



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

Communicated on 2 September 2019

FIRST SECTION

Application no. 4907/18
XERO FLOR SP. Z O.O.
against Poland
lodged on 3 January 2018

STATEMENT OF FACTS

The applicant company, Xero Flor w Polsce sp. z o.o. is a limited liability company with its registered office in Leszno Dolne. It is represented before the Court by Mr P. Piątek, a lawyer practising in Zielona Góra.

A. The circumstances of the case

The facts of the case, as submitted by the applicant company, may be summarised as follows.

The applicant company is one of the leading producers of turf (*trawnik rolowany*) in Poland. The surface area of its turf cultivation covers 65 hectares. In September/October 2010 and in March/April 2011 game (boars and deer) caused damage to the turf. The applicant company notified the forest district about the damage. The representatives of the forest district and the applicant company accompanied by an expert viewed the affected areas on a number of occasions. The expert drew up a protocol assessing the damage.

On an unspecified date the forest district paid 42,800 Polish zlotys ("PLN") in compensation to the applicant company.

1. The first-instance proceedings

On 18 September 2012 the applicant company brought a claim against the State Treasury represented by the manager of the Szprotawa forest district in the Zielona Góra Regional Court. It sought PLN 142,800 (approximately EUR 35,500) in compensation for damage caused to turf

cultivation by game. The applicant company calculated the amount of compensation on the basis of the protocol of final assessment of damage of 13 April 2011 as agreed by the parties, which was PLN 199,920. This amount was reduced by the cost of collection of turf (PLN 14,280) and the amount that had been already paid by the defendant (PLN 42,800).

The applicant company further requested the court to refer three legal questions to the Constitutional Court:

(a) is § 5 of the Regulation, in so far as it puts persons growing multiannual crops (*uprawa wieloletnia*) in a less favourable position than persons growing annual crops (*uprawa jednoroczna*) in that it limits the level of compensation by linking it with the period in which the damage was sustained, without having specified the basis for such a limitation, compatible with Articles 32 §§ 1-2, 64 § 2 and 2 of the Constitution?

(b) is section 49 of the Hunting Act, in so far as it delegates matters of statute to the level of sub-statutory regulation and in so doing it interferes with the [constitutional] right to property by unlawfully restricting it by means of sub-statutory regulation, compatible with Articles 64 § 3, 92 § 1 and 2 of the Constitution?

(c) are §§ 4 and 5 of the Regulation, in so far as they exceed the statutory authorisation and restrict the [constitutional] right to property by limiting the right to compensation for damage, compatible with Articles 92 § 1, 64 § 3 and 2 of the Constitution?

The applicant company submitted that the reduced percentage rates provided in § 5 of the Regulation could not have been applied to calculation of compensation for damage caused to turf because this provision was relevant only to annual crop, while turf was a multiannual crop. It further submitted that turf was mature after 12 to 18 months from sowing and could be collected and sold during the period of 36 months from the date of reaching maturity. Accordingly, damage to the turf during the period of its maturity should be treated as damage to a fully developed crop. There was no justification for any reduction in the level of compensation.

The State Treasury accepted the claim up to PLN 58,140.

In a partial judgment of 6 February 2013 the Regional Court awarded that sum to the applicant company.

In a judgment of 16 September 2014 the court awarded further PLN 517.72 in compensation.

The court ordered an expert report. Relying on the expert report, it established that turf was not a multiannual crop. It was a highly specialised and atypical crop, because it was ready for collection during the period of about two years after having reached maturity. For that reason it was not comparable to traditional crop cultivation, such as cereal, corn or potatoes.

The court established that on 13 April 2011 an expert had made the final assessment of damage. The parties agreed that the area of damaged crop was 3,36 ha and that the damages amounted to PLN 199,920. The applicant

company disagreed with the application of the coefficient of 25% to the amount of damages.

The court ruled that the amount of costs of collection of turf was to be fixed at PLN 0.84 per square meter. It established that in autumn 2010 the damage had been done to the area of 1.90 ha and in the spring 2011 to 1.46 ha. Following the findings of the expert, the court applied the coefficient of 85% to the area damaged in the autumn and the coefficient of 25% to the area damaged in the spring in accordance with § 5 of the Regulation. These gave respectively PLN 84,561 and PLN 19,111 which amounted to a total sum of PLN 103,672. The defendant had already paid PLN 103,154.28 to the claimant and therefore the court ruled that the remaining amount of PLN 517.72 should be paid in compensation.

The legal basis for the applicant company's claim was section 46 § 1(1) of the Hunting Act. The procedure for assessment of damage and payment of compensation was regulated in the Regulation of the Minister of Environment. § 5 of the Regulation provided that the level of compensation was to be determined by applying coefficients depending on the period during which the damage was sustained (see relevant domestic law below). This provision stipulated that the coefficient of 25% was to be applied to damage sustained in the period prior to 15 April and coefficient of 85% to the damage sustained in the period after 11 June.

Having regard to the expert report's conclusions, the court found unjustified the applicant company's assertion that turf was a multiannual crop and that, therefore, the coefficients prescribed in § 5 of the Regulation could not have been applied to its case since they were solely applicable to annual crops. The court referred to the definition of "permanent pasture" in the Commission Regulation (EC) No 1120/2009¹ and noted that in order to distinguish between arable land and permanent crops or permanent pasture a five-year criterion was to be applied. In accordance with the criterion adopted by the European Commission, turf was not a permanent crop.

With regard to the applicant company's arguments about the unconstitutionality of the Regulation, the court stated that "it did not share the claimant's view about the unconstitutionality of the impugned Regulation due to limitation on the amount of compensation".

2. Proceedings before the Court of Appeal

The applicant company appealed. It alleged, *inter alia*, that the first-instance court had:

1. Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers.

- (1) erred on the facts in considering that turf was not a multiannual crop, while its cultivation lasted more than twelve months;
- (2) erred in law in finding that §§ 4 and 5 of the Regulation were not unconstitutional;
- (3) breached the civil procedure by having failed to properly reason its assessment that §§ 4 and 5 of the Regulation was constitutional and to address the argument regarding the unconstitutionality of section 49 of the Hunting Act;
- (4) breached Article 193 of the Constitution by having failed to refer to the Constitutional Court legal questions on the constitutionality of §§ 4 and 5 of the Regulation and section 49 of the Hunting Act while there existed substantiated doubts as to their constitutionality;
- (5) wrongly held that §§ 4 and 5 of the Regulation were applicable to the case.

The applicant company requested that the first-instance judgment be amended and that it be awarded PLN 84,142.88 in remainder of its due compensation. The applicant company further requested the Court of Appeal to refer to the Constitutional Court the same legal questions which it had submitted to the first-instance court.

On 16 December 2014 the Poznań Court of Appeal dismissed the appeal for the most part, having amended the first-instance judgment only in respect of the date relevant for the calculation of interest.

The Court of Appeal accepted the findings of the lower court and found that the arguments raised in the appeal were unjustified. It confirmed that turf was not a multiannual crop and that, accordingly, the Regulation was applicable to the calculation of damage.

The Court of Appeal dismissed the applicant company's arguments that the impugned provisions of the Regulation were unconstitutional, and that the lower court had breached Article 193 of the Constitution. It noted that in the present case it was not necessary to refer legal questions to the Constitutional Court in order to determine the dispute since there were no doubts that turf was not a multiannual crop, and that the provisions of the Regulation were applicable to the case.

The court further noted that there were no particular provisions regulating the assessment of damages that would correspond to the specificities of the cultivation of turf. The applicant company had contested the rules of the calculation of damage, but had not demonstrated that turf was a multiannual crop. In the court's assessment, the lack of particular provisions taking into account the specificities of turf could not be regarded as a reason justifying the unconstitutionality of §§ 4 and 5 of the Regulation.

The court further noted that the allegation of a breach of Article 64 § 3 of the Constitution concerning limitation of property rights was unfounded since issues related to this provision had not constituted the subject-matter

of the case. It also found that Article 32 of the Constitution prohibiting discrimination was not applicable to the case.

3. Proceedings before the Supreme Court

The applicant company lodged a cassation appeal. It argued that the Court of Appeal had erroneously applied §§ 4 and 5 of the Regulation to turf, while those provisions could have been applied only to crop whose production cycle from sowing to harvest was limited to one year. The applicant company further claimed that those provisions had been unconstitutional and, thus, should not have been applied. It reiterated its earlier objections as to the constitutionality of §§ 4-5 of the Regulation and section 49 of the Hunting Act.

The applicant company also alleged that the Court of Appeal had erred in relying on the Commission Regulation (EC) No 1120/2009 whose subject-matter had not concerned issues relating to compensation for damage caused by game.

On 3 December 2015 the Supreme Court refused to accept the cassation appeal for examination.

4. Proceedings before the Constitutional Court

On 15 April 2015 the applicant company lodged a constitutional complaint. It alleged that:

(1) section 49 of the Hunting Act, in so far as it delegated the statutory matters to the level of sub-statutory regulation and in so doing it interfered with the [constitutional] right to property by unlawfully restricting it by means of sub-statutory regulation, was incompatible with Articles 64 § 3, 92 § 1 and 2 of the Constitution;

(2) §§ 4 and 5 of the Regulation, in so far as they exceeded the statutory authorisation and restricted the [constitutional] right to property by limiting the right to compensation for damage, were incompatible with Articles 92 § 1, 64 § 3 and 2 of the Constitution and section 49 of the Hunting Act;

(3) § 5 of the Regulation, in so far as it put persons growing crops whose production cycle from sowing to harvest was not limited to one year in a less favourable position than persons growing one-year crops in that it limited the level of compensation by linking it with the period in which the damage was sustained, without having specified the basis for such a limitation, was incompatible with Articles 32 §§ 1-2, 64 § 2 and 2 of the Constitution.

The applicant company also invoked Article 14 and Article 1 of the Protocol No. 1 to the Convention.

The constitutional complaint was admitted for examination on the merits.

A bench of five judges was composed to examine the constitutional complaint. It comprised Judges L.K., the president of the bench, M.M., the rapporteur, J.P., M.P.-S. and P.T.

On 5 July 2017 the Constitutional Court, by a majority of three to two, discontinued the constitutional complaint proceedings. The decision was given after a hearing held in camera. The Constitutional Court noted that a bench examining the merits of the complaint was not bound by an earlier decision admitting the constitutional complaint for examination on the merits.

With regard to section 49 of the Hunting Act, the Constitutional Court found that this provision had not constituted the basis for the final decision in the complainant's case. Section 49 was addressed to the Minister of the Environment and authorized him to issue a regulation. This provision did not have direct effect on the complainant's rights and freedoms. Accordingly, the court discontinued the proceedings in this part.

With regard to §§ 4 and 5 of the Regulation, the Constitutional Court noted that these provisions had constituted the basis for the final decision in the complainant's case. However, it observed that the constitutional complaint concerned the act of application of the law by a court and not the content of the impugned provisions. In the court proceedings the complainant argued that its crop had been multiannual, and the courts had erroneously applied the impugned provisions to its situation. The Constitutional Court found that the complainant had not demonstrated how the content of §§ 4 and 5 of the Regulation had infringed its constitutional rights and freedoms. For these reasons, it discontinued the proceedings in this part too.

Judge M.P.-S. in her dissenting opinion disagreed with the discontinuation of the proceedings and found that the constitutional complaint should have been examined on the merits in part concerning the compliance of the impugned provisions of the Regulation with Articles 92 § 1 and 64 of the Constitution. She noted that the complainant had sufficiently demonstrated that the provisions of the Regulation were enacted in breach of the statutory authorisation contained in section 49 of the Hunting Act and violated the constitutional guarantees of property rights.

In her view, §§ 4 and 5 of the Regulation clearly exceeded the scope of the statutory authorization contained in section 49 of the Hunting Act. This statutory provision authorised the Minister for the environment to determine the procedure for assessment of damage caused by game. Nonetheless, the impugned § 5 of the Regulation introduced far-reaching percentage limitations to the level of compensation determined on the basis of § 4 of the Regulation. However, the Minister was not authorized to decrease the level of compensation. Moreover, in the light of Article 64 § 3 of the Constitution the legislature could not allow that a sub-statutory regulation limited compensation for a breach of property rights. This was noted by the

Prosecutor General, who underlined in his submissions that under Polish law section 46 of the Hunting Act contained the sole, permissible limitations (in comparison with the principles of civil law) to the scope of compensation for damage caused by game.

Judge P.T. in his dissenting opinion disagreed with the finding that section 49 of the Hunting Act had not constituted the basis for the decision in the claimant's case and had not infringed the complainant's rights within the meaning of Article 79 of the Constitution.

In his view, individual rights and freedom could have been infringed by statutory provisions authorising the enactment of a regulation determining the legal situation of an individual. If Article 64 § 3 of the Constitution prescribed that the property rights could be restricted only in a statute, then a statutory provision allowing for such restrictions in a regulation would violate that guarantee. He disagreed with the majority's approach which implied that in constitutional complaint proceedings it was not possible to raise an allegation that rights and freedoms could only be restricted by a statute. This requirement constituted a key guarantee for permissible limitations of constitutional rights. Excluding that possibility would undermine the logic of a constitutional complaint.

For similar reasons Judge P.T. did not share the view that section 49 of the Hunting Act had not constituted the basis for the court decision within the meaning of Article 79 of the Constitution. He noted that the Constitutional Court had repeatedly underlined the necessity of interpreting the term "normative act on the basis of which a court (...) has issued a final decision on his freedoms or rights" in an autonomous manner. This term comprised all provisions, which influence the normative basis for a court decision and, in consequence, influence the position of a claimant.

Judge P.T.'s dissenting opinion further concerned the composition of a bench in which the Constitutional Court examined the case. He noted that the bench was composed in violation of the Constitution, in particular its Article 194 § 1. M.M., who was assigned to the bench, had been elected by the Sejm for a post that had been already filled and the Sejm of the 8th term had had no power to do so. The Sejm of the 7th term had elected R.H., A.J. and K.Ś. as judges of the Constitutional Court. Doubts with regard to the statutory basis for their election were dispelled in the Constitutional Court's judgment of 3 December 2015 (case no. K 34/15). This ruling was subsequently confirmed by the Constitutional Court's decision of 7 January 2016 (case no. U 8/15). The statutory basis for election of these three judges was in compliance with the Constitution. The Sejm of the 8th term could not determine independently doubts regarding the compliance of the statutory basis for election of these judges with the Constitution, since this competence was reserved to the Constitutional Court in accordance with Article 188 (1-3) of the Constitution. In consequence, the Sejm's independent assessment with regard to the unconstitutionality of the legal

basis for election of judges to the Constitutional Court could not constitute the basis for adopting a legally binding resolution declaring that the election of a judge to the Constitutional Court had not been effected.

The Constitutional Court's decision was served on the applicant company on 10 July 2017.

B. Relevant domestic law and practice

1. Constitution of the Republic of Poland

The relevant provisions of the Constitution read as follows:

Article 10

1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Article 64

1. Everyone shall have the right to ownership, other property rights and the right of succession.
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the essence of such right.

Article 79 § 1

In accordance with principles specified by statute, anyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution.

Article 92 § 1

1. Regulations shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

Article 193

Any court may refer to the Constitutional Court a question of law as to whether a normative act is in conformity with the Constitution, ratified international agreements or statutes, if the answer to such question of law will determine an issue currently [pending] before such court.

Article 194

1. The Constitutional Court shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. ...”

2. Hunting Act of 13 October 1995

Section 46

“1. The lessee or manager of the hunting grounds shall compensate damage caused:

1. to harvested crops and crops under cultivation by boars, elks, deer, fallow deer and roe deer,
2. during the hunt.”

Section 49

“ The Minister of Environment in agreement with the Minister of Agriculture shall issue a regulation prescribing the procedures of damage assessment and payment of compensation for damage caused to crops under cultivation and harvested crops, taking into account the moment of the notification of damage, the obligation of initial and final damage assessment and the size of damaged crop.”

3. Regulation of the Minister of Environment of 8 March 2010 concerning the procedures for damage assessment and payment of compensation in respect of damage to crops.

The Regulation was issued on the basis of section 49 of the Hunting Act. It contained detailed rules and procedures for the assessment of damage caused by game.

§ 5 of the Regulation read as follows:

“In the final assessment of damage with regard to crops requiring the ploughing the amount of compensation shall be fixed, if the damage occurred in the period:

- 1) prior to 15 April – at 25%,
- 2) between 16 April and 20 May – at 40%,
- 3) between 21 May and 10 June – at 60%,
- 4) after 11 June – at 85%

of the amount calculated in the manner specified in § 4(7) of the Regulation.”

4. Case-law regarding compensation for damage caused by game

In its resolution of 19 May 2015 (no. III CZP 114/14), the Supreme Court noted that the liability of hunting grounds or of the State Treasury regulated in sections 46-50 of the Hunting Act was a form of strict (objective) liability, which could be excluded only by one of the exonerating circumstances set out in section 48 of the Act. These provisions of the Hunting Act which constituted *lex specialis* to the Civil Code, while modifying the rules of civil liability did not amend its essence. The Supreme

Court noted that the civil law rule of full compensation was not absolute, but the exemptions to it had to be set out in a statute. It stated that section 46 § 1 (1) of the Hunting Act was an example of such an exception. At the same time, the Supreme Court clearly stated that the scope of damage could not have been defined by reference to sub-statutory rules, such as the Regulation of the Minister of Environment.

In its judgment of 6 March 2014 (no. I ACa 886/13), the Szczecin Court of Appeal noted with regard to the amended section 49 of the Hunting Act that the Minister of Environment had lost the possibility of prescribing the rules for damage assessment, including with regard to the limitations of the liability in comparison with the rules of the Civil Code.

5. Relevant case-law of the Constitutional Court regarding the composition of that court

The following rulings of the Constitutional Court are relevant in the context of the present case:

- (a) the judgment of 3 December 2015, no. K 34/15;
- (b) the judgment of 9 December 2015, no. K 35/15;
- (c) the decision of 7 January 2016, no. U 8/15;
- (d) the judgment of 11 August 2016, no. K 39/16.

COMPLAINTS

1. The applicant company complains under Article 6 of the Convention that its right to a fair trial was violated by reason of the application of discriminatory provisions of §§ 4 and 5 of the Regulation adopted on the basis of a flawed authorisation contained in section 49 of the Hunting Act. In addition, the same right was violated on account of the courts' refusal to refer a legal question to the Constitutional Court on the conformity of the impugned provisions of the Hunting Act and of the Regulation with the Constitution and the Convention.

2. The applicant company alleges a violation of Article 1 of Protocol No. 1 to the Convention because it could not obtain full compensation for the damage sustained to its property. This was due to the provisions of §§ 4 and 5 of the Regulation which contained unjustified limitations on the level compensation for damage caused by game depending on the period of the year in which the damage had been sustained. Those provisions were detrimental to the applicant company because the condition of its crop and the scope of damage caused by game was not directly linked to any given season of the year.

3. The applicant company complains under Article 6 of the Convention that its right to a fair trial was breached because the Constitutional Court

examined its constitutional complaint in a bench composed in violation of the Constitution. In particular, the bench of five judges of the Constitutional Court was composed in breach of Article 194 § 1 of the Constitution, since Judge M.M. assigned to the bench, had been elected by the Sejm of the 8th term to a post of a judge of the Constitutional Court that had been already filled by another judge elected by the Sejm of the 7th term.

The Sejm of the 7th term elected R.H., A.J. and K.Ś. as judges of the Constitutional Court. The Constitutional Court confirmed in its judgment of 3 December 2015 (no. K 34/15) and in its decision of 7 January 2016 (no. U 8/15) that these three judges had been elected on the proper legal basis. Accordingly, the Sejm of the 8th term did not have a competence to decide that the election of those judges had been contrary to the Constitution and to elect again other judges of the Constitutional Court, including Judge M.M. to the posts that had already been filled. The applicant company refers to the dissenting opinion of Judge P.T.

QUESTIONS TO THE PARTIES

1. Was the reasoning contained in the judgments given by the ordinary courts in the applicant company's case sufficient to comply with their obligation under Article 6 § 1 of the Convention to give reasons for their judgments (see *Pronina v. Ukraine*, no. 63566/00, §§ 23-25, 18 July 2006; *Fabris v. France* [GC], no. 16574/08, § 72 *in fine*, ECHR 2013 (extracts))?

In particular, did the ordinary courts adequately consider the applicant company's arguments as to the alleged unconstitutionality of section 49 of the Hunting Act and § 5 of the Regulation of the Minister of Environment of 8 March 2010?

2. Has there been an interference with the applicant company's peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1? If so, was that interference lawful and necessary to control the use of property in accordance with the general interest?

Reference is made to the applicant company's argument regarding the limitations on the level compensation for damage caused by game as set out in § 5 of the Regulation. Reference is further made to the Supreme Court's resolution of 19 May 2015 (no. III CZP 114/14).

3. Was Article 6 § 1 of the Convention under its civil head applicable to the proceedings before the Constitutional Court (cf. *Ruiz-Mateos v. Spain*, 23 June 1993, §§ 35-38, Series A no. 262; *Süßmann v. Germany*, 16 September 1996, § 41, *Reports of Judgments and Decisions* 1996-IV;

Voggenreiter v. Germany, no. 47169/99, §§ 30-33, ECHR 2004-I (extracts))?

4. Was the bench of the Constitutional Court, which included Judge M.M. and dealt with the applicant company's constitutional complaint a "tribunal established by law" as required by Article 6 § 1 of the Convention, having regard to the applicant company's arguments regarding the validity of election of Judge M.M.?

Reference is made to the Constitutional Court's judgments of 3 and 9 December 2015 and 11 August 2016 and the decision of 7 January 2016.