalewski v. Poland*, no. 59857/00, 22 April 2008).

43. Having examined all the material submitted to it, the Court, having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

44. There has accordingly been a breach of Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. The applicant invoked Article 6 of the Convention and submitted that in the circumstances of the case she had been deprived of access to court. There had been over the years successive changes in the case-law of the civil and administrative courts as to which authorities, judicial or administrative, were competent to examine restitution cases. Ultimately, in 2010, the Constitutional Court had held that such cases should be decided by civil courts. Prior to that judgment her civil case had already been determined by the civil court on the basis that a civil court lacked jurisdiction until a substantive administrative decision on the merits of her restitution claim had been given. After the judgment of the Constitutional Court the administrative authorities discontinued the proceedings, thereby closing for her the possibility of access to the administrative court. Nor could she bring her case before a civil court, because the case had become *res iudicata*.

46. The Court has been called upon a number of times to examine cases concerning conflicting court decisions (see, *Paduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts); *Beian v. Romania (no. 1)*, no. 30658/05, ECHR 2007-XIII (extracts); and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009), and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention (see *Beian (no. 1)*, cited above, §§ 34-40; *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Iordan Iordanov and Others*, cited above, §§ 48-49; and *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008). In so doing it has explained the criteria that guided its assessment, which consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Iordan Iordanov and Others*, cited above, §§ 49-50).

47. The Court notes that in the present case there were indeed long-standing differences of opinion in judicial practice as to whether civil or administrative authorities had jurisdiction to examine the restitution cases. It further observes that these differences persist, despite the fact that the Constitutional Court and the Supreme Administrative Court, the latter by way of a resolution designed to eliminate inconsistencies in judicial practice, attempted to harmonise the relevant case-law. However, the Court is of the view that for the purposes of the present case it is not necessary to examine this part of the application and to assess whether the discrepancies in judicial practice referred to by the applicant had implication for her

access to court. It notes that in her case the Minister acting as the highest administrative authority competent to examine the case quashed his previous decision, relying on the resolution of the Supreme Administrative Court that it was for the administrative authorities to examine restitution cases (see paragraph 14 above). It further notes that the applicant subsequently obtained an administrative decision in her favour (see paragraph 17 above) which was ultimately upheld by the Minister. It cannot therefore be said that she was deprived of access to a court to her detriment.

48. The applicant complained that her right to a fair hearing had been breached by the fact that the civil court had ordered her to bear the costs of translation into French of her statement of claim and other documents for the purpose of serving them on her family who were parties to the proceedings, despite the fact that she had informed the court that they all spoke and understood Polish. The Court finds that this complaint is unsubstantiated, since the applicant did not provide any relevant evidence.

49. 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.

50. The applicant complained, invoking Article 1 of Protocol No. 1 to the Convention, that her right to the peaceful enjoyment of her possessions has been breached by the excessive length of the proceedings.

51. Having regard to its finding under Article 6 § 1 (see paragraph 45 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 1 of Protocol No. 1 (see *Zanghì v. Italy*, § 23, 19 February 1991, Series A no. 194-C; *Beller v. Poland*, cited above, § 74, 1 February 2005).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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

53. The applicant claimed EUR 34,500 in respect of pecuniary and non-pecuniary damage. The Government did not express an opinion on the matter.

54. 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 6,500 in respect of non-pecuniary damage.

B. Costs and expenses

55. The applicant also claimed an unspecified amount for the costs and expenses incurred before the Court. The Government did not express an opinion on the matter.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for instance, *Belziuk v. Poland*, 25 March 1998, § 49, *Reports* 1998-II). In the present case, regard being had to the fact that no documents have been submitted to the Court concerning the relevant legal costs, the Court dismisses the claim.

C. Default interest

57. 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 concerning the excessive length of the proceedings admissible and the remaining complaints under Article 6 inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 6,500 (six thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Päivi Hirvelä President