

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

FOURTH SECTION

DECISION

Application no. 7481/05
Henryka OSTROWSKA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 13 November 2012 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 2 February 2005,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Henryka Ostrowska, is a Polish national, who was born in 1956 and lives in Mielec.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

4. On 11 July 2001 the applicant filed an application with the Rzeszów Social Security Board *(Zakład Ubezpieczeń Społecznych)* ("SSB") to be granted the right to an early-retirement pension for persons raising children who, due to the seriousness of their health condition, required constant care, the so-called "EWK" pension.

5. On 1 August 2001 the Rzeszów Social Security Board issued a decision granting the applicant the right to an early-retirement pension in the net amount of 521 Polish zlotys (PLN).

6. On 30 September 2002 the Rzeszów Social Security Board issued simultaneously two decisions in respect of the applicant. By virtue of one decision, the payment of the applicant's pension was discontinued with immediate effect. By virtue of the other decision, the Board reopened the proceedings, revoked the initial decision granting a pension and eventually refused to grant the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance.

7. The applicant appealed against the respective decisions divesting her of the right to an early-retirement pension.

8. On 3 December 2003 the Tarnobrzeg Regional Court (*Sąd Okręgowy*) dismissed the appeal.

9. The applicant further appealed against the first-instance judgment.

10. On 19 May 2004 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) dismissed the appeal. This decision was served on the applicant on 22 June 2004.

B. Other EWK cases pending before the Court

11. Some 130 applications arising from a similar fact pattern have been brought to the Court. The majority of the applicants form the Association of Victims of the SSB (*Stowarzyszenie Osób Poszkodowanych przez ZUS*) ("the Association"), an organisation monitoring the practices of the Social Security Board in Poland, in particular in the Podkarpacki region.

12. Out of all applications lodged with the Court, about twenty-four applicants decided not to lodge a cassation appeal against the judgment of the Court of Appeal given in their case.

13. One hundred-and-four applicants lodged cassation appeals against the final judgments given in their cases. The Supreme Court entertained and dismissed on the merits fifteen appeals. In eighty-one applications the Supreme Court refused to entertain cassation appeals on the ground that they did not raise any important legal issues or require the Supreme Court to give a new interpretation to legal provisions which raised serious doubts or

gave rise to ambiguity in the jurisprudence of the domestic courts. In the remaining eight cases cassation appeals were rejected for failure to comply with various procedural requirements.

C. Relevant domestic law and practice

14. The legal provisions applicable at the material time and questions of practice are set out in the judgment in the case of *Moskal v. Poland*, no. 10373/05, § 31-34, 15 September 2009.

COMPLAINTS

15. The applicant alleged under Article 6 of the Convention that the *ex-officio* reopening of the social security proceedings, which had resulted in the quashing of the final decision granting her a right to a pension, was in breach of the principle of legal certainty.

16. She further complained without invoking any provisions of the Convention that divesting her, in the circumstances of the case, of her acquired right to an early-retirement pension amounted to an unjustified deprivation of property.

THE LAW

17. The Government firstly submitted that the applicant had not exhausted the remedies available under Polish law in that she had not lodged a cassation appeal with the Supreme Court. They argued that the cassation appeal should be considered an effective and available remedy for the EWK cases. The Government referred to some examples of domestic case-law.

18. They further maintained that the applicant's complaints were incompatible with the 6 months' time-limit. They stressed that the proceedings in the case came to an end on 19 May 2004 and while the Court of Appeal's judgment was served on the applicant on 22 June 2004 she lodged her application with the Court only on 13 June 2005.

19. The applicant contested the objection and considered that she had exhausted all available remedies.

20. In so far as the Government alleged non-exhaustion of domestic remedies, the Court notes that there were essentially two types of decisions terminating the proceedings in the EWK cases. First, in all cases where the applicants lodged cassation appeals in accordance with the procedural requirements, the Supreme Court either examined them on the merits as in

Moskal (cited above, § 24) or decided not to entertain them. Second, in cases where the applicants, as in the present case, desisted from lodging cassation appeals the final decisions were those given by the courts of appeal.

21. Analysing the applications brought to the Court concerning the same subject-matter it is noticeable that only fifteen cassation appeals were examined on the merits by the Supreme Court. Moreover, they were all dismissed. The Supreme Court refused to entertain eighty-one correctly lodged cassation appeals seeing no ground justifying their examination on the merits (see paragraph 13 above). Twenty-four applicants did not attempt to lodge a cassation appeal claiming that the practice of the Supreme Court showed that this remedy had no prospects of success (see paragraph 12 above).

22. The Court considers that there was a consistent line of jurisprudence of the regional and appellate courts in cases where an EWK pension was revoked after the SSB's doctor had re-assessed the file and concluded that the child's illness had not been such as to require the parent's constant care within the meaning of the domestic law. The Supreme Court in principle endorsed this approach by refusing to examine on the merits cassation appeals in the great majority of cases. Moreover, the Government did not refer to any examples of cases in which the Supreme Court had allowed a cassation appeal and reversed the previous judgments by granting the EWK pension.

23. The applicant in the case under consideration appealed against the SSB's decision to the regional and later to the appellate court. The core of her appeals was the allegedly incorrect assessment by the SSB's doctor that the child had not required the applicant parent's constant care and the court's conclusion that the EWK pension had been correctly revoked. The Court therefore accepts that, in the particular circumstances of the present case, the applicant was not required to avail herself of that remedy (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI).

24. In the light of the above, the Court finds that in the particular circumstances of the case the applicant should be considered to have been dispensed from appealing to the Supreme Court in her case. The Court therefore concludes that the application cannot be rejected for failure to exhaust domestic remedies and the Government's objection must be dismissed.

25. In so far as the Government alleged that the applicant failed to comply with the six months time-limit, the Court observes that Article 35 § 1 of the Convention provides that the six-month period runs from the final decision in the process of exhaustion. In the present case the Rzeszów Court of Appeal dismissed the applicant's appeal against the first-instance judgment on 19 May 2004. This judgment was served on the applicant on 22 June 2004,

and therefore more than six months before the introduction of the case before the Court.

26. It follows that the application is 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 unanimously

Declares the application inadmissible.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President