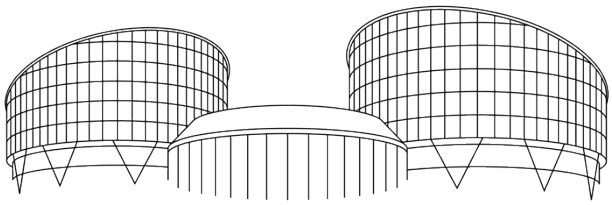

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 2912/11
Sebastian KOWAL
against Poland

The European Court of Human Rights (Fourth Section), sitting on 18 September 2012 as a Chamber composed of:

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 5 January 2011,

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, Mr Sebastian Kowal, is an Polish national, who was born in 1987 and lives in Brenna. He is represented before the Court by Mr S. Tatka, a lawyer practising in Cieszyn.

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 an unspecified date in 2008 the Social Assistance Centre in Brenna instituted proceedings with a view to making the applicant's father A. K. undergo treatment for alcoholism. They referred to numerous police interventions at the family apartment as a result of A.K.'s repeated acts of aggression and violence against his family and to a diagnosis made by a psychiatrist to the effect that he suffered from alcoholism.

5. He apparently failed to comply with that order.

6. On 11 August 2008 the applicant informed the police of acts of domestic violence committed by his father.

7. On 9 September 2008 the applicant's mother lodged an action for separation with the Bielsko-Biala Regional Court.

8. On 24 November 2008 a bill of indictment against A.K. on charges of domestic violence was lodged with the Cieszyn District Court.

9. On 5 December 2008 the Bielsko-Biala Regional Court allowed the applicant's mother's separation claim. In its judgment the court established that the applicant's mother and father were to use separate parts of the family house.

10. On 13 February 2009 the Cieszyn District Court convicted the applicant's father of domestic violence (*znęcanie sie nad osobą najbliższą*). The applicant's father submitted himself to the sentence (*dobrowolne poddanie sie karze*). The court sentenced him to one year and three months' imprisonment and conditionally stayed the execution of that sentence for a probation period of four years. The court also obliged him to abstain from alcohol abuse and assigned a probation officer to supervise his conduct.

11. On 5 November 2009 the applicant, his mother and younger brother requested the court to lift the stay of the execution of the prison sentence. They submitted that A.K. continued to drink and that his behaviour remained violent.

12. On 21 December 2009 the court held the first hearing in the case. It heard evidence from the applicant, his mother, his brother, the probation officer and three other persons. It had regard to the police records and to the probation officer's file. It found that the applicant's father had continued to be violent, had battered his wife, proffered insults and humiliated his sons and had abused alcohol.

13. The next hearing was held on 1 February 2010. The court heard evidence from the applicant's younger brother and ordered that an expert report on A.K.'s mental health be prepared.

14. On 13 April 2010 the Cieszyn District Court gave a decision. It noted that the applicant's mother had declared that her husband's behaviour had slightly improved and that therefore there were grounds for accepting

that he was capable of mending his ways. The court was of the view that in these circumstances it would not be justified to order the prison sentence to be executed. However, it ordered the defendant to leave the family apartment within 14 days, referring to Article 72 § 1 (7) (b) of the Criminal Code. It observed that this obligation could be imposed on a defendant regardless of his ownership of the apartment and that it only limited him in the exercise of the right to live here, his ownership rights remaining intact.

15. On 19 April 2010 the applicant's father appealed against this decision. He requested that the obligation to leave the house be lifted. A hearing before the appellate court was scheduled for 14 June 2010.

16. In 2010 the probation officer contacted the applicant and his mother on the one hand and A.K. on the other within the framework of the supervision of the execution of the judgment given on 13 February 2009 on the following dates: 2, 3, 3, 21 and 26 January, 29March, 13, 15 and 29 April, 1 and 4 May 2010.

17. On 4 May 2010 the applicant wrote to the probation officer and complained that his father continued to be violent.

18. On 17 August 2010 the Bielsko-Biala Regional Court upheld the decision of 13 April 2010. It therefore became final on that date and A.K. was obliged to leave the house by 31 August 2010.

He failed to do so.

19. On an unspecified later date the applicant requested the assistance of a local bailiff. In reply, he was informed orally that it was legally impossible for the bailiff to take any enforcement steps if the person ordered to leave the apartment refused to do so.

20. By a letter of 23 September 2010 the probation officer requested the Cieszyn District Court to take steps in order to have the decision of 13 April 2010 executed, referring to A.K.'s failure to move out.

21. At the hearing held on 4 November 2010 A.K. informed the court that he had been trying to find a new apartment, but that he had not found one so far. The court adjourned the examination of the case until 21 December 2010.

22. On 17 December 2010, in a civil case for the division of marital property, the applicant's parents concluded a settlement on the basis of which A.K. was obliged to move out of the family house within six months from that date. This settlement became final on 25 December 2010.

23. During the hearing held on 21 December 2010 the Cieszyn District Court was informed of the settlement concluded on 17 December 2010. It adjourned the proceedings until 15 February 2011 in order to read the case-file.

24. On 15 February 2011 the Cieszyn District Court noted that the applicant's father had moved out of the house on 1 February 2011. It therefore decided not to order the enforcement of the prison sentence and obliged A.K. not to approach the applicant and his mother.

B. Relevant domestic law

25. Article 13 of the Law on Domestic Violence (*Ustawa o przeciwdziałaniu przemocy w rodzinie*) was adopted on 29 July 2005. It amended Article 72 § 1 of the Criminal Code by adding to it the following text:

> When staying execution of a sentence, the court may impose on a defendant an obligation to: (...)
>
> 7. (b) leave an apartment where the defendant lives with the victim [of the offence concerned].

C. Council of Europe documents

26. In its Recommendation Rec (2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, *inter alia*, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention.

27. With regard to violence within the family, the Committee of Ministers recommended that member States should classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalise all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol for operation by the police, medical and social services.

COMPLAINT

28. The applicant complained under Article 8 of the Convention that the State had failed to fulfil its positive obligation to protect him, his younger brother and their mother from domestic violence by failing to take any steps in order to enforce the judicial decision ordering his father to leave the apartment. As a result, the applicant and his family remained exposed to A.K.'s violent behaviour despite the judicial injunction ordering him to leave the apartment.

THE LAW

29. The applicant complained under Article 8 of the Convention that the State had failed to fulfil its positive obligation to protect him, his younger brother and their mother from domestic violence.

Article 8 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

30. The Government argued that the applicant had abused the right of petition provided for under Article 34 of the Convention. They argued that he had lodged his application with the Court by way of an application form dated 22 December 2010. However, he had failed to inform the Court about the settlement which his parents had concluded on 17 December 2010. Moreover, he had subsequently failed to inform the Court that his father had moved out of the house on 1 February 2011 and about his parents' legal separation under the decision given in 2008. Despite this, in his letter of 30 January 2012 he had upheld his application to the Court.

31. The applicant acknowledged that his father had left the house on 1 February 2011, but argued that he was entitled to maintain his case after that date. The case concerned the authorities' failure to assist the applicant and his family in obtaining his father's compliance with the order of 13 April 2010 under which he was obliged to move out of the family house and the breach of the applicant's and his family's rights resulting from that failure. The fact that the applicant's father had ultimately moved out after the applicant had lodged his application with the Court did not affect the substance of the case and the applicant could not be accused of acting in bad faith.

32. The Court reiterates that an application may be rejected as abusive under Article 35 § 3 of the Convention, among other reasons, if it was knowingly based on untrue facts (see, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Popov v. Moldova* (no. 1), no. 74153/01, § 48, 18 January 2005; *Rehak v. Czech Republic* (dec.), no. 67208/01, 18 May 2004; and *Kérétchachvili v. Georgia* (dec.), no. 5667/02, 2 May 2006). Incomplete and therefore misleading information may also amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Poznanski and Others v. Germany* (dec.), no. 25101/05, 3 July 2007; and *Predescu v. Romania*, no. 21447/03, §§ 25-26, 2 December

2008). It is the applicant's duty to present at least those essential facts which are at his disposal and which he must be aware are of significant bearing for the Court to be able to properly assess the case. However, any such failure would not necessarily have to mean that there has been an abuse of the right to petition (see, for example, *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 88-89, 20 June 2002).

33. Turning to the circumstances of the present case, the Court observes that it essentially concerns the allegation that the authorities had failed to assist the applicant in having the decision of 13 April 2010 executed. When the applicant lodged his application with the Court, this decision remained unexecuted and the relevant proceedings were still pending before the Cieszyn District Court. The applicant was not represented by a lawyer at that time. The fact that the applicant's father subsequently moved out of the apartment does not, in the Court's opinion, affect the substance of the complaint concerning the period during which the decision of 13 April 2010 remained unexecuted. The Court is of the view that it cannot be said that the applicant's failure to inform it about all the developments after 1 February 2011 had amounted to an abuse of the right of petition.

34. The Government further submitted that the applicant had failed to exhaust domestic remedies. It had been open to him to inform the probation officer about all facts relevant to the execution of the conditionally stayed sentence imposed on his father. He had availed himself of this opportunity. The probation officer had reacted to his request with no delay. On 23 September 2010 he informed the court about A.K.'s failure to comply with the obligation to move out. However, the applicant should have requested the prosecuting authorities to institute criminal proceedings against his father on charges of failure to comply with a judicial order, punishable under Article 244 of the Criminal Code. He failed to do so.

35. The applicant disagreed.

36. The Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, § 65).

37. In the present case the applicant, by repeatedly complaining to the probation officer, had recourse to the remedy specifically designed to address his complaint about his father's failure to abide by the terms of the judgment given by the criminal court on 13 February 2009 and the subsequent difficulties which arose in connection with the effective execution of that judgment. The applicant repeatedly drew the authorities'

attention to his father's continued violent behaviour and requested them to take appropriate action in order to protect his rights, by way of making his father comply with the terms of the decision given in the criminal case against him.

38. The Court is of the view that, having exhausted the available and relevant remedy provided for by domestic law, the applicant should not be required to embark on another attempt to obtain redress by requesting that a new set of criminal proceedings be instituted, even supposing such action to be effective in the circumstances of the case and capable of addressing the core problem of the case, namely continued domestic violence against the family members.

39. Accordingly, for the purposes of Article 35 § 1 of the Convention, the applicant has exhausted domestic remedies.

40. For this reason, the Government's plea of inadmissibility must be dismissed.

41. As to the substance of the case, the Government submitted that in cases concerning Article 8 of the Convention the Court had stressed on many occasions that the State enjoyed a wide margin of appreciation, especially as regards the positive obligations under this provision. Regard had to be had to domestic practices and individual circumstances of each case. This was an area where the Contracting Parties enjoyed a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, with due regard to the needs and resources of the community and of individuals. The Government were of the view that the same considerations applied to cases of domestic violence.

42. In the present case the domestic authorities had acted diligently, constantly having in mind the need to balance the competing interests, namely to protect the applicant from domestic violence and to exert preventive and educational effect on his father's conduct during the probation period. It was not in dispute that the applicant's father had committed an offence of domestic violence. This had been confirmed by the judgment of the Cieszyn District Court of 13 February 2009. However, subsequently the defendant had continued to be violent and the applicant had informed the authorities thereof. The domestic authorities had pursued all actions necessary to protect him and his family. The probation officer charged with supervision of the defendant's conduct had had frequent contacts with the defendant and with the applicant's family.

43. The Government finally averred that on the basis of the settlement concluded between the applicant's mother and father on 19 December 2010, the applicant's mother had agreed to give her husband six months within which he was to leave the marital home. As he had moved out on 1 February 2011, this time-limit had been respected.

44. The Government concluded that the complaint about the alleged breach of Article 8 of the Convention was manifestly ill-founded as the authorities had complied with their positive obligations under this provision.

45. The Court reiterates that, while the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *X and Y v. the Netherlands*, 26 March 1985, §§ 23-24 and 27, Series A no. 91, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003).

46. Under Article 8 the States have a duty to protect the physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *X and Y v. the Netherlands*, cited above, §§ 22 and 23; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C; *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 118, 10 October 2002 and *M.C. v. Bulgaria*, no. 39272/98, §§ 150 and 152, ECHR 2003-XII).

47. The Court has acknowledged the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection (see, *mutatis mutandis*, *Opuz v. Turkey*, no. 33401/02, § 27, ECHR 2009; *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 64-65, 12 June 2008; and *Sandra Janković v. Croatia*, no. 38478/05, § 44-45, ECHR 2009-... (extracts); *A v. Croatia*, no. 55164/08, §§ 55-61, 14 October 2010). In particular, in the case of *Hajduová v. Slovakia* the Court found that the lack of sufficient measures taken by the authorities in reaction to the applicant's partner's behaviour, notably the failure to comply with its statutory obligation to order detention of a violent partner for psychiatric treatment following his conviction amounted to a breach of the State's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life (*Hajduová v. Slovakia*, no. 2660/03, § 58, 30 November 2010).

48. The Court stresses that its task is not to take the place of the competent Polish authorities in determining the most appropriate methods of protecting individuals from attacks on their personal integrity in the context of domestic violence, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see *Sandra Jankovic v. Croatia*, cited above, § 46). In line with the principle stated above, it is for the national authorities to organise their legal systems so as to comply with their obligations under the Convention, including their obligation to ensure effective protection of victims of domestic violence.

49. Turning to the circumstances of the present case, the Court first observes that it is not in dispute between the parties that the applicant's father was violent. The courts examined the criminal case against him on charges of domestic violence and convicted him by the judgment of 13 February 2009, after proceedings which were conducted speedily and which lasted, on the whole, six months. A sentence of one year and three months' imprisonment was imposed on him. While the prison sentence was conditionally stayed for a probationary period of four years, the court assigned a probation officer to supervise the defendant's conduct. Hence, not only did the authorities examine the applicant's allegations speedily, but also the substantive outcome of the proceedings was intended to protect him and his family against domestic violence.

50. The Court notes that after the judgment given in his criminal case the defendant did not mend his ways. The applicant and his family requested therefore, on 5 November 2009, that the stay of the execution of the sentence against A.K. be lifted, referring to the fact that he continued to drink and his conduct remained violent. The relevant proceedings were instituted shortly afterwards. The court held two hearings, on 21 December 2009 and 12 April 2010. On the latter date the court dismissed the request to have A.K. imprisoned, but it examined in detail his conduct in so far as it was related to the applicant's complaint of continued violence. It observed that the defendant's behaviour had slightly improved and, while it was therefore not necessary to make him serve the prison sentence, he should leave the family apartment.

51. The Court emphasises that in cases of domestic violence it is imperative that the authorities act speedily. While it is true that in the present case the proceedings concerning the applicant's request lasted five months which, in the Court's view, can be said to be open to criticism, the Court observes that ultimately in their decisions the courts had proper regard to the protection of the applicant and his family against further violence. The perpetrator was ordered, by the decision given on 13 April 2010, to leave the apartment and this decision was ultimately upheld on appeal on 17 August 2010.

52. It cannot therefore be said that the authorities were dealing with the case in a slow or inefficient manner, or that they did not have due regard to the victims' plight or that they minimised it.

53. The Court further observes that A. K. failed to comply with the order to move out. On 23 September 2010, merely three weeks after the second-instance decision given on 17 August 2010 had become final, the court probation officer requested the court to take steps in order to have this decision executed. On 4 November 2010 the court held a hearing and questioned A.K. It adjourned the examination of the case until 21 December 2010. Ultimately, the proceedings were discontinued on 15 February 2010,

the court having regard to the fact that the applicant's father had meanwhile complied with the decision and moved out of the house.

54. Having regard to the circumstances of the case seen as whole, the Court considers that it cannot be said that the authorities' response to the conduct of the applicant's father was manifestly inadequate with respect to the gravity of the offences in question (see, *mutatis mutandis, Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 54, 8 April 2008). Nor can it be said that the decisions given in the case were not capable of having a preventive or deterrent effect on the perpetrator's conduct.

55. Similarly, it has not been found that the authorities failed to view the applicant's situation and the domestic violence caused by his father as a whole and to respond adequately to the situation seen in its entirety, by, for instance, conducting numerous sets of proceedings dealing with separate instances of domestic violence (compare and contrast with *A. v. Croatia*, cited above, § 77).

56. 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.

For these reasons, the Court by a majority

Declares the application inadmissible.

Lawrence Early
Registrar

David Thór Björgvinsson
President