

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos. 15120/10, 17883/10 and 13626/11
by Danuta KRACZKIEWICZ and Others
against Russia

The European Court of Human Rights (Fifth Section), sitting on 5 July 2011 as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Anatoly Kovler,
Mark Villiger,
Isabelle Berro-Lefèvre,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above applications lodged on 8 and 21 March 2010 and 26 February 2011,

Having deliberated, decides as follows:

THE FACTS

The applicants, Ms Danuta Kraczkiewicz and eighteen others listed in the annex (application no. 15120/10), Ms Teresa Wojciechowska and Ms Janina Mazur (application no. 17883/10) and Mr Darek Konrad Dawda and Mr Jacek Dawda (application no. 13626/11), are Polish nationals who live in Poland, Belgium and Canada. They are represented before the Court by

Mr I. Kamiński, Mr R. Nowosielski and Mr B. Sochański, Polish lawyers practising respectively in Cracow, Gdańsk and Szczecin.

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

All the applicants are relatives of servicemen in the Polish Army who were taken prisoner by the Soviet Red Army in late 1939 following the occupation of the eastern part of Poland by the USSR. On 5 March 1940 Mr Beria, head of the USSR's NKVD, wrote to Joseph Stalin, Secretary General of the USSR Communist Party, proposing to approve the shooting of Polish prisoners of war on the grounds that they were all "enemies of the Soviet authorities and full of hatred towards the Soviet system". On the same day the Politburo of the Central Committee of the USSR Communist Party took the decision to consider, "using a special procedure" and employing "capital punishment – shooting" in the case of Polish officers held in the prisoner-of-war camps. Examination of the cases was delegated to a three-person panel ("*troika*") composed of NKVD officials, which operated on the basis of lists of detainees compiled by the regional branches of the NKVD. The executions took place in April and May 1940.

After the burial pits were discovered, the Soviet authorities responded by putting the blame on the Germans who – according to Moscow – had in the summer of 1941 allegedly taken control of the Polish prisoners and had therefore murdered them. On 3 March 1959 Mr Shepelin, Chairman of the State Security Committee (KGB), prepared a note recommending "the destruction of all the [21,857] records on the persons shot in 1940 in the ... operation..." The remaining documents were put in a special file, known as "package no. 1", and sealed. In Soviet times, only the Secretary General of the USSR Communist Party had the right of access to the file. On 28 April 2010 its contents were officially made public on the website of the Russian State Archives Service.

On 13 April 1990 the official news agency of the USSR acknowledged the responsibility of NKVD officials for "the crime committed in Katyń Forest". In the same year, prosecutors in Kharkov and Kalinin (Tver) instituted criminal investigations in connection with the discovery of mass burials. The investigations were later joined and taken over by the Russian Chief Military Prosecutor's Office ("case no. 159").

On 21 September 2004 the Chief Military Prosecutor's Office decided to discontinue criminal case no. 159 on the ground that the persons allegedly responsible for the crime had already died. In the meantime, on 22 December 2004, the Interagency Commission for the Protection of State Secrets classified thirty-six volumes of the case file – out of a total of 183 volumes – as "top secret" and a further eight volumes as "for internal use only". The decision to discontinue the investigation was given top-secret classification and its existence was only revealed on 11 March 2005 at a press conference given by the Chief Military Prosecutor.

On 13 March 2008 the Chief Military Prosecutor's Office rejected a request for rehabilitation submitted by counsel on behalf of Ms Wołk-Jezierska and other applicants in case no. 29520/09 ("the Wołk-Jezierska group"). The prosecutor's office stated that it was not able to determine the legal basis for the repression against Polish citizens in 1940. Following a judicial appeal against the prosecutor's refusal, on 25 November 2008 the Moscow City Court upheld it at final instance as lawful and justified.

On 14 October 2008 the Military Court of the Moscow Command rejected a further complaint against the prosecutor's decision on the discontinuation of case no. 159. It found that the complainants' relatives had not been among those identified and that "the 'Katyń' investigation ... [had] not establish[ed] the fate of the said individuals." On 29 January 2009 the Military Panel of the Supreme Court of the Russian Federation upheld the judgment of 14 October 2008, repeating verbatim extensive passages of the findings of the Moscow Military Court. It added that the decision of 21 September 2004 could not be quashed because the prescription period had expired.

The applicants in the instant case awaited the outcome of the legal proceedings instituted by the Wołk-Jezierska group.

On various dates in late 2009 the applicants submitted requests to the Chief Military Prosecutor's Office concerning the rehabilitation of their relatives and the discontinuation of case no. 159.

The Chief Military Prosecutor's Office rejected their requests and justified its decisions in a manner identical to that of the decisions concerning the Wołk-Jezierska group. All the decisions were sent to the applicants via the Consular Division of the Polish Embassy in Moscow and reached them on various dates in October and November 2009 (applications nos. 15120/10 and 17883/10) or December 2010 (application no. 13626/11).

COMPLAINTS

The applicants complained under Article 2 of the Convention that the Russian authorities had not carried out an adequate and effective investigation into the death of their relatives and that the authorities' reaction to their requests and applications amounted to a breach of Article 3 of the Convention. Relying on Article 8 of the Convention, they claimed that the names of their relatives had not been cleared of criminal stigma and that the information on their relatives' burial places had been withheld from them. They also submitted this last grievance under Article 9, alleging that they had been unable to pay their respects to their relatives in accordance with their religion.

THE LAW

The Court considers it appropriate to join the applications and to determine at the outset whether the applicants complied with the admissibility requirements defined in Article 35 § 1 of the Convention, which stipulates:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

The requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated. The rule of exhaustion of domestic remedies obliges those seeking to bring their case against the State before an international judicial organ to use first the remedies provided by the national legal system. The six-month period would normally run from the final decision in the process of exhaustion of domestic remedies. However, where it is clear that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009-..., and *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004).

Turning to the facts of the instant case, the Court notes that the applicants' complaints related to the investigation into the Katyń massacre, which was discontinued by the prosecutor's decision of 21 September 2004. A group of individuals, collectively known as the Wołk-Jezierska group, lodged a judicial appeal against that decision, which was rejected at final instance by the Supreme Court of the Russian Federation on 29 January 2009. The proceedings for the rehabilitation of the Polish prisoners, which the same group had instituted in 2008, ended with the final decision of the Moscow City Court of 25 November 2008. In both cases, the Russian courts upheld the prosecutor's decisions as having been lawful and justified.

The applicants in the present cases were not parties to any judicial proceedings in Russia. Rather, they awaited the outcome of the proceedings instituted by the Wołk-Jezierska group and subsequently, more than six months after completion of the proceedings, made applications to the prosecutor challenging the refusal to rehabilitate their relatives and the decision to discontinue the criminal investigation. It appears that their applications were substantially similar in content to those previously submitted by the individuals belonging to the Wołk-Jezierska group and relied on the same arguments.

The Court does not need to decide *in abstracto* whether or not an application to a prosecutor could have constituted an effective domestic remedy in the context of the present cases, although it has already found on

many occasions that in the Russian legal system, the power of a court to reverse a decision to discontinue criminal proceedings is a substantial safeguard against the arbitrary exercise of powers by the investigating authorities (see, as a classic authority, *Belevitskiy v. Russia*, no. 72967/01, § 61, 1 March 2007). What is important in the present case is that the individuals in the Wołk-Jezierska group had already challenged the prosecutor's refusals before the Russian courts and had failed. Taking into account the fact that the applicants in the present cases were represented by the same counsel as the Wołk-Jezierska group, they should have been aware of the unsuccessful outcome of the previous proceedings.

Following the rejection of the Wołk-Jezierska group's claim by the Russian courts at final instance, subsequent applications to the prosecutors could not reasonably be considered to have been an effective domestic remedy to be exhausted. As it was clear that no other effective remedy was available to the applicants, the Court considers that the six-month period started running from the date on which the domestic proceedings were concluded by a final decision. It reiterates that the six-month rule enshrines the basic principle that complaints of breaches of Convention rights be brought with the expedition necessary to ensure effective and fair examination of the case and that there are no exceptions and no possibility of waiver. The Court has held on a number of occasions that applicants must act with reasonable expedition in bringing their cases before it for examination and have sufficient explanation, consonant with the purpose of Article 35 § 1 of the Convention and the effective implementation of the Convention guarantees, for long periods of delay (see, most recently, *Artyomov v. Russia*, no. 14146/02, § 115, 27 May 2010). The applicants did not give any explanation as to why they did not lodge their applications within six months of the final decisions rejecting the claims of the Wołk-Jezierska group but rather chose to wait for at least another seven months before making their applications to the prosecutor, which they already knew would be futile, and then lodging their applications with the Court.

It follows that these applications are inadmissible for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court, by a majority,

Declares the applications inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President

Annex. List of applicants in application no. 15120/10

1. KRACZKIEWICZ Danuta, date of birth 15 January 1918
2. DRABCZYŃSKI Stanisław, date of birth 28 September 1942
3. GRZYMAŁA Iwona, date of birth 22 September 1938
4. HOROSIEWICZ Iwona, date of birth 1 May 1939
5. JURALEWICZ Piotr, date of birth 28 May 1920
6. KWIATKOWSKA Zofia, date of birth 26 November 1937
7. LIPKA Andrzej, date of birth 30 November 1936
8. MARKIEWICZ Andrzej, date of birth 3 March 1938
9. OSIECKA Ewa, date of birth 11 July 1938
10. PĘKALSKA-OŚWIĘCIMSKA Anna, d.o.b. 26 November 1938
11. PLEWAKO Stanisław, date of birth 1 May 1956
12. PLEWAKO Włodzimierz, date of birth 15 January 1935
13. RIEDL Cecylia, date of birth 3 February 1932
14. SKRZYPCZAK Krzysztof, date of birth 20 December 1956
15. SKRZYPCZAK Stefan, date of birth 17 July 1954
16. SZKLARZEWSKA Maria, date of birth 14 January 1929
17. SWIĘCIŃSKI Andrzej Bernard, date of birth 3 July 1934
18. WARDYN Łukasz, date of birth 3 June 1978
19. CHOJECKA Grażyna Małgorzata, date of birth 10 January 1956