

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

FOURTH SECTION

CASE OF WĘGRZYN v. POLAND

(Application no. 29423/05)

JUDGMENT

STRASBOURG

28 January 2014

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



In the case of Węgrzyn v. Poland,

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

Ledi Bianku, *President,*
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 7 January 2014,

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

PROCEDURE

1. The case originated in an application (no. 29423/05) 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 Jan Węgrzyn ("the applicant"), on 5 August 2005.

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 alleged, in particular, that the ex officio reopening of the social security proceedings concerning his right to an early-retirement pension, which resulted in the quashing of the final decision granting him a right to a pension, was in breach of Article 1 of Protocol No. 1 to the Convention.

4. On 20 May 2010 the application was communicated 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 was born in 1955 and lives in Widełka.

6. The applicant has two children. Prior to his early retirement he had been employed and had paid his social security contributions to the State.

A. Proceedings concerning the grant and the revocation of an EWK pension

7. On 13 February 2002 the applicant filed an application with the Rzeszów Social Security Board *(Zakład Ubezpieczeń Społecznych)* to be granted the right to an early-retirement pension for persons raising children who, due to the seriousness of their health condition, required constant care, the so-called "EWK" pension.

8. Along with his application for a pension, the applicant submitted, among other documents concerning his daughter's health condition, a medical certificate issued by a specialist doctor on 21 December 2001. The certificate stated that the child (born in 1991) suffered from neurogenic bladder dysfunction and that she was in need of her parent's constant care.

9. On 18 February 2002 the Rzeszów Social Security Board issued a decision granting the applicant the right to an early-retirement pension.

10. The Social Security Board initially suspended the payment of the pension until the end of February 2002 due to the fact that the applicant was still working on the date of the decision.

11. On 28 February 2002 the applicant's employment contract expired.

12. Consequently, on 1 March 2002 the Rzeszów Social Security Board started to pay the retirement pension in the net amount of 943.88 Polish zlotys (PLN) (approx. EUR 232).

13. The applicant was issued with a pensioner's identity card marked "valid indefinitely" and he continued to receive his pension without interruption until the date of the revocation of the right.

14. On an unspecified date the Rzeszów Social Security Board asked the Main Social Security Board's doctor *(Główny Lekarz Orzecznik)* to inform it whether the applicant's daughter required the permanent care of a parent. The doctor stated that, on the basis of the medical documents, the child could not be considered as ever having required such care.

15. On 8 October 2002 the Rzeszów Social Security Board issued simultaneously two decisions in respect of the applicant.

16. By virtue of one decision, the payment of the applicant's pension was discontinued with immediate effect. By virtue of the other decision, the Social Security Board revoked the initial decision granting a pension and eventually refused to grant the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance.

17. The applicant appealed against the decision divesting him of the right to an early-retirement pension. He submitted that he should receive the benefit because his child required constant care, as confirmed by the medical certificate attached to the original application for a pension. Moreover, the applicant alleged that the revocation of his retirement pension was contrary to the principle of vested rights.

18. On 20 November 2003 the Rzeszów Regional Court dismissed the applicant's appeal.

19. The applicant appealed against the first-instance judgment.

20. On 16 April 2004 the Rzeszów Court of Appeal dismissed the applicant's further appeal. The domestic court held that the applicant had been rightfully divested of his right to a pension under the scheme provided by the 1989 Ordinance as he had not satisfied the requirement of necessary permanent care.

21. A professional lawyer prepared and lodged a cassation appeal against the second-instance judgment on the applicant's behalf.

22. On 17 September 2004 the Supreme Court rejected the cassation appeal *(odrzucił)* on the ground that the lawyer had not indicated the grounds which would justify the examination of the cassation appeal *(okoliczności uzasadniające rozpoznanie kasacji)*.

B. The applicant's financial situation

23. Following the social security proceedings the applicant was not ordered to return his early-retirement benefits paid by the Social Security Board, despite the revocation of his right to an early-retirement pension.

24. Throughout the whole period of receiving the EWK pension the applicant did not work.

25. According to the Government's submissions, on 28 October 2002, the applicant started working at his previous employers'. He continued his employment there until 31 January 2005. As of 1 February 2005 he continued employment with another employer where he is still working on a permanent basis.

26. The Government also submitted that the applicant's gross annual income amounted to approx. 95% of the average brut salary in Poland in 2003, 97% in 2004, 93% in 2005, 100% in 2006, 82% in 2007, 98% in 2008 and 104% in 2009.

27. The applicant submitted that on 28 October 2002 he had started work as an auxiliary employee with the lowest remuneration and that his salary was lower than before the granting of the EWK pension. He produced a copy of his employment contract dated 28 October 2002 from which it emerges that the contract had been concluded for three months and that the applicant had been paid PLN 1,000 (approx. EUR 250). He also produced two copies of his further employment contracts of 30 April 2003 and 31 October 2003 also concluded for three months each with remuneration amounting to PLN 1,000.

28. According to the information available on the official website of the Social Security Board the average remuneration in Poland was PLN 2,133 in 2002 and PLN 2,131 in 2003. It follows that the applicant's salary in these years amounted to less than 50% of the average remuneration.

29. The Government also submitted that before being granted the EWK pension the applicant had been employed and his income had amounted to approx. 112% of the average brut salary in 1997, 140% in 1998, 102% in 1999, 109% in 2000 and 136% in 2001.

30. The Government further submitted that the applicant's son had also worked as of 1 February 2007.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Social security system

31. The legal provisions applicable at the material time and questions of practice are set out in the judgment in the case of *Moskal v. Poland*, no. 10373/05, § 31-34, 15 September 2009.

B. Cassation appeal

32. A party to civil proceedings could, at the material time, lodge a cassation appeal with the Supreme Court against a judicial decision of a second-instance court. A party had to be represented by an advocate or a legal adviser.

33. Article 393^1 of the Code of Civil Procedure as applicable at the material time listed the grounds on which a cassation appeal could be lodged. It read as follows:

> "The cassation appeal may be based on the following grounds:
>
> 1) a breach of substantive law as a result of its erroneous interpretation or wrongful application;
>
> 2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case."

34. Pursuant to Article 393^{13} the Supreme Court, having allowed a cassation appeal, could quash the challenged judgment in its entirety or in part and remit the case for re-examination. Where the Supreme Court failed to find non-conformity with the law, it dismissed the cassation appeal. According to Article 393^{15} if the cassation appeal was well-founded the Supreme Court could also amend the impugned judgment and adjudicate on the merits.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

35. The applicant complained that divesting him, in the circumstances of the case, of his acquired right to an early-retirement pension amounted to an unjustified deprivation of property. This complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. The Government's preliminary objections

(a) Non-exhaustion of domestic remedies

(i) The Government

36. The Government argued that the applicant had not exhausted the domestic remedies available to him, as required by Article 35 § 1 of the Convention.

37. They submitted that the applicant did not lodge a cassation appeal against the Rzeszów Court of Appeal's judgment of 16 April 2004 in compliance with procedural requirements. As a result, his cassation appeal was rejected on the ground that the circumstances which would justify the examination of the cassation appeal had been insufficiently described.

38. The Government argued that the cassation appeal should be considered an effective and available remedy for the EWK cases. They referred to several examples of domestic case-law. In particular, they pointed to a case in which a cassation appeal had been allowed by the Supreme Court which had remitted it to the Court of Appeal. Afterwards the applicant's appeals against the Social Security Board's decision had again been rejected at two instances and, finally, the Supreme Court had refused to entertain the second cassation appeal lodged in this case. The Government did not indicate the grounds for quashing the judgment by the Supreme Court when examining the cassation appeal for the first time.

39. 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.

(ii) The applicant

40. The applicant did not comment on the Government's objection.

(iii) The Court

41. The Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, § 65).

42. Insofar as the Government argued that the applicant's cassation appeal had not been lodged in compliance with procedural requirements, the Court notes at the outset that in the operative part of the decision of 17 September 2004 the Supreme Court indeed rejected the cassation appeal lodged by the applicant's lawyer. The ground which was relied on by the Supreme Court to justify the decision in question was of a formal character, namely the failure of the applicant's lawyer to give the grounds which would justify the examination of his client's cassation appeal. The Court notes further that the reasons behind the Supreme Court's decision were the same as reasons relied on by the same court in other case examined by the Strasbourg Court namely in *Antoni Lewandowski v. Poland*, no. 38459/03, § 25, 2 October 2012, where the Supreme Court refused to entertain the applicant's cassation appeal. Therefore, the Court sees no reason to depart from the reasoning adopted in the case of *Antoni Lewandowski* where the Court found that the applicant's procedural mistake did not have any material bearing on the effectiveness of his cassation appeal. Most cassation appeals which had been lodged by applicants with similar cases were considered by the Supreme Court as not deserving of substantive examination. Accordingly, the prospects of success of the applicant's cassation appeal, even if it had been lodged properly, were very slim and, therefore, not sufficient for the purposes of Article 35 § 1 of the Convention (see, *Antoni Lewandowski*, cited above, §§ 62-66).

(b) Incompatibility ratione materiae and ratione personae with the Convention

43. The Government further submitted that the present application should be considered incompatible ratione materiae and ratione personae

with the Convention because it concerns rights and freedoms which are not guaranteed by the Convention and because the applicant cannot claim to be a victim of a violation of the Convention within the meaning of its Article 34.

44. The Court has already examined the Government's objection as regards the alleged incompatibility *ratione materiae* of the EWK applications and dismissed it (see *Moskal*, cited above, §§ 38-45). It sees no reason to depart from its previous finding.

45. As regards the Government's objection concerning the alleged incompatibility *ratione personae* with the Convention, the Court notes that the EWK pension in question had been granted personally to the applicant and that, following the revocation of the pension, the applicant was involved in the judicial proceedings complained of as a party. In any event, the Court has already examined a number of EWK applications and found, at the admissibility stage of their examination that they were not manifestly ill-founded or inadmissible on any other grounds (see among many other authorities, *Antoni Lewandowski*, cited above, §72, *Lasota v. Poland*, No. 6762/04, § 54, 2 October 2012). It follows that the Government's objection concerning the inadmissibility *ratione personae* of the application must be dismissed.

(c) Further preliminary objections

46. The Government also submitted that the applicant should have made an application to the Constitutional Court, challenging the compatibility of the relevant social security provisions with the Constitution. They further argued that the applicant did not suffer significant disadvantage and that his application constituted an abuse of the right to individual petition.

47. The Court has already examined identical objections regarding non-exhaustion as regards the applicant's failure to lodge a constitutional complaint, no significant disadvantage and abuse of the right to individual petition and dismissed them, in the follow-up cases to *Moskal* (see, for instance, *Antoni Lewandowski*, cited above, §§ 54-72, *Potok v. Poland*, no. 18683/04, §§ 36-44, and *Lew v. Poland*, no. 34386/04, §§ 56-62, 4 December 2012). It sees no reason to depart from its previous findings.

2. Conclusion on admissibility

48. The Court also 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' submissions

(a) The applicant

49. The applicant submitted that divesting him, in the circumstances of the case, of his acquired right to an early-retirement pension had amounted to an unjustified deprivation of property.

(b) The Government

50. The Government claimed that the interference with the applicant's property rights had been lawful and justified. In particular, divesting the applicant of his right to the early-retirement pension had been provided for by law and was in the general interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued.

2. The Court's assessment

(a) General principles

51. The relevant general principles are set out in the *Moskal* judgment, cited above, paragraphs 49-52. The Court would nevertheless reiterate that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and must pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Moskal*, cited above, §§ 49 and 50).

(b) Application of the above principles to the present case

(i) Whether there has been an interference with the applicant's possessions

52. The parties agreed that the decisions of the Rzeszów Social Security Board of 8 October 2002, subsequently validated by two court instances (the regional court and the court of appeal), which deprived the applicant of the right to receive the EWK pension, amounted to an interference with his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention. The Court sees no reason to hold otherwise.

(ii) Lawfulness of the interference and legitimate aim

53. As in the *Moskal* case the Court considers that this interference was provided for by law and pursued a legitimate aim, as required by Article 1 of Protocol No. 1 to the Convention (see *Moskal*, cited above, §§ 56, 57 and 61-63 and also *Iwaszkiewicz v. Poland*, no. 30614/06, §§ 47, 48, 26 July 2011).

(iii) Proportionality

54. In the instant case, a property right was generated by the favorable evaluation of the applicant's dossier attached to the application for a pension, which was lodged in good faith, and by the Social Security Board's recognition of the right (see paragraphs 7-8 above). Before being invalidated the decision of 18 February 2002 had undoubtedly produced effects for the applicant.

55. It must be stressed that the delay with which the authorities reviewed the applicant's dossier was relatively long. The decision of 18 February 2002 was left in force for ten months before the authorities became aware of their error. On the other hand, as soon as the error was discovered the decision to discontinue the payment of the benefit was issued relatively quickly and with immediate effect (see paragraph 16 above). Even though the applicant had an opportunity to challenge the Social Security Board's decision of 8 October 2002 in judicial review proceedings, her right to the pension was eventually determined by the courts almost two years later (see paragraphs 15-22 above).

56. In examining the conformity of these events with the Convention, the Court reiterates the particular importance of the principle of good governance. It requires that where an issue pertaining to the general interest is at stake, especially when it affects fundamental human rights, including property rights, the public authorities must act promptly and in an appropriate and above all consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 128, ECHR 2004-XII; *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008; and *Rysovskyy v. Ukraine*, no. 29979/04, § 71, 20 October 2011). It is desirable that public authorities act with the utmost care, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other such rights. In the present case, the Court considers that having discovered their mistake, the authorities failed in their duty to act speedily and in an appropriate and consistent manner (see *Moskal*, cited above, § 72).

57. Moreover, in the Court's opinion, the fact that the State did not ask the applicant to return the pension which had been unduly paid (see paragraph 23 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in his case. As a result of the impugned measure, the applicant was faced, without any transitional period enabling him to adjust to the new situation, with the total loss of his early-retirement pension, which constituted his only source of income at that time. It is true that the applicant managed to find job relatively quickly after his EWK pension had been revoked (see paragraph 25-27 above). The Court notes however that, according to the applicant's submissions supported by the relevant documents in the first two years following the revocation of his EWK pension the applicant could manage to find

employment only on temporary basis and his salary amounted to PLN 1000 which constituted less than 50% of the average salary in Poland (see paragraphs 27 and 28 above).

58. The Government submitted that the applicant's son had been employed as of 1 February 2007. However, the Court considers that this fact is not decisive for the matter at hand, namely whether the revocation of the EWK pension placed an excessive burden on the applicant as an individual in his own right irrespective of third party financial support.

59. In view of the above considerations, the Court does not see any reason to depart from its ruling in the leading case concerning EWK pensions, *Moskal v. Poland*, and finds that in the instant case a fair balance has not been struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and that the burden placed on the applicant was excessive.

60. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant submitted that he had sustained non-pecuniary damage. He left the determination of its amount to the Court.

63. The Government submitted that since the applicant had not specified the amount of his claim for just-satisfaction, they were unable to make any comments.

64. The Court finds that the applicant was deprived of his income in connection with the violation found and must take into account the fact that he undoubtedly suffered some pecuniary and non-pecuniary damage (see *Moskal*, cited above, § 105 with a further reference). Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,500 to cover all heads of damage.

B. Costs and expenses

65. The applicant also claimed PLN 1,200 (approx. EUR 300) for costs and expenses incurred before the domestic courts.

66. The Government submitted that the applicant had failed to substantiate his claim as regards costs and expenses.

67. The Court notes that from the documents produced by the applicant it emerges that he had been represented by lawyers before the Court of Appeal and before the Supreme Court. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 300 for costs and expenses in the domestic proceedings.

C. Default interest

68. 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 application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 300 (three 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 28 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ledi Bianku
Deputy Registrar	President