CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

Application no. 39350/98
by Zbignevas Romualdas JODKO
against Lithuania

The European Court of Human Rights (Third Section) sitting on 7 September 1999 as a Chamber composed of

Sir Nicolas Bratza, *President*,
Mr J.-P. Costa,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mrs H.S. Greve, *Judges*,

with Mrs S. Dollé, *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 6 May 1997 by Zbignevas Romualdas Jodko against Lithuania and registered on 14 January 1998 under file no. 39350/98;

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

Having regard to the observations submitted by the respondent Government on 1 April 1999 and the observations in reply submitted by the applicant on 13 May 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Lithuanian national of Polish origin, born in 1961. At present he is detained in the Rasų prison in Vilnius.

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

A. Particular circumstances of the case

On 13 March 1996 the Vilnius Regional Court convicted the applicant of murder. He was sentenced to 11 years' imprisonment. On 27 March 1996 the applicant was served with a written copy of the first instance judgment. The applicant appealed.

On 15 May 1996 the Court of Appeal held a hearing at which the applicant's counsel was present. The court dismissed the appeal, finding that the first instance court had properly decided the case.

In early 1997, the applicant approached the prison administration, asking why he had received no written version of the appellate decision of 15 May 1996. The Ministry of Justice informed him that on 22 May 1996 the Court of Appeal had in fact sent a written version of the appellate decision to a special hospital of the Ministry of Interior where, at the time, the applicant had been detained. The applicant applied to the Ombudsman, who confirmed that the hospital had received the decision on 23 May 1996. The Ombudsman advised the applicant to ask the hospital management about the alleged disappearance of the written decision. The applicant appears not to have approached the hospital management subsequently.

Following the applicant's demand, on 13 March 1997 the Court of Appeal sent him a written version of the decision of 15 May 1996. On 11 April 1997 he was furnished with another copy of the decision. The applicant expressed his intention to file a cassation appeal in the case but was informed by the Supreme Court that he had not complied with the three months' time-limit to file a cassation appeal under Article 419 of the Code of Criminal Procedure.

On 17 February 1999 the applicant applied to the Ministry of Justice, complaining that he had been denied access to the Supreme Court. The Ministry of Justice advised the applicant to apply to the Supreme Court for leave to file a cassation appeal out of time pursuant to Article 120 of the Code of Criminal Procedure. There is no indication that the applicant subsequently requested that leave.

B. Relevant domestic law

Pursuant to Article 379 § 4 of the Code of Criminal Procedure, a decision of the appellate court dismissing an appeal is pronounced in open court. Reasons must be given. In its final form a written version of the decision must be prepared within 3 days after its pronouncement. Pursuant to Article 386 § 1 of the Code, within 7 days following its adoption the appellate decision must be transmitted, for execution, to the court which gave the first instance judgment. Under Article 401 § 1 of the Code the first instance court is then required to furnish a copy of the first instance judgment to the prison administration (no time-limits are set by domestic criminal procedure in this respect). Article 401 § 1 also provides that,

where the first instance judgment is amended or quashed, a written version of the appellate decision must also be sent to the prison for the defendant's information.

Under Article 419 of the Code of Criminal Procedure, a cassation appeal can be filed within three months after the first instance judgment becomes effective. Pursuant to Article 398 § 2 of the Code, if the appeal against the first instance judgment is dismissed at appellate instance, the first instance judgment becomes effective on the date when the appellate decision was taken.

Article 418 § 2 of the Code lays down the requirements for a cassation appeal. Pursuant to the above provision, a cassation appeal should include references to the name of a cassation court, the case and decision at issue, the substance of the decision and the reasons for appealing against it, and the appeal claims.

Article 421 § 2 of the Code of Criminal Procedure stipulates that, provided that a cassation appeal complies with the above requirements, a senior judge of an appellate court or cassation court should order the transmission of the case-file from the lower court. Within seven days following receipt of the case-file, a senior cassation court judge must issue an order accepting the appeal for consideration.

Pursuant to Article 120 § 1 of the Code of Criminal Procedure, a time-limit that was missed for an important reason can be reinstated by a court upon the request of the person concerned.

COMPLAINTS

1. Under Articles 6 and 13 of the Convention and Article 2 of Protocol No. 7 to the Convention the applicant complains that he was deprived of effective access to the Supreme Court. He states that, due to the mistake of the officials at the Court of Appeal, the copy of its judgment of 15 May 1996 was sent to him only on 13 March 1997. Thus he missed the time-limit to submit a cassation appeal in his case.

2. Under Article 6 of the Convention the applicant further complains that he was deprived of the right to a fair trial. He alleges various material and procedural irregularities throughout the proceedings. The applicant submits that he is innocent and that the courts reached wrong decisions.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 6 May 1997 and registered on 14 January 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

On 13 January 1999 the Court decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 1 April 1999. The applicant replied on 13 May 1999.

THE LAW

1. The applicant states that he was deprived of effective access to the Supreme Court, and that thus Articles 6 and 13 of the Convention and Article 2 of Protocol No. 7 to the Convention were violated.

Article 6 of the Convention provides, insofar as relevant, as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... ."

Article 13 states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 2 § 1 of Protocol No. 7 to the Convention reads:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

In their observations the Government assert that Article 6 guarantees no right to a cassation appeal, and that it is not applicable in connection with this part of the application. They submit that in any event the applicant's complaint of a denial of access to the Supreme Court is unsubstantiated. According to the Government, the right to submit a cassation appeal is an accessible and enforceable right of the defendant or his counsel. No leave to file a cassation appeal is required. The cassation court is under the obligation to consider an appeal provided that it has been correctly filed. The Code of Criminal Procedure imposes no restrictions on the right to lodge a cassation appeal, save the three months' time-limit under Article 419 and the basic requirements for the contents of a cassation appeal under Article 418 § 2. Moreover, it is the duty of the cassation court to collect the material for the examination of the case; domestic law does not require that a copy of the contested decision be annexed to a cassation appeal. On the facts of the case, the Government submit that the applicant missed the three months' time-limit to file a cassation appeal because of his negligence. His careless attitude is confirmed by the fact that he did not make complaints about the decision of 15 May 1996 until early 1997. Furthermore, he did not complain in this respect to the hospital management after the Ombudsman advised him to do so. Nor did he apply for leave to file a cassation appeal out of time. The Government also stress that the applicant's official defence counsel could have lodged a cassation appeal himself. However, the lawyer did not avail himself of this opportunity.

The applicant argues that no effective measures were taken to ensure that he received a written version of the appellate decision. He asserts that he was therefore deprived of access to the Supreme Court.

The Court notes the Government's argument that Article 6 of the Convention is not applicable to cassation proceedings and that, in any event, they are accessible and effective. Whilst Article 6 does not compel Contracting States to set up courts of appeal or cassation, once they do exist the guarantees of Article 6 apply to the ensuing proceedings, being an integral part of the whole procedure which determines the criminal charge at issue (see, among many other authorities, the Delcourt v. Belgium judgment of 17 January 1970, Series A. no. 11, pp. 12-15, §§ 22-26). Therefore, Article 6 is indeed applicable to the cassation proceedings in the present case. The way in which Article 6 applies to proceedings before courts of appeal depends on the special features of the proceedings involved. Account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appellate court (see, *inter alia*, the Fejde v. Sweden judgment of 29 October 1991, Series A no. 212-C, p. 67, § 26).

The Court would further recall that Contracting States enjoy considerable freedom of the choice in the appropriate means to be used to ensure that their judicial systems comply with the requirements of Article 6 (see the Hadjianastassiou v. Greece judgment of 16 December 1992, Series A no. 252, p. 16, § 33). Thus the Court is not required to determine whether Article 6 requires a defendant, or his lawyer, to be furnished with a written version of a specific decision. The question in each case is whether the requirements of Article 6 have been met overall.

Article 6 of the Convention does not prevent the Contracting States from setting time-limits in order to regulate the administration of justice (see, in the context of limitation periods in a civil case, the Stubbings and others judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1502, § 50). In the present case, the three months' period for filing a cassation appeal cannot, of itself, be found to be incompatible with Article 6 of the Convention.

The applicant claims, however, that he was not able to comply with that term because he was not served with a written version of the appellate decision until long after the three months' time-limit had expired.

The Court notes that it is not necessary, in Lithuanian law, for a defendant to submit a copy of the appellate decision when lodging a cassation appeal. As the reasons for the second instance judgment were given in open court, in the presence of the applicant's lawyer, the absence of immediate access to a written version of the judgment would not have hindered the formulation of a cassation appeal. The present case is thus different from that of Hadjianastassiou v. Greece referred to above, where it was in substance impossible for the applicant to pursue his appeal without the written decision of the President of the Courts-Martial Appeal Court, the reasons of which had not been given at the appeal hearing.

Further, the Court recalls that in the case of Hadjianastassiou the applicant showed considerable diligence in his efforts to discover the reasons for the contested decision, and indeed made an appeal within the five day time-limit at his disposal (*loc. cit.*, p. 16, § 34). The present applicant, by contrast, appears to have made no effort whatever to contact either his lawyer or the courts for at least six months after the appeal hearing.

Finally, the Court notes that in April 1997 the applicant informed the Supreme Court that he wished to lodge a cassation appeal, but received the reply that he had not complied with the time-limit. He did not, either on that occasion or subsequently, after being so advised by the Ministry of Justice, apply for leave to make a cassation appeal out of time in accordance with Article 102 of the Code of Criminal Procedure. He has, therefore, at no point put the reasons for his failure to appeal in time to the Supreme Court.

In these circumstances, the Court considers that the failure of the Lithuanian authorities to deliver a copy of the written reasons for the decision of 15 May 1996 does not of itself disclose any appearance of a violation of Article 6 § 1 of the Convention.

The Court does not deem it necessary to examine the above complaint under Article 13 of the Convention as the latter is a *lex generalis* with respect to Article 6.

As regards the applicant's complaint under Article 2 of Protocol No. 7 to the Convention, the Court notes that his case was in fact reviewed at appellate instance. There was thus compliance with the guarantee of the above provision in the present case.

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

2. The applicant further complains under Article 6 of the Convention of unfairness in the criminal proceedings against him and of their outcome.

However, the Court is not required to decide whether or not this part of the application discloses any appearance of a violation of Article 6 as the applicant has failed to submit to the Supreme Court a cassation appeal in his case and has not, therefore, in accordance with Article 35 § 1 of the Convention, exhausted the remedies available under Lithuanian law.

The Court notes that the applicant was in hospital for a certain time, during the period when he could have submitted a cassation appeal in accordance with the relevant time-limit laid down in domestic law. However, the applicant has not relied on this fact or elaborated how his state of health could have prevented him from pursuing his cassation appeal. Therefore, the Court can find no reasons to absolve the applicant from the obligation to exhaust domestic remedies for the purpose of Article 35 § 1 of the Convention.

It follows that this part of the application must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

S Dollé
Registrar

N. Bratza
President