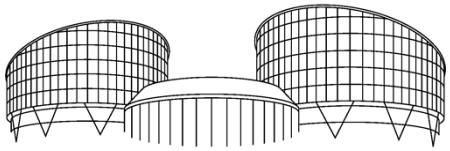

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 9873/11
Jadwiga WASIEWSKA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 2 December 2014 as a Chamber composed of:

Ineta Ziemele, *President,*
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 28 January 2011,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

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 Jadwiga Wasiewska, is a Polish national, who was born in 1936 and lives in Bydgoszcz. She was represented before the Court by Mr A. Drozd, a lawyer practising in Bydgoszcz.

2. The Polish Government ("the Government") were represented by their Agent, 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.

1. The background

4. In 1997 the applicant and her husband T.W. divorced. The applicant submitted that prior to the divorce her former husband had thrown her out of their flat. He changed the locks and prevented the applicant from entering to take personal items belonging to her, their daughter and granddaughter.

5. On 30 April 2002 the applicant and her former husband reached a friendly settlement as regards the division of their marital property, i.e. the flat. The applicant became the sole owner of the flat against the payment to T.W. of 32,000 Polish zlotys (PLN) until 2 September 2002. Her former husband retained the right to stay in the flat until that date. However, T.W. made it impossible for the applicant to sell the flat so that she could have the money to pay him his share.

6. The applicant's former husband obtained an enforcement order against the applicant with the result that part of her retirement pension was seized by the bailiff to help pay off her debt. She was also obliged to pay half of the maintenance costs for the flat.

2. Eviction order

7. In 2006 the applicant brought a civil case for eviction against her former husband. On 22 September 2008 the Bydgoszcz District Court allowed the applicant's action and ordered the eviction of T.W. At the same time it ordered that the defendant be allocated social housing by the municipality. The execution of the judgment was to be stayed until he had been allocated social housing.

8. The applicant appealed, complaining about the part of the court's judgment obliging the municipality to award her former husband social housing. Her appeal was dismissed on 9 April 2009 by the Bydgoszcz Regional Court. The appeal lodged by T.W. was rejected for formal reasons.

9. On 29 March 2010 the Bydgoszcz District Court issued an order confirming that the judgment of 22 September 2008 was final.

10. Subsequently T.W. instituted proceedings in which he sought to quash the enforcement order arguing that the flat allocated to him by the municipality had been in bad condition. On 29 June 2011 the Bydgoszcz Regional Court finally dismissed his application to quash the enforcement order.

11. On an unspecified date the applicant made use of a remedy provided by the Law of 17 June 2004 on complaints about a breach of the

right to an investigation conducted or supervised by a prosecutor and to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*– "the 2004 Act"). She complained about the length of the enforcement proceedings conducted by the court bailiff.

12. On 9 November 2011 the Bydgoszcz Regional Court dismissed the complaint finding that there had been no delay on the part of the bailiff.

13. The applicant's former husband refused two offers of social housing in 2010. In 2012 he was offered another flat which had to be refurbished before he could move in.

14. The applicant submitted that in July 2013 T.W. finally moved out and she regained possession of her flat.

3. The claim for damages against T.W.

15. On an unspecified date in 2009 the applicant brought a civil claim for damages against her former husband, T.W. She relied on section18 (1) of the 2001 Act claiming that T.W. had been living in her flat without legal title to it. She sought compensation from him in the amount calculated in reference to the cost of rent for a similar apartment on the free market.

16. On 15 April 2001 the Bydgoszcz DC partly granted the action and awarded the applicant PLN 17,600 (approximately 4,200 euros (EUR)) in compensation for T.W.'s use of the flat without legal title. The court established that since the eviction order the applicant's former husband had no right to stay in the flat and since he continued to live there he had been liable to pay compensation. T.W. appealed.

17. On 22 September 2011 the Bydgoszcz Regional Court allowed the appeal and dismissed the applicant's action. The court agreed with the lower court's findings as to the facts of the case, in particular that T.W. had no right to stay in the flat. However the appellate court noticed that since T.W. had had the right to social housing, on the basis of section 18 (3) of the 2001 Act, he had been liable to pay only his share of rent. There was no legal basis to order him to pay compensation on the basis of free-market calculations. Since the applicant sought compensation and not the reimbursement of half of the maintenance costs, the court dismissed her action.

B. Relevant domestic law and practice

18. The December 2006 Amendment to the Act of 21 June 2001 on the protection of the rights of tenants, housing resources of municipalities

and on amendments to the Civil Code (*Ustawa o ochronie praw lokatorów, misszkaniowym zasobie gminy I o zmianie kodeku cywilnego, "the 2001 Act"*) added a new provision (subsection (5)) to section 18, which makes the municipality liable, under the rules of tort, for any damage sustained by the landlord on account of the municipality's failure to provide the tenant with social housing. This provision reads:

> "(5) If the municipality has not provided social housing to a person who is entitled to it by virtue of a judgment, the landlord shall have a claim for damages against the municipality on the basis of Article 417 of the Civil Code."

Consequently, the municipality's failure is statutorily deemed to be an "unlawful omission" within the meaning of Article 417 of the Civil Code.

19. Article 417 of the Civil Code reads in so far as relevant:

> "1. The State Treasury, municipality or another legal person wielding public power by virtue of the law shall be liable for damage caused by an unlawful act or omission in the exercise of that power."

20. The Supreme Court, in its ruling of 25 June 2008 (no. CZP 46/2008) concerning a claim for damages under section 18(5) of the 2001 Act read in conjunction with Article 417 of the Civil Code, confirmed that a landlord was entitled to full compensation for any damage sustained on account of a municipality's failure to provide social housing to a tenant.

21. Pursuant to section 18 (3) of the 2001 Act, as long as the municipality has not supplied social housing, the tenant pays the same amount of rent that he would have paid if the tenancy had not been terminated. According to section 18 (1) and (2), other tenants in respect of whom the tenancy has terminated and who have not vacated the flat pay compensation to a landlord corresponding to the market-related rent that the landlord could normally receive. If such compensation does not cover losses incurred by a landlord, he may seek supplementary compensation.

COMPLAINTS

22. The applicant complained under several Articles of the Convention about the authorities' failure to enforce their own judgments ordering the eviction of her former husband from the flat she owned. She further complained about the impossibility to initiate a criminal investigation against her former husband who made it impossible for her to have access to her belongings left in the flat and the flat itself, and the State's failure to secure respect for her rights and freedoms guaranteed by the Convention.

THE LAW

A. Article 6 of the Convention

23. The Court considers that the complaint about the authorities' failure to enforce the eviction order against T.W. should be examined under Article 6 of the Convention. This Article, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

24. The Government submitted that the applicant failed to exhaust domestic remedies available to her. After the eviction judgment became final the municipality was under obligation to provide T.W. with social housing. Since they failed to do so it was open for the applicant to lodge a civil claim for damages from the municipality as stipulated in section 18 (5) of the 2001 Act taken together with Article 417 of the Civil Code. The Government referred to the Supreme Court's jurisprudence which had confirmed the landlord's right to full compensation for any damage sustained as a result of the municipality's failure to provide social housing to the tenant.

25. The applicant contested this assertion and submitted that she had exhausted all effective remedies. She complained about the bailiff inactivity and lodged a civil claim for compensation against her former husband.

26. The rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the Court for their acts before they have had an opportunity to put matters right through their own legal system. Recourse should therefore be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. As a consequence, complaints intended to be made before this Court should have first been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, and any procedural means that might prevent a breach of the Convention should have been used (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, Reports of Judgments and Decisions 1996-IV and *Cardot v. France*, 19 March 1991, § 34, Series A no. 200).

27. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *McFarlane*

v. Ireland [GC], no. 31333/06, § 107 10 September 2010 and *T. v. the United Kingdom [GC]*, no. 24724/94, 16 December 1999, § 55).

However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, §§ 74-77, ECHR 1999 V and *Knaggs and Khachik v. the United Kingdom* (dec.) nos. 46559/06 and 22921/06, § 155, 30 August 2011).

28. The Court has consistently held that mere doubts as to the prospects of success of national remedies do not absolve an applicant from the obligation to exhaust those remedies (see, inter alia, *Pellegrini v. Italy* (dec.), no. 77363/01, 26 May 2005; *MPP Golub v. Ukraine* (dec.), no. 6778/05, 18 October 2005; and *Milosevic v. the Netherlands* (dec.), no. 77631/01, 19 March 2002). However, an applicant is not required to use a remedy which, "according to settled legal opinion existing at the relevant time", offers no reasonable prospects of providing redress for his complaint (*see D. v. Ireland* (dec.), no. 26499/02, §§ 89 and 91, 28 June 2006 and *Fox v. the United Kingdom* (dec.), § 42). Equally, an applicant cannot be regarded as having failed to exhaust domestic remedies if he can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he has not used was bound to fail (*Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI; *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 121 et seq., ECHR 2007-... (extracts)).

29. Turning to the particular circumstances of the case, the Court notes that the eviction order given by the Bydgoszcz District Court on 22 September 2008 became final on 29 March 2010, at the latest. However, the eviction of T.W. was conditioned upon his receiving social housing from the municipality. Thus the court stayed the execution of the judgment until such an accommodation could be allocated to him. The applicant's former husband finally accepted a flat allocated by the municipality in 2012 and moved out in June 2013 (see paragraphs 7-13 above). Therefore the facts of the case show that the non-enforcement of the judgment ordering eviction of T.W. was caused by delay with which the municipal authorities fulfilled their obligation to provide him with social housing.

30. As indicated by the Government it would have been possible for the applicant to bring a claim for damages against the municipality under section 18 (5) of the 2001 Act read in conjunction with Article 417 of the Civil Code. The Court notes that following an amendment introduced in December 2006, the 2001 Act clearly stipulates that the municipality is

liable for their failure to provide the tenant with social housing in the execution of a final judgment. This remedy offers a possibility to obtain compensation, under the rules of tort, for damages sustained by the landlord on account of the municipality's failure to act. This had been confirmed by the domestic courts' case law, including the Supreme Court. The latter's case-law clearly confirms that a landlord is entitled to full compensation for any damage sustained on account of a municipality's failure to provide social housing to a tenant (see paragraph 20 above).

31. The Court has already examined this remedy in the context of general measures introduced at domestic level covering persons affected by the systemic problem identified in the Hutten-Czapska pilot judgment (see *Hutten-Czapska v. Poland* (friendly settlement) [GC], no. 35014/97, § 41, 28 April 2008 and *Association of Real Property Owners in Łódź and Others v. Poland* (dec.), no. 3485/02, §§ 70 and 72, ECHR 2011 (extracts)). In the context of those cases, concerning rent-control schemes, the Court noted that "the new rules in section 18(5) of the 2001 Act, enlarging the scope of the municipal authorities' civil liability for failure to provide protected tenants with social housing had enabled landlords to recover compensation for losses incurred in that connection".

32. However, the applicant did not attempt to use this remedy. The Court observes that the fact that the applicant was unsuccessful in obtaining damages from her former husband did not absolve her from trying another - possibly more effective - remedy clearly provided for in section 18(5) of the 2001 Act. Moreover, according to the Court's case-law suing a private individual cannot be regarded as a remedy in respect of an act on the part of the State (see *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 22, § 48; and *Iatridis v. Greece [GC]*, no. 31107/96 § 47 in fine, ECHR 1999-II and *Zlínsat, spol. s r.o., v. Bulgaria*, no. 57785/00, § 55, 15 June 2006).

33. Bearing in mind that applicants are required to use "any procedural means that might prevent a breach of the Convention" (see paragraph 26 above), the Court finds that the complaint is inadmissible for failure to exhaust domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Other complaints

34. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that the remainder of the application does not disclose any appearance of a

violation of the rights and freedoms set out in the Convention or its Protocols.

35. It follows that this part of 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, unanimously,

Declares the application inadmissible.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President