

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 22410/05
by Jan NOWEL and Others
against Poland

The European Court of Human Rights (Fourth Section), sitting on 31 May 2011 as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 9 June 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Jan Nowel, Krzysztof Masalski and Wacław Janas, are Polish nationals who live in Maćkowa Ruda. They were represented before the Court by Mr J. Janas, 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 facts of the case, as submitted by the parties, may be summarised as follows.

1. Historical background

2. On 2 March 1864 Tsar Alexander II, then King of Poland, had issued a decree (*ukaz*) granting the inhabitants of the Rosochaty Róg village a profit à prendre which amounted to a right to fish from shore in the Wigry and Uszknikajcie Lakes. The right was approved on 6 March 1869 by the Central Commission for Peasant Affairs and entered in the Suwałki land register in 1875. The right to fish was enjoyed only by those peasants who had the right entered in their so-called "liquidation tables", and after their death by their legal heirs.

3. In 1918 Poland regained independence.

4. On 19 September 1922 the Waters Act was adopted (*ustawa wodna*) which introduced a general rule that all waters were public unless they constituted private property pursuant to the Act or pursuant to special legal titles. Subsequently, further numerous legal acts were adopted aimed at nationalisation of waters.

2. Circumstances of the case

5. The applicants are owners of land adjacent to Wigry Lake.

6. In 1999 they filed a statement of claim with the Suwałki Regional Court (S*ąd Okręgowy*) against the Wigry National Park in which they referred to the Tsar's decree of 1869, granting the inhabitants of the Rosochaty Róg village a profit à prendre which amounted to a right to fish in Wigry Lake. They stressed that the owners of the land adjacent to the lake had benefited from the right to fish in the lake until 1996, when the director of the Wigry National Park had prohibited the applicants from fishing there.

7. On 18 October 2000 the Suwałki Regional Court delivered a judgment in which it found that since 1869 the applicants had had a right to fish in the lake, which had not been revoked by any of the subsequent legal regulations. The court specified that the right was limited to the right to fish from the shore, without using boats or platforms. In addition, the fishermen had to respect the fish-protection periods.

8. On 15 February 2001 the Białystok Court of Appeal (S*ąd Apelacyjny*) upheld the first-instance judgment. The judgment is final.

9. In 2002 the applicants filed another statement of claim against the Wigry National Park in which they asked the court to declare that their fishing rights comprised also the right to fish from a platform and while standing in the water.

10. On 15 April 2003 the Suwałki Regional Court gave judgment. It confirmed that the applicants had a right to fish for their own needs in Wigry Lake and that they could exercise that right from their land, from a platform or while standing in the water.

11. On 24 July 2003 the Bialystok Court of Appeal upheld that decision.

12. On the defendant's appeal, on 22 December 2004 the Supreme Court (*Sąd Najwyższy)* quashed both judgments and dismissed the claim. It held that since 1962 at the latest – when the new Waters Act had come into force - the applicants' right to fish in Wigry Lake had expired. The court stressed that by virtue of sections 1 and 2 of that Act all waters in Poland had been nationalised. It further considered that nationalisation constituted a primary method of acquiring property so that ownership of the waters had been transferred to the State without any servitudes.

13. The Supreme Court, *inter alia*, found:

> "The lower courts omitted the consequences for the existence of the claimants' fishing rights which follow from sections 1 and 2 of the Waters Act 1962.
>
> In accordance with the unanimous opinion of the legal doctrine and of the jurisprudence this Act led to nationalisation of waters. (...) In line with the generally accepted approach the nationalisation constitutes a primary method of acquiring property which signifies that the title to property is transferred to the State free from any servitudes, unless the nationalisation act provides for an exception in this respect. (...)
>
> Thus, it can be reasonably argued that private waters were nationalised free from any servitudes. Although, generally speaking, in the present case the right to fish encumbered the State object from the outset, nevertheless the primary goal of the nationalisation of waters (rationalisation of their use) argues in favour of the view that this nationalisation, *a fortiori*, led to the expiry of the property rights (*prawa rzeczowe*) encumbering State waters. Thus, even if the fishing rights had not expired earlier, they did so on the date of the entry into force of the Waters Act 1962."

14. The applicants subsequently filed a constitutional complaint. On 19 October 2005 the Constitutional Court refused to examine it. The applicants appealed. On 14 February 2006 the Constitutional Court allowed their appeal and decided to consider their case.

15. The applicants subsequently filed a request with the Supreme Court, for the reopening of the proceedings that had been terminated on 22 December 2004.

16. On 18 April 2007, upon a question of law referred by the Ombudsman relating to fishing rights in other lakes, the Supreme Court adopted a resolution (III CZP 139/06) and stressed that the fishing rights had been unenforceable since 1932 (see paragraph 23 above).

17. On 18 April 2008 the Supreme Court rejected the applicants' request for reopening.

18. On 7 May 2008 the Constitutional Court issued a decision in which it discontinued the proceedings in the applicants' case on formal grounds. It held that the constitutional complaint had not concerned an alleged

unconstitutionality of a legal provision but rather a flawed application by the Supreme Court of the Waters Act to the facts of the case. One of the judges in his dissenting opinion considered that even assuming that the applicants' right to fish in Wigry Lake was a property right, it had been limited by the Nature Conservation Act of 16 April 2004.

B. Relevant domestic law and practice

1. Fisheries Act

19. On 7 March 1932 the Fisheries Act was adopted (*ustawa o rybołóstwie*). The Act stipulated that the right to fish was linked to the ownership of the waters in question. In public waters the right belonged to the State.

2. Waters Act

20. By sections 1 and 2 of the Waters Act 1962 (*prawo wodne*) all waters in Poland were nationalised. The Act is no longer in force. Currently, the legal status of inland waters is regulated by the Waters Act of 18 July 2001 which entered into force on 1 January 2002.

3. Nature Conservation Act

21. Section 15 (1) paragraph 2 of the Nature Conservation Act (*ustawa o ochronie przyrody*) of 16 April 2004, as worded at the material time, provided that fishing was prohibited in natural parks, with the exception of areas specifically designated in the conservation plans. The Act was amended and this provision repealed on 15 November 2008. Section 15 (1) paragraph14 now provides:

> "Catching fish and other water-borne living organisms with the exception of areas specifically designated in the conservation plans [is prohibited]".

4. Resolution of the Supreme Court of 18 April 2007

22. On 9 November 2006 the Ombudsman referred to the Supreme Court a question of law (*pytanie prawne*) as to whether the fishing rights granted in 1864 (to fish in certain Mazury lakes) had expired in 1962 with the adoption of the new Waters Act. The Ombudsman referred to the divergent practice of the domestic courts and the Supreme Court in examining such claims.

23. In its resolution of 18 April 2007 (III CZP 139/06), adopted by a bench of seven judges, the Supreme Court dealt with this question. The court referred to the Fisheries Act 1932 and concluded that the fishing rights granted in 1864 had not expired in 1962. However, they had been unenforceable since the entry into force of the Fisheries Act 1932.

COMPLAINTS

1. The applicants complained under Article 1 of Protocol No. 1 to the Convention that the Supreme Court's judgment of 2004 constituted a *de facto* expropriation of their property without proper compensation.

2. They further alleged under Article 6 § 1 of the Convention that the proceedings before the Supreme Court had been unfair.

THE LAW

24. Relying on Article 1 of Protocol No. 1 to the Convention, the applicants complained that the Supreme Court's judgment of 2004 constituted a *de facto* expropriation of their property without proper compensation. Article 1 of Protocol No. 1 reads:

> "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."

A. The Government's submissions

25. The Government pleaded that at the time of lodging their application with the Court the applicants had not had any rights which could have been described as "possessions". They referred to the historical and legal context of the present case. In their opinion, the rights established in 1864 had not expired, since there was no proof that any measures had been taken specifically in respect of the peasants of the Rosochaty Róg village. However, at present these rights could not be executed because of the entry into force of the Fisheries Act 1932.

26. The Government stressed that in challenging the Supreme Court's judgment of 2004, the applicants in effect were seeking to replace national case-law for that of the Court, which they considered more favourable to their case.

27. They concluded that the interference with the rights of the applicants' predecessors had occurred in 1932 by virtue of the entry into force of the Fisheries Act. The judicial decisions given between 2000 and 2004 had not constituted an interference with their rights.

28. Consequently, in the Government's opinion the application was incompatible *ratione temporis*, *ratione personae* and *ratione materiae* with the provisions of the Convention and its Protocols.

B. The applicants' submissions

29. The applicants emphasised that the judgment of 22 December 2004 of the Supreme Court had ultimately deprived them of their ownership. Until that date they had been exercising the right to fish in Wigry Lake. In addition, this right had been confirmed by the final judgment of the Bialystok Court of Appeal of 15 February 2001 and also by the judgments of 15 April 2003 and 24 July 2003 which were subsequently overruled by the Supreme Court.

30. They stressed that the fishing rights attached to the ownership title of property adjacent to Wigry Lake should have been considered "possessions" within the meaning of Article 1 of Protocol No. 1.

C. The Court's assessment

31. The Court notes that the thrust of the Government's submissions focuses on the incompatibility of the application *ratione temporis* and *ratione materiae* with the provisions of the Convention and its Protocols. Even assuming that the facts of the case are within its jurisdiction *ratione temporis*, the Court finds that the application is in any event inadmissible for the reasons set out below.

32. The Court notes at the outset that the applicants in particular object to the Supreme Court's judgment of 22 December 2004. In this respect it observes that in its 2004 judgment the Supreme Court held that since 1962 at the latest the applicants' right to fish in Wigry Lake had expired.

33. The applicants dispute this finding. In their view, it was flawed since previously the Suwałki Regional Court and the Białystok Court of Appeal had confirmed that the right to fish, established in 1869, had not been revoked.

34. The Government referred to the Supreme Court's resolution of 2007 and were of the opinion that the fishing rights established in 1864 had not expired. However, they could not be enforced because of the entry into force of the Fisheries Act of 1932.

35. The Court must first determine whether Article 1 of Protocol No. 1 is applicable in the instant case. It reiterates that this provision protects "possessions", which can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. It does not, however, guarantee the right to acquire property (see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United*

Kingdom [GC], no. 44302/02, § 61, ECHR 2007-... *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). Where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-...; and *Kopecký*, cited above, § 52). No legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (*Anheuser-Busch Inc*., cited above, ibidem; *Kopecký*, cited above, § 50).

36. The Court observes that the applicants' complaint related to the interpretation by the Supreme Court of their right to fish in Wigry Lake. It notes that the factual and legal reasons for the Supreme Court's judgment and resolution were set out at length and the court carried out a detailed and reasoned review of existing law. As regards the character of the right in question the Supreme Court in its judgment of 2004 was of the opinion that the applicants' fishing rights had expired in 1962 at the latest. In its subsequent resolution of 2007 the Supreme Court concluded that even if the fishing rights had not expired in 1962 they were unenforceable since 1932, which marked the entry into force of the Fisheries Act, which provided in practice for nationalisation of fishing rights in public waters.

37. The Court accepts the position adopted by the Supreme Court that even in the absence of a formal repeal of the legal act, which constituted the basis for a particular right, it is possible that such right could expire (or become unenforceable) due to the passage of time and a change in the relevant circumstances.

38. The Court considers that there is no indication that the findings of the Supreme Court in the applicants' case – albeit different from those reached by the Suwałki Regional Court and the Bialystok Court of Appeal - were arbitrary or manifestly unreasonable (see *Bergsson and Others v. Iceland* (dec.), no. 46461/06, 23 September 2008 and, *mutatis mutandis*, *Borenstein and Others v. Poland* (dec.), no. 6303/04, 24 June 2008).

39. Against this background, the Court is unable to accept that the applicants had a sufficiently established proprietary interest to which a "legitimate expectation" could be attached. It finds that, in relation to their claim of a property right to fish in Wigry Lake, they did not have a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. Therefore the guarantees of that provision do not apply to the present case (see *Bergsson*, cited above).

40. It follows that the applicants' complaint under Article 1 of Protocol No. 1 must be rejected in accordance with Article 35 § 3 of the Convention as being incompatible *ratione materiae* with the provisions of the Convention and its Protocols.

41. In so far as the applicants complain under Article 6 § 1 of the Convention about the unfairness of the proceedings, the Court notes that the applicants' complaint essentially concerns the outcome of the proceedings and, as such, is clearly of a fourth-instance nature.

It follows that the complaint must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention as manifestly ill-founded.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Nicolas Bratza
President