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

FIRST SECTION

DECISION

Application no. 61811/14
F.S.
against Poland

The European Court of Human Rights (First Section), sitting on 25 September 2018 as a Committee composed of:

Aleš Pejchal, *President,*
Krzysztof Wojtyczek,
Armen Harutyunyan, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 3 September 2014,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr F.S., is a Polish national, who was born in 1974 and lives in Poznań. He was represented before the Court by Ms M. Gąsiorowska, a lawyer practising in Warsaw.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 23 January 2012 the applicant brought a petition for divorce before the Poznań Regional Court, asking for divorce on no-fault grounds.

4. The defendant applied for this action to be dismissed, arguing that it would be contrary to her will and to their adopted child's best interests. She further argued that it would also be contrary to her religious beliefs. She submitted that it was the applicant who should be held responsible for the breakdown of the marital ties as he had moved out of the marital home.

5. The court heard evidence from twelve witnesses.

6. By a judgment of 9 December 2013 the Poznań Regional Court dissolved the marriage. It held that both spouses were at fault for the breakdown of marital ties. It further held that the spouses were to share parental authority, while their child was to live with his mother. The court determined the amount of child maintenance to be paid by the applicant.

7. In the written grounds of the judgment the court referred in detail to numerous pieces of evidence it had taken, such as various documents, expert opinions and to the evidence of witnesses. As to the latter, the court stressed that only the evidence given by three witnesses, the applicant's parents and the defendant's mother, were relevant for findings of fact which had legal relevance to the case, namely the determination of fault of the spouses for the breakdown of the marital ties. It was of the view that the parties' fault consisted, on both sides, in that they had been unable for a long time to communicate properly their needs and views on their lifestyle and essential everyday life choices.

8. Both parties were represented by lawyers.

9. The applicant appealed against the amount of child support to be paid.

10. The defendant appealed. She argued that she did not wish to divorce, because divorce was against her religious beliefs; that she loved her husband and that the first-instance court had wrongly assessed the evidence put before it.

11. No request to be heard by the appellate court was formulated in her appeal. Nor did the applicant request to be so heard.

12. In his reply to the defendant's appeal, the applicant argued that it was based on arbitrary conclusions and views unsupported by the evidence before the first-instance court. It was further argued, with reference to a number of concrete examples, that the appeal contained contradictory submissions regarding the findings of fact made by the first-instance court. It was further argued that the first-instance court had made correct findings regarding the defendant's contribution to the breakdown of the marital ties. It was submitted that the first-instance court had taken ample evidence from various sources, including witnesses. The applicant requested the court to dismiss her appeal and to uphold the first-instance judgment as well-founded.

13. The summonses to the hearing to be held before the appellate court were sent to the parties' lawyers. The parties were not summoned to attend the hearing and their presence was not mandatory in law.

14. A hearing was held before the Poznań Court of Appeal on 8 May 2014. The lawyers representing both parties attended.

15. The applicant's wife came to the court and attended the hearing. The applicant did not attend.

16. After the judge rapporteur summarised the case, the defendant's lawyer shortly reiterated the arguments contained in her appeal.

Subsequently, the applicant's wife requested the court to allow her to make oral submissions. The court agreed.

17. She made thirty-minute oral submissions to the court. Afterwards the court closed the hearing and gave judgment.

18. The Court of Appeal allowed the defendant's appeal, quashed the first-instance judgment and ruled on the merits of the applicant's petition for divorce by dismissing it.

19. In the written grounds of the judgment the court referred to various pieces of evidence gathered by the first-instance court. It did not refer to the oral submissions made by the defendant before the appellate court.

20. The court, having examined the evidence gathered by the first-instance court, established that there could be no doubt that the applicant had been at fault for the breakdown of the marital ties. It did not establish any behaviour of the defendant which could have been considered as faulty. The available evidence did not support the conclusion that the defendant had been at fault for the breakdown of the marriage. In the absence of that fault, her opposition to the divorce had to be taken into account and considered as justified. It made it impossible for the court to grant the applicant's petition for divorce. Furthermore, there was no indication that her refusal to divorce ran counter to the principles of social coexistence (*zasady współżycia społecznego*) within the meaning of Article 5 of the Civil Code. Consequently, divorce could not be granted.

21. The judgment was final, a cassation appeal against a divorce judgment not being available in law.

B. Relevant domestic law and practice

22. Pursuant to Article 56 § 1 of the Family and Custody Code (*Kodeks rodzinny i opiekuńczy*), either spouse may file a petition for divorce if there has been a complete and irretrievable marriage breakdown (*zupełny i trwały rozkład pożycia*). For the purposes of establishing whether a complete breakdown has occurred, the established judicial practice is to examine *ex officio* whether the financial, emotional and sexual ties between the spouses have ended (the Supreme Court's judgment no. III CKN 386/98 of 22 October 1999, and the Katowice Court of Appeal's judgment no. I ACa 51/10 of 12 March 2010).

23. The courts establish this applying the general procedural rules governing the taking of evidence, in addition to certain specific rules provided for by the Code of Civil Procedure for the purposes of divorce proceedings.

24. In particular, under Article 431 of the Code of Civil Procedure, a decision in a divorce case cannot be based exclusively on the acceptance of the divorce petition or of certain facts by the respondent. Article 432 of the Code provides that both parties to a divorce case are to be heard in person.

25. Under Article 56 §§ 2 and 3 of the Family and Custody Code, a divorce may not be granted even where there has been a complete breakdown of the marriage, if:

> "(2) ... it would be detrimental to the well-being of [the] minor children [of the marriage] or if, for other reasons, granting the divorce would be contrary to the principles of social coexistence (*zasady współżycia społecznego*);
>
> (3) ... it has been requested by the spouse who is at fault for the breakdown of the marriage, unless the other spouse has expressed his or her consent thereto, or the refusal of such consent by the other spouse is – in the circumstances at issue – contrary to the reasonable principles of social coexistence..."

26. The courts have developed ample case-law addressing situations where a respondent spouse refuses to consent to a divorce. In particular, they have held that an innocent respondent has a right to refuse to consent. A presumption of good faith was therefore applicable to such a refusal, until it was demonstrated, with reference to the specific circumstances of a case, that the refusal ran counter to the principles of coexistence in society within the meaning of Article 5 of the Civil Code (the Supreme Court's judgments nos. II CKN 956/99 of 26 October 2002 and I CKN 305/01 of 26 February 2000).

27. Under Article 375 of the Code of Civil Procedure, save for situations irrelevant for the present case, an appellate court examines appeals at a hearing.

28. Article 376 provides that a hearing before an appellate court shall be held regardless of the parties' absence. A judgment given in the absence of one of the parties at a hearing is not a judgment in absentia.

29. The Supreme Court, in its judgments of 23 August 2003 (no. I PK 213/02) and of 17 April 2013 (no. I CSK 473/12), held that a hearing before an appellate court can be adjourned on grounds of absence of one of the parties only in cases when the court had, in the summons, obliged that party to attend the hearing.

COMPLAINTS

30. The applicant complained under Article 8 of the Convention that by refusing to grant him a divorce the authorities had breached his right to respect for his private life. He further relied on Article 9 of the Convention and submitted that the courts, by refusing to grant his divorce petition, had disregarded the fact that he had not shared the religious views of his wife and the model of marital life based on her religious beliefs which she had tried to impose on him.

31. The applicant complained under Article 6 of the Convention that the proceedings had not been fair. The fact that the appellate court heard his

wife while he himself was not heard was in breach of the principle of equality of arms. He did not know in advance that his wife would be heard, had no knowledge of her submissions and at no point could take a position in reply prior to the court dismissing his petition.

THE LAW

A. Complaint under Article 8

32. The applicant complained that by refusing to grant him a divorce the authorities had breached his right to respect for his private life. He relied on Articles 8 and 9 of the Convention.

33. Being the master of characterisation to be given in law to the facts of the case, the Court is not bound by the characterisation given by the applicant or a Government (see *Guerra and Others v. Italy*, 19 February 1998, § 44, Reports of Judgments and Decisions 1998‑I). The Court considers that the applicant's complaints should be examined from the standpoint of Article 8 of the Convention which, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

34. The Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002-I). In both contexts of positive and negative obligations regard must be had to the fair balance that has to be struck between the competing interests (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 87, ECHR 2011-V); and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Mizzi v. Malta*, no. 26111/02, § 106, ECHR 2006 I (extracts) and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 106, ECHR 2014). In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention

and to reconcile the competing personal interests at stake (compare and contrast, *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112).

35. The Court has already held that neither Article 12 nor 8 of the Convention can be interpreted as conferring on individuals a right to divorce (see *Johnston and Others*, cited above, § 57; *Piotrowski v. Poland* (dec.), no. 8923/12, § 46, 22 November 2016; and *Babiarz v. Poland*, no. 1955/10, § 49, 10 January 2017). Moreover, the *travaux préparatoires* of the Convention indicate clearly that it was an intention of the Contracting Parties to expressly exclude such right from the scope of the Convention (*Johnston and Others*, cited above, § 52). Nevertheless, the Court has reiterated on many occasions that the Convention is a living instrument to be interpreted in the light of present-day conditions (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). It has also held that, if national legislation allows divorce, which is not a requirement of the Convention, Article 12 secures for divorced persons the right to remarry (see *F. v. Switzerland*, 18 December 1987, § 38, Series A no. 128).

36. The circumstances of the present case differ from those examined in the context of the case of *Johnston and Others* (cited above), as the case concerns neither a blanket restriction nor a blanket prohibition imposed by the domestic law. The applicant's argument is not based on an absolute impossibility to obtain a divorce under family law in Poland but on a dismissal of his divorce action by the domestic courts.

37. The Court notes that Polish divorce law provides detailed substantive and procedural rules which can lead to a divorce being granted. In particular, Article 56 § 3 of the Family and Guardianship Code can be regarded as intended to be a safeguard to protect one party, usually the weaker, against the machinations and bad faith of the other party. There is also ample domestic case-law on the application of the relevant substantive provisions to situations where an innocent party and, on the other hand, a party at fault for the breakdown of the marital relations are involved in the divorce proceedings, providing further clarification and guidance to the courts (see Relevant domestic law; see also *Babiarz*, cited above, § 52).

38. In the present case, the courts examined the facts in detail and in the proper context of domestic law. During the divorce proceedings comprehensive evidence was gathered. The applicant, represented by a lawyer of his choice, had an opportunity to present his position to the court and to put questions to the witnesses. The first-instance judgment was subject to a review by the appellate court. The reasoning of that judgment contained a detailed explanation of the interests that were taken into account, how the evidence was assessed and what the grounds were for its decision. Likewise, the appellate court, having regard to the parties' submissions made in their appeals, examined the applicant's objections to

the allegedly erroneous assessment of the evidence made by the first-instance court and explained grounds on which it ultimately decided to dismiss the applicant's petition for divorce.

39. The Court further notes that it has not been argued that under Polish law a refusal to divorce creates *res iudicata*, thereby preventing the applicant from submitting a fresh petition for divorce to the courts at a later stage if and when circumstances change (see *Babiarz*, cited above, § 55).

40. In the Court's view, if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce.

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

B. Complaint under Article 6

42. The applicant complained under Article 6 of the Convention that the proceedings before the appellate court had not been fair. He did not know in advance that his wife would be heard, had no knowledge of her submissions and at no point could take a position in reply prior to the court dismissing his petition.

43. Article 6 of the Convention, in so far as relevant, provides:

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

44. The Court reiterates that Article 6 of the Convention does not guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. Article 6 § 1 of the Convention leaves to the State a free choice of the means to be used in guaranteeing litigants these rights (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 59-60, ECHR 2005-II). Thus, the questions of personal presence, the form of the proceedings – oral or written – and legal representation are interlinked and must be analysed in the broader context of the "fair trial" guarantee of Article 6 of the Convention. The Court should establish whether the applicant, a party to the civil proceedings, had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274; *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000; *Steck-Risch and Others v. Liechtenstein*, no. 63151/00, § 54, 19 May 2005; *Larin v. Russia*,

no. 15034/02, §§ 35-36, 20 May 2010; and *Siwiec v. Poland*, no. 28095/08, § 47, 3 July 2012). Finally, the Court reiterates that, in determining issues of fairness of proceedings for the purposes of Article 6 of the Convention, it must consider the proceedings as a whole, including the decision of the appellate court (see *C.G. v. the United Kingdom*, no. 43373/98, § 35, 19 December 2001).

45. In the present case the applicant was represented by the same lawyer before the first-instance court and before the appellate court. The appeal lodged by the applicant's former wife was served on his lawyer prior to the one and only hearing to be held before the appellate court. Hence, the applicant had an opportunity to acquaint himself with the arguments raised by the appellant against the first-instance judgment. He availed himself of this opportunity and submitted to the court his detailed reply to the defendant's arguments.

46. The Court further notes that the applicant's lawyer was duly summoned to that hearing. She attended it, representing the applicant's views. It therefore cannot be said that the applicant's interests were not represented at that hearing. The applicant himself, whose presence was not mandatory, chose not to attend the hearing for reasons on which he did not comment in his application to the Court, while his wife was present. She requested and was given an opportunity to make oral submissions. There is no evidence that the applicant was unable to attend the hearing before the appellate court.

47. It has not been shown or argued that the applicant's lawyer objected during the hearing to the defendant making oral submissions to the appellate court.

48. Furthermore, in the exercise of its power freely to assess the evidence the appellate court was entitled not to regard the applicant's wife's statements as decisive. It does not appear from the judgment that it attached any particular weight to her oral submissions to that court. Lastly, when setting aside the divorce judgment given by the first-instance court the appellate court referred to the evidence other than the statements in issue. No reference whatsoever was made to her submissions.

49. Accordingly, the Court does not discern any difference in treatment in respect of the hearing of the parties. The manner in which the appellate court conducted the proceedings did not place the applicant at a disadvantage vis-à-vis his opponent.

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

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 18 October 2018.

Renata Degener Deputy Registrar	Aleš Pejchal President