

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

FIRST SECTION

CASE OF TOBIJAŃSKI v. POLAND

(Application no. 72520/17)

JUDGMENT

STRASBOURG

23 January 2025

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



In the case of Tobijański v. Poland,

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

Alena Poláčková*, President*,
Krzysztof Wojtyczek,
Artūrs Kučs*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 72520/17) 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") on 29 September 2017 by a Polish national, Mr Janusz Tobijański ("the applicant"), who was born in 1960, lives in Częstochowa and was represented by Ms M. Dunder, a lawyer practising in Częstochowa;

the decision to give notice of the application to the Polish Government ("the Government"), represented by their Agent, Mr J. Sobczak of the Ministry of Foreign Affairs;

the parties' observations;

Having deliberated in private on 12 December 2024,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged unfairness of the criminal proceedings against the applicant owing to the fact that he could not attend the only hearing held before the Court of Appeal.

2. On 29 June 2010 the applicant together with three other persons was charged with fraud in relation to an object of significant value.

3. On 20 February 2012 the Częstochowa Regional Court convicted the applicant of the use of a document attesting untruth (*poświadczenie nieprawdy*) and forgery.

4. On 8 November 2012, on the applicant's appeal, the Katowice Court of Appeal quashed the first-instance judgment and remitted the case.

5. On 12 March 2015 the Częstochowa Regional Court convicted the applicant as charged and ordered him to pay a fine in the total amount of 20,000 Polish zlotys (approximately 5,000 euros).

6. On 14 April 2015 the applicant's lawyer lodged an appeal against this judgment. The appeal referred to the assessment of evidence and the fact that the court of first instance had not heard the evidence from certain witnesses.

7. The hearing before the Katowice Court of Appeal was set for 2 October 2015 and the parties were notified thereof.

8. On 14 September 2015 the applicant's defence lawyer informed the court that he was not authorised to represent the applicant at the appeal hearing.

9. On 1 October 2015 the applicant sent a letter to the Court of Appeal asking to adjourn the hearing on the grounds that he had been urgently admitted to hospital the day before. He stated that the expected period of his stay in the hospital was seven days. He also stressed that he was not represented by a lawyer in the appeal proceedings. His submission was supported by a certificate issued by the hospital and a statement from a medical consultant.

10. The president of the Criminal Division of the Court of Appeal sent a fax to the hospital requesting information on the applicant's illness. In reply, on the same day, the head of the internal medicine division of the Czestochowa Hospital stated that the applicant could not travel to the hearing scheduled for 2 October 2015.

11. At the hearing held on 2 October 2015 the judge read out the applicant's letter. The prosecutor asked the court to dismiss the applicant's request as he had failed to justify his absence in accordance with the law. Subsequently, the court dismissed the applicant's request on the grounds that he had not submitted a certificate prepared by a court-appointed doctor (Article 117 § 2a of the Code of the Criminal Procedure – "CCP"). It also observed that it did not appear that the applicant's failure to appear had been caused by extraordinary impediment. It further upheld the first-instance judgment amending only the legal qualification of the offence in question.

12. On 2 November 2015 the Polish Commissioner for Human Rights ("the Commissioner") informed the Regional Court that the case files had been sent to the Supreme Court in connection with a cassation appeal which the Commissioner had lodged on the applicant's behalf.

13. In the cassation appeal the Commissioner alleged a gross breach of the criminal proceedings since the Court of Appeal had conducted the appeal hearing in the applicant's absence, despite the fact that the applicant had been hospitalised and had expressed a wish to provide additional explanations.

14. The cassation appeal was dismissed by the Supreme Court on 29 March 2017 (served on the applicant on 14 April 2017). Pursuant to the relevant provisions of the CCP that decision did not contain any written reasoning.

15. The applicant complained under Article 6 §§ 1 and 3 (c) of the Convention that his right to a fair trial had been breached because the Court of Appeal had examined an appeal against his conviction in his absence.

THE COURT'S ASSESSMENT

I. ADMISSIBILITY

16. The Government argued that the application had been lodged outside the six-month time-limit. They noted that the final judgment had been delivered on 2 October 2015 while the application had been lodged on

29 September 2017. The cassation appeal proceedings instituted by the Commissioner should be regarded as extraordinary proceedings which the applicant had not been required to exhaust. The applicant disagreed, noting that the Commissioner lodged a cassation appeal on his behalf alleging a serious breach of the applicant's rights caused by the fact that the Court of Appeal had held an appeal hearing without his participation.

17. The Court reiterates that for the purposes of Article 35 § 1 of the Convention, the six-month time-period[1] runs from the date of the final decision in the process of exhaustion of domestic remedies (see *Blokhin v. Russia* [GC], no. 47152/06, § 106, ECHR 2016). It is true that in principle remedies of a discretionary nature could not be considered effective and could not restart the running of the six-month limit (see *Petrović v. Serbia*, no. 40485/08, § 59, 15 July 2014). Nevertheless, situations in which a request to reopen the proceedings actually results in a reopening, or in which a request for extraordinary review is successful, may constitute an exception to this rule (see *Gasparyan v. Armenia (no. 1)*, no. 35944/03, § 30, 13 January 2009 with further references and *Petrović,* § 59, cited above).

18. In the Court's view, the situation in the present case falls within the category of exceptional cases. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to lodge his complaint with the Court before his position in connection with the matter has been finally settled at the domestic level. The Commissioner lodged a cassation appeal on the applicant's behalf immediately following the judgment of the Court of Appeal. Moreover, in his cassation appeal the Commissioner criticised the fact that the appeal hearing had been held in the applicant's absence noting explicitly that this was a grave breach of the rules of the criminal procedure. It was thus perfectly reasonable for the applicant to await the Supreme Court's decision on the Commissioner's cassation appeal. Consequently, in the particular circumstances of the present case, the Supreme Court's decision of 29 March 2017 was the final decision for the purposes of Article 35 § 1 of the Convention and the Government's objection should be dismissed.

19. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

II. MERITS

20. The general principles concerning personal attendance of the defendant before the appeal courts have been summarised in *Mtchedlishvili*

[1] Protocol No. 15 to the Convention has shortened to four months from the final domestic decision the time-limit provided for by Article 35 § 1 of the Convention. However, in the present case the six-month period still applies, given that the final domestic decisions were taken prior to 1 February 2022, date of entry into force of the new rule (pursuant to Article 8 § 3 of Protocol No. 15 to the Convention).

v. Georgia, no. 894/12, §§ 30-33, 25 February 2021, and *Seliwiak v. Poland*, no. 3818/04, §§ 54-59, 21 July 2009.

21. The Court firstly observes that, in accordance with the procedural legislation in force at the material time, an appellate court was empowered to hold a full retrial of a case on the law as well as on the facts and make a full assessment of the applicant's guilt or innocence. This has not been disputed by the parties.

22. The Court further notes that the applicant was not represented by a defence lawyer in the appeal proceedings (see paragraphs 8 and 9 above) and had expressly requested a postponement of the appeal hearing on account of his medical condition (see paragraph 9 above). The Court must therefore examine whether the Court of Appeal could hold that those reasons were not valid.

23. The Government argued that the applicant had not exercised the right to personal participation in the appeal hearing because of his own negligence. While he had informed the court of his inability to participate in the hearing, he had not submitted a certificate from a court-appointed doctor as required by law (Article 117 § 2a of the CCP, which stated that non-appearance due to illness of defendants, witnesses, defence counsel, attorneys and other participants in the proceedings whose presence was compulsory or who requested to be present required a certificate issued by a court-appointed doctor). They stressed that the applicant had been clearly aware of the relevant rules, as during the proceedings in his case he had submitted three applications for adjournment of the hearings on each occasion supported by a certificate issued by a court-appointed doctor.

24. The applicant disagreed noting that he could not have provided a certificate issued by a court-appointed doctor given that he had been urgently admitted to the hospital. He submitted that he had provided a medical certificate stating that he could not have travelled to the hearing. This had been explicitly confirmed by the doctors of the Czestochowa Hospital in reply to the Court of Appeal's question. Lastly, the applicant referred to the case law of the Supreme Court, which had already held in some cases in the context of Article 117 § 2a of the CCP that the lack of a formal medical certificate of inability to appear in court could be justified by random circumstances i.e. sudden illness. Furthermore, it had also stated that sometimes even though the medical certificate did not meet the relevant requirements it could clearly indicate that due to the nature of the medical condition the person concerned had been unable to appear at the hearing (for example: judgment of 24 October 2018, VKK 483/18; judgment of 18 May 2021, IIIK 121/21, and judgment of 1 September 2020, VKK 241/19).

25. The Court notes in that regard that the Court of Appeal when dismissing the applicant's request had not analysed the medical certificates in the file in order to determine whether the applicant was indeed unable to attend the hearing or whether his illness was sudden. On the contrary, the

Court of Appeal dismissed the applicant's request stating that he had failed to justify his absence in accordance with the law (see paragraph 11 above). It is true that the Court has already held that it is open to the national authorities to assess whether the accused showed good cause for his absence, or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (see *Sejdovic v. Italy* [GC], no. 56581/00, § 88, ECHR 2006-II). However, in the present case the Court of Appeal had not considered the merits of the justification provided by the applicant but merely noted that the certificate should have been issued by a court-appointed doctor (compare *Henri Rivière and Others v. France*, no. 46460/10, §§ 32-33, 25 July 2013).

26. In view of the above considerations, the Court cannot be satisfied that the Court of Appeal had in fact considered the question whether the justification provided by the applicant was valid and whether he had shown good cause for his absence. Thus, in the Court's view, the proceedings did not comply with the requirements of fairness and there has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. The applicant claimed 24,767.60 Polish zlotys (PLN) (approximately 6,000 euros (EUR)) in respect of pecuniary damage. That sum represented a fine imposed by the court of first instance and paid by the applicant in the amount of PLN 20,000 as well as the court fees related to the first and second instance proceedings. The applicant also claimed PLN 8,610 (approximately EUR 2,000) for the reimbursement of costs and expenses incurred before the Court. The applicant did not submit any documents in support of the latter claim.

28. The Government maintained that the claims were unfounded. They noted that there was no direct causal link between the pecuniary damage claimed and the alleged violation. They further submitted that the claims relating to the expenses incurred before the Court were unsubstantiated.

29. The Court does not discern any causal link between the breaches of Article 6 of the Convention and the pecuniary damage alleged; it therefore rejects this claim (compare *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia*, no. 48783/07, § 65, 7 January 2016). It also notes that the applicant did not make any claims for non-pecuniary damage. It thus considers that the finding of a violation under Article 6 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

30. The Court further observes that the applicant did not substantiate his claim for the costs of legal services with any relevant supporting documents. Accordingly, the Court does not award any sum on this account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 January 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Alena Poláčková President