CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30214/96
by Marian JAWOROWSKI
against Poland

The European Court of Human Rights (Fourth Section) sitting on 23 March 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr J.A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr V. Butkevych,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,
Mr I. Cabral Barreto,
Mr G. Ress,
Mrs N. Vajić, *Substitute Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 September 1994 by Marian JAWOROWSKI against Poland and registered on 15 February 1996 under file no. 30214/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen born in 1948, is a bailiff residing in Chorzów, Poland.

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

Particular circumstances of the case

a) Criminal proceedings against the applicant

At the relevant time the applicant was employed in the Katowice Regional Court (*Sąd Wojewódzki*) as a bailiff.

On an unspecified date in 1993 the Bytom District Prosecutor (*Prokurator Rejonowy*) indicted the applicant on a charge of exceeding his powers while acting in the capacity of a bailiff during a public auction (an offence outlawed by Section 246 § 1 of the Criminal Code). The bill of indictment was lodged with the Bytom District Court (*Sąd Rejonowy*).

On 16 February 1994 the court convicted the applicant of the offence with which he had been charged and sentenced him to six months' imprisonment suspended for two years and a fine of 5,000,000 old Polish zlotys (PLZ) and prohibited him from exercising the profession of bailiff for one year. Further, the court ordered the applicant to pay court fees of PLZ 800,000 and held that any costs which might be involved in the proceedings should be borne by the applicant.

On 25 March 1994 the applicant lodged an appeal with the Katowice Regional Court, contesting the findings of fact made by the court of first instance and the accuracy of the testimony given by the main prosecution witness.

On 10 May 1994 the Katowice Regional Court held a hearing. The applicant was assisted by a lawyer of his own choice. During the hearing, after the presiding judge had read out the reasons for the first-instance judgment, the applicant made an oral statement, commenting on those reasons. In the applicant's words: "... this was my rejoinder (*replika*) to the reasons given by the court of first instance and to my conviction." Thereafter, he requested the court to record his statement in the minutes. This was refused by the presiding judge who then proceeded with the hearing and read out other material contained in the case-file.

On 11 May 1994 the court upheld the judgment of the court of first instance, finding that the Bytom District Court had accurately established the facts of the case and correctly assessed the evidence presented during the trial.

On 12 May 1994 the applicant filed a pleading entitled an "appeal" with the Chief Justice of the Katowice Regional Court, complaining that the presiding judge had refused to record the content of his statement in the minutes of the appellate hearing.

In his reply of 8 June 1994, the Chief Justice informed the applicant that, having verified the circumstances which had led the judge to make the contested decision, he found no appearance of arbitrariness on her part, in particular as she, when conducting the hearing,

had followed the relevant provisions of the Code of Criminal Procedure, in particular Sections 403 and 407.

In the meantime, on 12 May 1994, the applicant had requested the Minister of Justice to grant him leave to file an extraordinary appeal to the Supreme Court against both judgments given in his case. He complained that his defence rights had been violated, especially as his oral statement and, consequently, his arguments challenging the reasons for the first-instance judgment had not been recorded in the minutes of the appellate hearing. Further, the applicant requested the Minister of Justice to disqualify all the judges of Katowice Province from dealing with his case.

On 9 August 1994 the Minister of Justice dismissed the applicant's above request as lacking any legal or factual basis.

b) Proceedings concerning the applicant's dismissal

On 3 October 1994 the Chief Justice of the Katowice Regional Court, under Section 14 § 1 (1) of the Law of 16 September 1982 on Employees of State Organs (*Ustawa o pracownikach urzędów państwowych*), terminated the applicant's employment without notice on the grounds that the applicant, by virtue of his criminal conviction, was prohibited from exercising the profession of bailiff.

On 23 November 1994, upon the applicant's appeal, the Minister of Justice upheld the above-mentioned decision, finding that under the relevant legal provisions the fact that the applicant had been convicted and, consequently, prohibited from exercising his profession did in itself sufficiently justify his dismissal without notice.

On an unspecified date the applicant lodged an appeal with the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) against both decisions, submitting that in the proceedings leading to his dismissal he had been denied the opportunity to present evidence supporting his arguments and that the contested decisions were, in general, unlawful.

On 6 March 1995 the Supreme Administrative Court gave judgment dismissing the appeal. The court held that, since under Section 14 § 1 (1) of the Law of 16 September 1982 on Employees of State Organs the law required that the employment of a civil servant had to terminate where he had been prohibited from exercising his profession by virtue of a criminal conviction, the applicant's dismissal had been both mandatory and lawful.

Relevant domestic law

1. Criminal legislation

Over the period to which the facts of the present case relate, the legal provisions governing proceedings in criminal courts were contained in the Code of Criminal Procedure of 19 April 1969 (at present, the Code is no longer in force as it was repealed and replaced by the so-called "New Code of Criminal Procedure").

a) Criminal procedure on appeals, in particular, presentation of appeals

Section 403 of the Code of Criminal Procedure provided, insofar as relevant:

"1. An appeal hearing shall open with an oral report prepared by the judge rapporteur. The judge rapporteur shall describe the course and the outcome of the proceedings [before the court of first instance]; in particular, he shall present the content of the judgment appealed against, the grounds of appeal and, finally, any matters which call for an *ex officio* decision [by the appellate court]. If necessary, certain documents contained in the case-file may be read out;

2. The parties may submit any oral or written arguments, explanation and/or motions; such submissions, if written, shall be read out ... ;

3. The presiding judge shall [further] call on the parties to present their arguments; they shall speak in the order established by him. An accused and his defence counsel shall not be refused the right to reply after the other parties have presented their arguments."

Under Section 407, the provisions governing proceedings before courts of first instance applied to appellate proceedings by analogy.

The judge presiding over an appellate hearing was responsible for conducting the hearing (Section 313 § 1) and, pursuant to Section 129, recording the course thereof in the minutes. Pursuant to Section 134 the presiding judge was under a duty to record the statements and motions submitted by the parties and, if necessary, a description of other events. In practice, he decided, by reference to the criterion of relevance, whether or not a particular statement should be included in the minutes, and if so, whether in full or summary form. The parties could request the court to record "everything which was relevant for their rights and interests" (Section 134 § 2) or, if this was refused or if they found that the content of the minutes was inaccurate, they could request the court to rectify the minutes (Section 138).

b) Domestic remedies in respect of a lack of impartiality on the part of courts

Chapter II of the Code of Criminal Procedure, entitled "Disqualification of a judge", Sections 30-34, laid down that a judge should be disqualified from dealing with a given case either where the law itself so required (*iudex inhabilis*) or in cases where, in view of his personal relationship with one of the parties, his impartiality could be open to doubt (*iudex suspectus*).

Grounds for disqualification falling with the first category were defined, in detail, in Section 30 of the Code and included the fact that the case directly concerned a given judge or a close relative of his and that he had already participated in the case as a party or had given evidence as a witness or expert.

Section 31 § 1 defined the second category of grounds for disqualification of a judge in the following terms:

"A judge shall be disqualified from dealing with a given case if there exists a personal relationship between him and a[ny] party to the proceedings and this relationship is of such a nature as to give rise to doubt as to his impartiality."

Section 32 § 1 provided:

"A judge shall be disqualified from dealing with a case either *ex officio*, or on his own motion, or at the request of a party to the proceedings."

A party to criminal proceedings could at any time lodge a request under § 2 of the section cited above, asking that one or more judges of a given court be disqualified from dealing with his case.

2. Dismissal from the civil service

At the relevant time, the rules governing appointment to and dismissal from the civil service were contained in the Law of 16 September 1982 on Employees of State Organs (as amended).

Section 14 § 1 (1) of the Law, in the version applicable at the material time, provided:

"The employment of a civil servant shall be terminated by operation of law and without notice if, in a final criminal conviction, he has been either sentenced to deprivation of civic rights or prohibited from exercising his profession."

COMPLAINTS

1. The applicant firstly complains under Article 6 § 1 of the Convention that in the criminal proceedings against him his defence rights were violated since the judge presiding over the appellate hearing before the Katowice Regional Court refused to record his comments on the first-instance judgment in the minutes of the hearing.

2. He further submits that no court in Katowice Province should have dealt with his case because he was an employee of the Katowice Regional Court at the time. Therefore, all the judges of both the first instance and appeal courts should have been disqualified from dealing with his case. As this did not occur, his right to have a criminal charge against him determined by an impartial tribunal, guaranteed by Article 6 § 1 of the Convention, was not respected.

3. Under Article 1 of Protocol No. 1 to the Convention the applicant submits that the Polish courts, by sentencing him to a fine and ordering him to pay court fees, arbitrarily interfered with his property rights.

4. Lastly, in respect of the proceedings leading to his dismissal, the applicant complains under Article 6 § 1 of the Convention that these proceedings were unfair and that he was dismissed from the civil service in an arbitrary fashion.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention that in the criminal proceedings against him his defence rights were violated since the judge presiding over the appellate hearing before the Katowice Regional Court refused to record his comments on the first-instance judgment in the minutes of the hearing.

The Court, noting that the present complaint relates both to the right to a fair trial guaranteed by Article 6 § 1 and the right to a defence guaranteed by paragraph 3 (c) of Article 6 (the latter being a particular aspect of the right to a fair trial), will examine this part of the application under these two paragraphs taken together (see, e.g., the F.C.B. v. Italy judgment of 28 August 1991, Series A, no. 208-B, p. 20, § 29).

Article 6 § § 1 and 3 (c) of the Convention provides, insofar as relevant:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ... ;"

The Court recalls that criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance. In appellate proceedings a State is, therefore, required to ensure that persons amenable to the law shall enjoy the fundamental guarantees contained in this Article, among which the right of an individual to defend himself plays an important role (see, e.g. the Belziuk v. Poland judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 570, § 37).

It further recalls that while paragraph 3 (c) of Article 6 confers on everyone charged with a criminal offence the right to "defend himself", it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial, that is to say whether the defendant was able to exercise his right to defend himself in an "effective" and "practical" manner (see, *mutatis mutandis,* the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, § 38).

In respect of the present case the Court firstly observes that the applicant asserts that his right to a fair trial, and more particularly, his right to defend himself, was violated by a single circumstance, namely, the fact that the judge presiding over the appellate hearing refused to record his oral comments on the grounds for the first-instance judgment. The Court further observes that the applicant does not maintain that he was unable - either himself or through his lawyer - to address the court, to submit any comments he wished to make on the observations made by his opponent, or to put forward any submissions on the matters which he regarded as pertinent to or relevant for the outcome of his case; indeed, this was clearly not the case.

On the other hand, the Court notes that, under Section 407 read together with Sections 129 and 134 of the Polish Code of Criminal Procedure, and according to the relevant domestic practice, a judge presiding over an appellate hearing had a certain discretion, exercised by reference to the criterion of relevance, to decide whether, and if so in what form, a statement by any party to the proceedings should be recorded in the minutes of the hearing.

In the Court's view, such a discretion left to a court cannot, in itself, be seen as contrary to the requirements of a "fair trial" within the meaning of Article 6 of the Convention. Nor does the Court consider that, in the circumstances of the present case, the judge's refusal to record the applicant's comments on the first-instance judgment in the minutes of the hearing amounted to such a failure to respect his defence rights as could have infringed Article 6, or that this refusal hindered the applicant in exercising his defence rights in an effective and practical manner.

Finally, assessing the facts of the case as a whole, the Court finds no element which would indicate that the proceedings were otherwise unfairly conducted.

It follows that this part of application is inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 and that it must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant further submits that no court in Katowice Province should have dealt with his case because he was an employee of the Katowice Regional Court at the time. Therefore, all the judges of both the first instance and appeal courts should have been disqualified from dealing with his case. As this did not occur, his right to have a criminal charge against him determined by an impartial tribunal, guaranteed by Article 6 § 1 of the Convention, was not respected.

Under Article 35 § 1 of the Convention "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

In this regard the Court recalls that the rule of exhaustion of domestic remedies referred to in that provision of the Convention obliges those seeking to bring the case against the State before an international judicial organ to use first the remedies provided by the national legal system (see, e.g. the Selçuk and Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, p. 907, § 65).

The Court further notes that under Polish law applicable at the material time, a defendant in criminal proceedings could at any stage of those proceedings challenge, under Section 32 of the Code of Criminal Procedure, the impartiality of the judge or judges dealing with his case, in particular by requesting that that judge or those judges be disqualified.

However, the Court observes that in the present case the applicant did not raise his objection to the impartiality of the courts which had dealt with his case until 12 May 1994, when he filed the request with the Minister of Justice for leave to file an extraordinary appeal. At this point the criminal proceedings against him had already been terminated by the judgment of the Katowice Regional Court of 11 May 1994.

As a result, the Court finds that the applicant failed to raise the issue of impartiality before the domestic authorities while the proceedings in question were pending, i.e. at a point at which his challenge to the impartiality of the judiciary could have had a real effect and, consequently, the situation now complained of could have been remedied. The Court concludes from this that the applicant has not complied with the requirements of Article 35 § 1 of the Convention in respect of the exhaustion of domestic remedies.

It follows that this part of the application must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 § 4 of the Convention.

3. Under Article 1 of Protocol No. 1 to the Convention the applicant submits that the Polish courts, by sentencing him to a fine and ordering him to pay court fees, arbitrarily interfered with his property rights.

Article 1 of Protocol No. 1 to the Convention provides:

> "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."

The Court observes that the applicant's complaint is based on the very fact that he was convicted of a criminal offence and, as a consequence, sentenced to a fine and ordered to pay court fees. Such measures as those complained of, which result from final and enforceable criminal convictions, are justified under the second sentence of Article 1 of Protocol No. 1, as being both effected in the "public interest" and "provided for by law". As a result, the Court finds that there is no appearance of a violation of the applicant's rights guaranteed by this provision of the Convention.

It follows that this part of the application is inadmissible as being manifestly ill-founded within the meaning of Article 35 § 1 of the Convention and that it must be rejected pursuant to Article 35 § 4 of the Convention..

4. Lastly, in respect of the proceedings leading to his dismissal, the applicant complains under Article 6 § 1 of the Convention that these proceedings were unfair and that he was dismissed from the civil service in an arbitrary fashion.

Article 6 § 1 of the Convention provides, insofar as relevant:

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

The Court recalls, in the first place, that in the light of its settled case-law disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1, unless the dispute in question relates either to a purely

economic right - such as payment of salary or pension, or an essentially economic right (see the Le Calvez v. France judgment of 29 July 1998, *Reports* 1998-V, p. 1900, § 57).

In respect of the instant case the Court observes that the proceedings complained of originated from the applicant's objection to the decision of the Chief Justice of the Katowice Regional Court of 3 October 1994, confirming that the employment of the applicant, an official employed in the Katowice Regional Court as a bailiff, had terminated under the rules of Polish law applying to civil servants and, more particularly, to the termination of their service. The Court further observes that in these proceedings the applicant did not seek the determination of any economic right arising in law after the termination of his employment; on the contrary, the only issue to be determined in these proceedings was whether or not the applicant's dismissal was lawful.

Consequently, Article 6 § 1 of the Convention does not apply in respect of the proceedings complained of.

It follows that the remainder of the application is inadmissible as being incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and that it must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Matti Pellonpää
President