

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

FOURTH SECTION

DECISION

Application no. 50648/10
by Zofia and Zbigniew HEMLICH
against Poland

The European Court of Human Rights (Fourth Section), sitting on 11 October 2011 as a Chamber composed of:

Ljiljana Mijović, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 17 August 2010,

Having regard to the declarations submitted by the respondent Government on 5 July 2011 requesting the Court to strike the application out of the list of cases and the applicants' replies to that declaration,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Zofia Hemlich, and Mr Zbigniew Hemlich, are Polish nationals who were born in 1947 and 1943 respectively and live in Żyrardów. They were represented before the Court by Mr M. Pietrzak, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

A. The circumstances of the case

The applicants own a plot of land. On 23 August 2007 their neighbours filed with the Żyrardów District Court an application for the establishment of an easement. The applicants contested the application.

On 7 April 2009 the Żyrardów District Court, composed of an assessor, found for the applicants' neighbours. It also fixed the charge for the easement to be paid by the neighbours. The applicants appealed.

On 1 July 2009 the Płock Regional Court dismissed their appeal. The applicants lodged a cassation appeal.

On 7 May 2010 the Supreme Court refused to entertain their cassation appeal.

B. Relevant domestic law and practice

1. Assessors (junior judges)

The relevant domestic law and practice regarding the status of assessors, including the landmark judgment of the Polish Constitutional Court of 24 October 2007 (case no. SK 7/06), are set out in the Court's judgment in the case of *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 16-25, 30 November 2010.

2. The Law on the National School for the Judiciary and the Prosecution Service

On 23 January 2009 Parliament enacted the Law on the National School for the Judiciary and the Prosecution Service (*Ustawa o Krajowej Szkole Sądownictwa i Prokuratury*), which entered into force on 4 March 2009. The law establishes a comprehensive and centralised institution responsible for training judges and prosecutors.

In response to the Constitutional Court's judgment of 24 October 2007 the Law on the National School for the Judiciary and the Prosecution Service abolished the institution of assessors as provided for by the Law of 27 July 2001 on the Organisation of Courts (section 60 (12)). Furthermore, it specifically provided that as from 5 May 2009 assessors ceased to be authorised to exercise judicial powers (section 68 (1)).

THE LAW

A. Lack of independence of the assessor

The applicants complained under Article 6 § 1 of the Convention about the lack of independence of the assessor who had examined their case at the first-instance level. They relied on Article 6 § 1 of the Convention which, in so far as relevant, provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

By letter dated 5 July 2011 the Government informed the Court that they proposed to make unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

The terms of the declaration provided as follows:

> "The Government hereby wish to express – by way of the unilateral declaration – their acknowledgement of the fact that the first-instance court which dealt with the applicant's case, sitting as an assessor, was not an independent tribunal, as required by Article 6 § 1 of the Convention.
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> In these circumstances, and having regard to the Court's judgment of 30 November 2010 in the case of *Henryk Urban and Ryszard Urban v. Poland* in which it stated that the fact of acknowledging the violation of the applicants' right to have their case heard by an independent tribunal, as guaranteed by Article 6 § 1 of the Convention, constitutes in itself sufficient just satisfaction for non-pecuniary damage and that the State's legal actions (*i.e.* adoption of the Law on the National School for the Judiciary and the Prosecution Service (*Ustawa o Krajowej Szkole Sądownictwa i Prokuratury*) on 23 January 2009) to remedy the shortcomings underlying the institution of assessors by abolishing it and introducing a new, comprehensive and centralised system for training judges effectively remedied the lack of independence of assessors within the Polish judiciary system, the Government submit that their unconditional acknowledgment of the fact that the applicant's right under Article 6 § 1 of the Convention was restricted should be found by the European Court a sufficient redress for any damage suffered by the applicant as a result of his case being decided by an assessor before the first-instance court.
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> The Government would respectfully suggest that the above declaration might be accepted by the Court as 'any other reason' justifying the striking out of the case of the Court's list of cases, as referred to in Article 37 § 1 (c) of the Convention."

The applicants objected to the striking out of their application on the basis of the Government's unilateral declaration. They contended that the conditions for the striking out of their case had not been fulfilled as the terms of the declaration together with the amendments to the relevant legislation had not afforded them an adequate redress. Furthermore, the said amendments had only prospective effect and did not provide the applicants with any possibility to re-examine the judgment given by the assessor.

The applicants further argued that the respect for human rights required the Court to continue the examination of their case. They disagreed that their case was similar to the case of *Henryk Urban and Ryszard Urban* since it also raised the issue of the court's refusal to afford them the possibility to challenge the findings of the expert opinion. Furthermore, they alleged that the judgments given by the domestic courts had amounted to a breach of Article 1 of Protocol No. 1 to the Convention. The complaint concerning the lack of independence of the assessor had to be examined strictly by the Court because the assessor had given judgment on 7 April 2009 while the relevant amendments had stipulated that as from 5 May 2009 the assessors were no longer authorised to adjudicate.

The applicants requested the Court to award them 5,298 euros (EUR) for pecuniary damage, EUR 5,000 for non-pecuniary damage and EUR 7,969 for costs and expenses, referring to the case of *Mirosław Garlicki v. Poland*. They also submitted that even if the Court were to deliver a judgment finding a violation of the Convention they would not have been able to take any steps with a view to removing the consequences of the violation since there was no possibility to reopen the civil proceedings following the Court's judgment.

The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application or part thereof out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

Article 37 § 1 *in fine* includes the proviso that:

> "However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

It also recalls that in certain circumstances, it may strike out an application or part thereof under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued (see *Martyna v. Poland* (dec.), no. 72040/01, 15 January 2008; *Gołubowski and 6 other applications v. Poland* (dec.), nos. 21506/08, 22650/08, 34732/08, 41594/08, 55405/08, 38781/09 and 49198/09, 5 July 2011). To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, § 75-77, ECHR 2003-VI).

The Court recalls that it has already dealt with the institution of Polish assessors from the standpoint of Article 6 of the Convention. In *Henryk Urban and Ryszard Urban v. Poland* (no. 23614/08, 30 November 2010), its

leading judgment on the issue, the Court examined in detail the question of the independence of a "tribunal" composed of an assessor in terms of conformity with the requirements of Article 6 § 1 and found, *inter alia*, as follows:

> "48. The Constitutional Court considered the status of assessors in its leading judgment of 24 October 2007. It held that section 135 § 1 of the 2001 Act, providing that the Minister of Justice could confer the exercise of judicial powers on assessors, fell short of constitutional requirements because assessors did not enjoy the necessary guarantees of independence, notably *vis-à-vis* the Minister. The Court notes that in its analysis of the question of the independence of assessors the Constitutional Court referred to the Strasbourg case-law and observed that Article 45 of the Constitution was modelled on Article 6 § 1 of the Convention (...).
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> 51. (...) The Court notes that the Constitutional Court's findings were made in the context of an abstract review of the constitutionality of statutory provisions but, mindful of the principle of subsidiarity, considers that they may be applied to the facts of the present case, having regard to the similarity between the constitutional and the Convention requirements in so far as judicial independence is concerned and the reliance of the Constitutional Court on the relevant jurisprudence of the Court. (...) The important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 § 1 of the Constitution, guarantees which are substantively identical to those under Article 6 § 1 of the Convention.
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> 52. The Court underlines that the Constitutional Court set aside the regulatory framework governing the institution of assessors as laid down in the 2001 Act. It further stresses that the Constitutional Court did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence (...). The Constitutional Court, referring to international standards, pointed to the variety of possible solutions for allowing adjudication by persons other than judges. In this connection, the Court notes that its task in the present case is not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors or other similar officers which exist in certain Member States of the Council of Europe, but to examine the manner in which Poland regulated the status of assessors.
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> 53. Having regard to the foregoing, the Court considers that the assessor B.R.-G. lacked the independence required by Article 6 § 1 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister (...). It is not necessary to consider other aspects of the status of assessors since their removability by the executive is sufficient to vitiate the independence of the Lesko District Court which was composed of the assessor B.R.-G."

The Court went on to observe that, having regard to the principle of legal certainty and its own case-law, there were no grounds which would require it to direct the re-opening of the applicants' case. However, it further noted that it would not exclude that it might take a different approach in a case where, for example, the circumstances of a particular case gave rise to legitimate concerns for believing that the Minister of Justice – Prosecutor

General had or could reasonably be taken to have had an interest in the proceedings (see *Henryk Urban and Ryszard Urban*, cited above, § 56, and *Mirosław Garlicki v. Poland*, no. 36921/07, §§ 107 and 114, 14 June 2011).

Thus, the first element of the Court's test in the *Henryk Urban and Ryszard Urban* judgment concentrated on the institutional deficiency as regards the position of assessors *vis-à-vis* the Minister of Justice – Prosecutor General. As noted above, the Court also had regard to the second element, namely the presence of specific circumstances in a particular case.

In the *Urban* case itself, the Court held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage which may have been sustained by the applicants (see *Henryk Urban and Ryszard Urban*, cited above, § 62). This is the Court's general approach in assessors' cases to the issue of just satisfaction unless the existence of specific circumstances is shown in a particular case.

Furthermore, in the same judgment the Court found that:

> "67. (...) It is noteworthy that the constitutional and Convention deficiency regarding the status of assessors was remedied by the domestic authorities – which decided to abolish the office of assessor altogether – within the time-frame allotted by the Constitutional Court (...). Having regard to the above, it may be noted that the authorities of the respondent State took the requisite remedial measures in order to address and remedy the deficiency underlying the present case."

As regards costs and expenses, the Court found that there was no justification for awarding legal costs under Article 41 (*Henryk Urban and Ryszard Urban*, cited above, § 70).

In the present case the Court cannot discern any circumstances which could give rise to an assumption that the Minister of Justice – Prosecutor General may have been taking an interest in the proceedings against or involving the applicants and therefore the issue in the present case is limited to the institutional deficiency regarding the status of assessors (compare and contrast, *Mirosław Garlicki*, cited above § 114). In the circumstances of the present case the Court accepts that the Government are not required to offer any compensation to the applicants in light of the *Henryk Urban and Ryszard Urban v. Poland* judgment.

The Court has carefully examined the terms of the Government's declaration. It observes that their declaration contain a clear acknowledgment of a breach of Article 6 § 1 of the Convention and refer to the adoption of the Law on the National School for the Judiciary and the Prosecution Service which abolished the institution of assessors (see relevant domestic law above). Having regard to the nature of the admissions contained in the Government's declaration as well as the absence of any factors which could distinguish the present cases from the Court's approach in the case of *Henryk Urban and Ryszard Urban v. Poland* the Court considers that it is no longer justified to continue the examination of the application in so far as it concerns the complaint related

to the lack of independence of the assessor (Article 37 § 1(c); see, for the relevant principles *Tahsin Acar v. Turkey* (preliminary issue) [GC], cited above).

In light of all the above considerations, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the complaint at issue (Article 37 § 1 *in fine*).

Accordingly, it is appropriate to strike the application out of the list in so far as it concerns the complaint related to the lack of independence of the assessor.

B. Remaining complaints

The applicants complained under Article 6 of the Convention that the domestic courts had wrongly applied the law in their case. They also alleged that the courts had denied them the opportunity to challenge the findings of the expert report. The applicants further complained under Article 1 of Protocol No. 1 that the outcome of the proceedings had amounted to a breach of their property rights.

In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols 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.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration;

Decides to strike the application out of its list of cases in so far as it relates to the complaint concerning the lack of independence of the assessor in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible in so far as they raise other complaints.

Fatoş Aracı
Deputy Registrar

Ljiljana Mijović
President