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

FOURTH SECTION

DECISION

Application no. 12509/05
Bożena SZAŁDA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 26 November 2013 as a Committee composed of:

Ledi Bianku, *President,*
Paul Mahoney,
Krzysztof Wojtyczek, *judges*,

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 29 March 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 Bożena Szałda, is a Polish national, who was born in 1961 and lives in Przecław.

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. The applicant is married and has children. Prior to her application for a pension she had been employed until 1999.

1. Proceedings concerning the grant and revocation of the EWK pension

5. On 3 October 2001 the applicant filed an application with the Rzeszów Social Security Board (*Zakład Ubezpieczeń Społecznych* –"the 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.

6. Along with her application for a pension, the applicant submitted, among other documents concerning her son's health, a medical certificate issued by Dr Z.L, urologist, which had been issued on 28 September 2001. The certificate also bore a stamp of the urology centre in Przemyśl (*Poradnia urologiczna Przychodni Specjalistycznej 114 Szpitala Wojskowego w Przemyślu* – "the Centre") and stated that the child (born in 1993) suffered from nocturnal enuresis and bronchial asthma and was in need of the parent's constant care.

7. On 8 October 2001 the SSB issued a decision granting the applicant the right to an early-retirement pension in the net amount of 613 Polish zlotys (PLN) per month.

8. The payment of the pension started on 1 October 2001.

9. On 22 August 2002 the SSB asked the Centre to provide medical documentation concerning the applicant's son. On 6 September 2002 the SSB requested the Main Social Security Board's doctor (*Główny Lekarz Orzecznik*) to inform it whether the applicant's son required the permanent care of a parent. On an unknown date the doctor stated, on the basis of the medical records provided to the SSB, that the child could not be considered as ever having required such care.

10. On 19 September 2002 the SSB simultaneously issued two decisions in respect of the applicant. By virtue of the first decision, the payment of the applicant's pension was discontinued with immediate effect. By virtue of the second decision, the SSB reopened the proceedings, revoked the initial decision granting a pension and eventually refused to award the applicant the right to an early-retirement pension under the scheme provided for by the Cabinet's Ordinance of 15 May 1989 on the right to early retirement of employees raising children who require permanent care (*Rozporządzenie Rady Ministrów z dn. 15 maja 1989 w sprawie uprawnień do wcześniejszej emerytury pracowników opiekujących się dziećmi wymagającymi stałej opieki* – "the 1989 Ordinance").

11. The applicant appealed against the respective decisions divesting her of the right to an early-retirement pension. She submitted that she should receive the benefit because her child required constant care, as confirmed by the medical certificate attached to her original application for a pension. Moreover, the applicant alleged that the revocation of her retirement pension was contrary to the principle of protection of vested rights.

12. On 10 October 2003 the Tarnobrzeg Regional Court (*Sąd Okręgowy*) altered the SSB's decisions and granted the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance. The court considered that the SSB should not have reopened the proceedings ex officio. The SSB appealed.

13. On 10 March 2004 the Rzeszów Court of Appeal (Sąd Apelacyjny) quashed the first-instance judgment and remitted the case.

14. On 29 July 2004 the Tarnobrzeg Regional Court dismissed the applicant's appeal. During the proceedings, the applicant's son was examined by an expert pediatrist. The expert found that he suffered from nocturnal enuresis and, sporadically, from diurnal enuresis. The child also suffered from astigmatism and flat feet. The expert stated that those conditions had never required hospital treatment, the child did not require any everyday help, he had been going to school by himself and had attended physical education lessons.

On the basis of the expert evidence the Regional Court held that the applicant's child did not require his mother's permanent care since his state of health did not significantly impair his body functions. The domestic court held that the applicant had been rightfully divested of her right to a pension under the scheme provided by the 1989 Ordinance as she did not satisfy the requirement of necessary permanent care.

15. The applicant appealed against the first-instance judgment.

16. On 24 November 2004 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) dismissed the appeal, fully upholding the first instance court's findings of facts and law. The Court of Appeal further noted that although the medical certificate had been issued by the specialist urology centre on 28 September 2001, according to the medical documentation the applicant's son had only been first registered as a patient of this centre as late as in September 2001.

17. On 24 February 2005 the Supreme Court (*Sąd Najwyższy*) refused to entertain the cassation appeal lodged by the applicant.

2. Criminal proceedings against Dr Z.L.

18. The Government submitted that in 2005 the Rzeszów District Prosecutor filed a bill of indictment against Z.L., a doctor from the specialist urology centre in Przemyśl (see also *Kusina v. Poland* (dec.), no. 28589/05, §§ 16-19, 9 April 2013). He was charged with having issued fourteen fraudulent certificates confirming that fourteen persons (including the applicant's son) had been treated in the Centre. They submitted that the applicant had testified as a witness in the proceedings.

19. On 8 February 2005 the Rzeszów District Court conditionally discontinued the proceedings against Z.L. on the ground that the act committed was of minor significance ("*wypadek mniejszej wagi*"). It further ordered him to pay a fine of PLN 1,000.

20. The applicant only generally submitted that the criminal proceedings against a third person should be considered immaterial in the present case.

3. The applicant's financial situation following the revocation of the EWK pension

21. Following the social security proceedings the applicant was not ordered to return the benefits paid by the Social Security Board, despite the revocation of her right to the early-retirement pension.

22. The applicant submitted, in general, that after the revocation of the EWK pension her financial situation had been difficult.

23. The Government submitted that before the granting of the EWK pension the applicant had been unemployed since February 1999. She was also unemployed after the revocation of her pension. The applicant owned a small farm (0.96 hectare) which was a source of income for her and her family.

B. Relevant domestic law and practice

24. The legal provisions applicable at the material time and questions of practice are set out in the judgments in the case of *Moskal v. Poland*, no. 10373/05, §§ 31-34, 15 September 2009 and *Antoni Lewandowski v. Poland*, no. 38459/03, §§ 36-43, 2 October 2012).

COMPLAINTS

25. The applicant complained under Article 6 of the Convention and, in substance, under Article 1 of Protocol No. 1 to the Convention about the reopening of the social security proceedings which had resulted in the revocation of her right to the EWK pension.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

A. Preliminary issues

1. Scope of the case before the Court

26. In the instant case the gist of the applicant's complaints is that the decision to divest her of her right to an early-retirement pension amounted to an unjustified deprivation of property. Consequently, the application falls to be examined under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "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."

2. The Government's objections

27. The Government raised several objections to the admissibility of the case. They submitted that the application constituted an abuse of the right of individual application. They argued that the applicant had failed to exhaust domestic remedies because she had failed to contest the final ruling by means of a constitutional complaint and that she had failed to comply with the six-month rule as the cassation appeal had not been an effective remedy in the instant case.

28. As regards non-compliance with the six-month rule, the Court has already considered in other EWK cases that the applicants should not be penalised for having tried to file a cassation appeal with the Supreme Court in order to avoid any risk of having their case rejected by the Court for non-exhaustion of domestic remedies (see, for example, *Lew v. Poland*, no. 39430/04, §§ 50-55, 4 December 2012). Accordingly, the final decision in the case under consideration was given by the Supreme Court on 24 February 2005 whereas the applicant lodged her application with the Court on 29 March 2005. That being so, the Court concludes that the applicant complied with the six-month term laid down in Article 35 § 1 and the Government's objection should therefore be dismissed.

29. The Court further notes that it has already examined identical objections regarding abuse of the right of individual application and

non-exhaustion as regards the applicant's failure to lodge a constitutional complaint, in the follow-up cases to *Moskal* (see, for instance, *Antoni Lewandowski*, cited above, §§ 45-72 and *Lew v. Poland*, cited above, §§ 35-49). It sees no reason to depart from its previous findings.

B. Article 1 of Protocol No. 1 to the Convention

1. The parties' submissions

30. The Government maintained that the application was manifestly ill-founded. They submitted that the interference with the applicant's property rights had been lawful and justified. In particular, divesting the applicant of her right to the early-retirement pension had been provided for by law and was in the public interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued. They further noted that even though the decision to revoke the EWK pension had had retroactive effect, the applicant had not been required to reimburse the sum of PLN 8,491 already paid to her.

31. The applicant submitted that divesting her of her right to an early-retirement pension had amounted to an unjustified deprivation of property. She claimed that she had borne an excessive burden in that the decision of 19 September 2002 had deprived her of her main source of income with immediate effect.

2. The Court's assessment

32. The relevant general principles are set out in paragraphs 49-50 of the *Moskal* judgment, cited above. The Court would nevertheless reiterate that any interference by a public authority with the peaceful enjoyment of possessions should be lawful, must be in the public interest and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Moskal*, cited above, §§ 49 and 50).

33. The Court finds, as it did in previous similar cases, that the decision of the SSB depriving the applicant of the right to receive the EWK pension amounted to an interference with her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention and that this interference was provided for by law and pursued a legitimate aim, as required by this Article (see *Moskal*, *Antoni Lewandowski* and *Lew*, cited above).

34. Accordingly, it remains for the Court to assess the proportionality of the impugned interference.

In the above cited cases the Court, examining whether the decision to rectify the mistake by revoking the EWK pension struck a fair balance between the public interest at stake and the property rights of an individual, considered that the circumstances of each applicant's case were decisive in this connection. In particular, it took into account the fact that the applicants

had applied in good faith for the EWK pension, the pension was their only income, and its sudden revocation placed an excessive burden on them as they were left without any resources or prospects of finding a new job quickly.

Furthermore, in those cases the Court observed that, as a general principle, public authorities should not be prevented from correcting their mistakes. To hold otherwise would be contrary to the doctrine of unjust enrichment. It would also be unfair to other individuals contributing to the social security fund, in particular those denied a benefit because they failed to meet the statutory requirements. Lastly, it would amount to sanctioning an inappropriate allocation of scarce public resources, which in itself would be contrary to the public interest (ibid.).

35. However, the present case differs from the cases cited above. The applicant, when applying for an EWK pension submitted a medical certificate signed by Dr Z.L, an urologist, which also bore a stamp of a specialist urology centre in Przemyśl (see paragraph 6 above). It was subsequently established that the certificate was fraudulent and that the applicant's son had not been treated in that centre (see paragraphs 16 and 19 above). Although the domestic courts later confirmed that the child suffered from the urological problem indicated in the certificate, they also found that the problem had only been of a minor character and that the child's state of health had at no stage significantly impaired his body functions (see paragraph 14 above).

In the circumstances of the present case the Court cannot assume, as it did in the previously examined *Kusina* case (see *Kusina v. Poland*, § 35, cited above), that the applicant did not act in good faith when lodging the application for an EWK pension. However, it cannot be overlooked that the authorities based their decision granting the applicant the EWK pension on the medical certificate which had subsequently been found to be fraudulent by the domestic courts. Having regard to this fact, the Court considers that the State was justified in reopening the proceedings as to the applicant's pension and, upon discovering that her child only suffered from minor medical problems which did not require the applicant's constant care, revoking the applicant's benefit.

36. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. The applicant also alleged violation of Article 6 of Convention (see paragraph 25 above). However, the Court considers that any issues that may be raised by the applicant under this provision have already been adequately addressed above (see paragraphs 31-35 above).

38. In any event, in all the previous cases examined to date, the Court considered that the complaints under Article 6 did not require a separate examination (see, among many other examples, *Moskal*, §§ 77-89, and *Antoni Lewandowski,* §§ 86-88, cited above; see also paragraph 28 above).

39. It follows that the remainder of the application must likewise be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı	Ledi Bianku
Deputy Registrar	President