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

FOURTH SECTION

DECISION

Application no. 33601/11
Janusz Zygmunt GIL
against Poland

The European Court of Human Rights (Fourth Section), sitting on 7 March 2017 as a Committee composed of:
Nona Tsotsoria, *President,*
Krzysztof Wojtyczek,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*
Having regard to the above application lodged on 10 May 2011,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Janusz Zygmunt Gil, is a Polish national, who was born in 1958 and lives in Sitno.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.
3. The applicant owns 24 hectare-land in Sitno, which is registered in the local land and mortgage register under no. ZA1Z/00070325/1. The land in question is classified as a single-use farming land (*grunt rolny*) and it has served the applicant for growing various seasonal crops such as beetroots and millet.
4. The general conditions of use of farming land in Sitno are set out in the local master plan (*miejscowy plan zagospodarowania przestrzennego*) which was approved by the Council of the Sitno Commune on

24 September 2002 and which, with some amendments, is still in force. The plan states the following in so far as relevant:

> "... placement of new dwellings is forbidden, except for large gardening and greenhouse farms; existing housing constructions may be developed and modernised, including by means of building a second house for family members in order to improve housing conditions; installation of overhead or underground utilities grids and equipment is possible. ..."

5. As derived from various official documents submitted by the applicant, a gas pipeline running diagonally across the applicant's land as a part of the Ukraine-Zamość grid is featured in the official plan drawn up by P.M., an expert in geodesy, on 4 June 2009. That document has not been submitted to the Court.

6. In 2009 the applicant rejected the offer of the State-controlled KSD (*Karpacka Spółka Gazownictwa*) gas limited liability company[1] to pay him 84,000 Polish zlotys (PLN) (approximately 21,000 euros (EUR)) of one-off compensation for transmission easements (*służebność przesyłu*), namely for the right to install and maintain an underground gas pipeline on part of the applicant's land. The negotiations began in 2008 or earlier.

7. Later, in 2009, the KSG company brought a court action for the same transmission easement on the applicant's land. The case was examined by the Zamość District Court (*Sąd Rejonowy*). The domestic court heard a number of witnesses and was presented with two expert reports estimating the loss of the value of the land which would be caused by the pipeline and the amount of just compensation due to the applicant.

8. The first report was drawn up on 15 July 2009 by a real-estate appraiser, J.N., who had been contracted by the applicant. The appraiser estimated just compensation at PLN 259,259 PLN (approximately EUR 64,815). He concluded that the gas pipeline would affect the applicant's entire land which was highly attractive and with a lot of potential for development. It was noted that the underground pipeline admittedly would not affect the applicant's usual farming activity. It would nevertheless make it impossible for him to grow a garden or an orchard, or to build a greenhouse. It was also stated that the land was located 10 kilometres from the Zamość city limits and that, in the future, it would probably be re-classified and would become a residential area. The appraiser's calculation took into consideration the following elements: (a) calculation that the surface affected by easement measured 24 hectares; (b) estimation that the maximum market value of one hectare of land was PLN 22,000 (approximately EUR 5,500); that estimation was concluded in view of twelve specified sales of single and multi-use farming lands located

[1] The KSG company has recently been transformed into the PSG (*Polska Spółka Gazownictwa*) limited liability company which owns 97% of the gas supply market in Poland and which is part of the State-controlled PGNiG joint stock company.

nearby and the 2002 local master plan, in so far as it designated the applicant's land for agricultural use and featured the gas pipeline running in a diagonal strip across the applicant's land and across other plots of land in the area; and (c) the 1.49 "K-coefficient" as calculated by the appraiser.

9. The second report was drawn up on 30 November 2009 by the court-appointed expert (*biegły*), in geodesy, J.S. The expert estimated just compensation at PLN 1,500 PLN (approximately EUR 375). The expert concluded that the applicant could continue using the area beyond the easement for farming, which was in line with the land's current use and classification. His calculation took into consideration the following elements: (a) calculation that the surface affected by easement measured 0.4470 hectare; (b) estimation that the maximum market value of one hectare of land was PLN 16,710 (approximately EUR 4,180); that estimation was concluded in view of eleven unspecified sales of land and the 2002 local master plan; and (c) the 0.2 maximum default "K-coefficient".

10. Both reports employed the same calculation method ("V.8. Standard"), which complied with the "Rules on estimation of the value of damage caused by construction of underground or overhead infrastructures" issued by the Polish Federation of the Boards of Property Appraisers (*Polska Federacja Stowarzyszeń Rzeczoznawców Majątkowych*). According to these rules (namely, point 1.6.5.), just compensation for the existence of utilities installations shall be calculated against the decrease of the value of the land in so far as the utilities installation has caused permanent restriction in the use of the property or changed the land's current function.

11. On 16 December 2009 the applicant contested the court-appointed expert's report, arguing that the expert had applied a wrong coefficient and considered that the applicant's land was only designated for agriculture and not for construction. To that effect, he referred to the 2002 local master plan which, as stated by the applicant, explicitly allowed for placement of greenhouses and for construction of new dwellings, in particular, of a second house for family members. The applicant also submitted that the expert had failed to provide the details of the sales on the basis of which he had made his estimation of the market value of one hectare of land. In particular, the report was not clear as to the location of the estates sold and as to their type. The applicant further asked the domestic court to obtain information about the sales of land similar to his, from an independent State institution, the Agency of Agricultural Land (*Agencja Nieruchomości Rolnej*) and, if necessary, from the District Construction Inspector (*Powiatowy Inspektor Budowlany*). Lastly, the applicant claimed that court-appointed experts in geodesy might be biased, as they were likely to have interests in obtaining lucrative orders from the KSG company, which was the principal customer in the market of land evaluations.

12. At the hearing which was held on 12 January 2010 the court-appointed expert (J.S.) provided more detailed information about the comparative sales on which he had relied in his report. He also explained that in the absence of similar easements in the area, it was impossible to calculate the K-coefficient; hence the default coefficient had to be used. The domestic court ordered the Sitno Commune Office to provide information as to the current designation of the applicant's land in the local master plan.

13. On 2 February 2010 the Zamość District Court granted the KSG company the right of transmission easements sought, awarding the applicant PLN 1,500 (approximately EUR 375) as compensation for losses, including the reduction of the value of the land caused by the construction of the pipeline, and for loss of profit. It was specified that the gas pipeline would run underground on a surface measuring 745 metres in length and 6 metres in width diagonally across the applicant's land, as featured in the plan of 4 June 2009 (see paragraph 5 above).

14. The domestic court relied entirely on the report of the court-appointed expert, having observed that the applicant's challenge of 16 December 2009 (see paragraph 11 above) had not discredited the report's thoroughness and the professionalism of the expert. The domestic court disregarded the report which had been drawn up by the appraiser contracted by the applicant (see paragraph 8 above).

15. The applicant appealed, arguing that J.S.' report was imprecise and erroneous, and claiming PLN 259,259 of compensation for the easements. In particular, the applicant submitted that compensation should have been calculated for the entire surface of the land and that the K-coefficient should not have been used in its default amount. The applicant also submitted that the amount of compensation awarded was unjust in view of the fact that in the past the KSG company had offered him PLN 84,000 for the easements (see paragraph 6 above). Lastly the applicant asked that an additional report be obtained from another court-appointed expert in view to establishing, among others, the market value of one hectare of the land in the region and whether the whole or only a part of the applicant's land was affected by the easements.

16. At the hearing of 22 April 2010 the appellate court obtained a supplementary report from the court-appointed expert, J.S. The expert could not tell why his and J.N.'s reports diverged. He stated that it was possible to seek the change of classification from farming land to another category. He had nevertheless made his evaluation on the basis of the local master plan as in force in 2009. J.S. also submitted that the restrictions on the use of the land in question after the laying of the pipeline stemmed only from the fact that the applicant would not be able to build or plant trees in the easement zone. He would nevertheless be able to use that part of the land as he had been using it so far, that is, for farming. The function of the land therefore

would remain unchanged. The expert also reiterated that in the absence of relevant data only a default K-coefficient could be employed.

17. At the same hearing, the appellate court dismissed the applicant's lawyer's motions to obtain a report from another court-appointed expert; to hear the applicant on the issue of the amount of compensations awarded for similar easements to his neighbours and to obtain copies of easement contracts between the KSG company and the applicant's neighbours. The applicant's lawyer registered a formal objection to the dismissal of those motions.

18. On 29 April 2010 the Zamość Regional Court (*Sąd Okręgowy*) dismissed the appeal, finding that the report which had been prepared by J.N. constituted inadmissible evidence because it had been privately obtained by the applicant and had not triggered the first-instance court to order another report from a court-appointed expert. The appellate court also expressly observed that the applicant had not presented motions for any other evidence. The domestic court also observed that the fact that higher compensation had been offered by the KSG company during negotiations could not have any bearing on its ruling as to the amount of compensation. The latter could have been based solely on the court-appointed expert's report.

19. The applicant lodged a cassation appeal against that judgment, *inter alia*, on the ground that the courts had dismissed his motion for a new expert report.

20. On 9 February 2011 the Supreme Court (*Sąd Najwyższy*) decided not to entertain the applicant's cassation appeal, holding that the case did not raise any universally significant legal issue.

B. Relevant domestic law and practice

21. Transmission easements are limited property rights regulated by the Civil Code and Other Acts Amendment Act of 30 May 2008, which entered into force on 3 August 2008 (*Ustawa o zmianie ustawy - Kodeks cywilny oraz niektórych innych ustaw* – "the 2008 Amendment Act"). Under Article 305^1 of the Civil Code, a utility company (which owns a utility grid or equipment and is responsible for the supply and distribution of electric energy or other utilities to a given area) is entitled to enter onto and use property owned by a third party in a specific manner to run a sewage or gas pipeline or a utility grid situated on the land. The landowner, in turn, is restricted in his right to use the servient part of the estate.

22. Under Article 305^2 of the Civil Code, the landowner and the utility company shall establish a transmission easement either by means of a contract or a court action. Just compensation (*wynagrodzenie*) is payable for the easement from the moment of its establishment.

23. Article 305^4 of the Civil Code provides that transmission easements are further regulated, in so far as applicable, by the provisions on land easements.

24. The criteria for the calculation of the compensation awarded under Article 225 of the Civil Code were laid down by the Supreme Court in its resolutions of 17 June 2005 (III CZP 29/05) and 10 July 1984 (III CZP 20/84), adopted by a bench of three and seven judges respectively. The compensation must be commensurate with the degree of interference with the plaintiff's property rights and must not, in the long run, flagrantly exceed the value of the part of the land encumbered by the utility installation. The Supreme Court accepted that, as a consequence, the amount of annual compensation awarded was likely to be insignificant.

COMPLAINTS

25. The applicant invoked Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. He essentially complained that by dismissing his motions for evidence the domestic courts had ruled on the basis of an erroneous expert's report and had awarded him disproportionately small compensation for the transmission easements which they granted to a commercial company.

THE LAW

26. The applicant essentially complained that by dismissing his motions for evidence the domestic courts had ruled on the basis of an erroneous expert's report and had awarded him disproportionately small compensation for the transmission easements which they had granted to a commercial company. The applicant submitted, in particular, that the value of his entire land would significantly be reduced by the gas pipeline running diagonally across his estates; that the restrictions on his use of the land were disproportionate and that the compensation awarded to him was outstandingly lower than the commercial profit which the KSG company would derive from its installation. The applicant invoked Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

The Court, being the master of characterisation to be given in law to the facts of the case, considers that this complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention only (see *Piekarska and 32 other applications v. Poland* (dec.), no.8585/13, § 95, 17 May 2016). This provision 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."

27. The Court observes that in the case of *Piekarska* (cited above, §§ 94-107), it has dealt with a similar complaint, namely that the amount awarded to the owner by the domestic court had been disproportionately small in view of the public nature of the easements which he had had to endure and the fact that the utility company had been controlled by the State and derived commercial profits from the restrictions on private land.

28. The case in question concerned agricultural land of an unspecified size, which at the time of the acquisition by one of the applicants, was already encumbered by the existence of an overhead electrical grid with a number of electrical poles. In that case, in 2015 the domestic court awarded the said applicant PLN 41 (approximately EUR 10) on account of the utility company's seven-year-non-contractual use of the land. That amount was in line with the calculation put forward by a court-appointed expert and with the criteria set out by the Supreme Court. The Court examined the relevant part of that application under the second paragraph of Article 1 of Protocol No. 1, allowing Contracting States to control the use of property in accordance with the general interest. The Court declared that complaint manifestly ill-founded, holding that the impugned domestic court's decision was not arbitrary or otherwise unfair and that the remuneration awarded to the applicant, the amount of which was in line with the calculations of a court-appointed expert, was proportionate to the degree of interference with the applicant's property rights. The Court also did not find any indication that the legal regime in respect of the applicant's property constituted a disproportionate and excessive burden for him. The Court's conclusion was based on the following reasons: (a) At the time of the acquisition by the applicant, the estates in question had already been encumbered by the existence of the utility installations and the applicant either was or should have become aware of the legal regime in respect of it; (b) The surface area taken up by the installations in question appeared rather insignificant and the presence of the protective zone did not constitute a significant impediment to the sale or use of the land for residential or agricultural purposes; there was also no indication that the legal regime in respect of the applicant's property entailed actual financial losses for the applicant beyond and above the compensation already awarded; (c) under the applicable law the owner of the utility installations was under a duty to reduce any interference with the applicant's use of his property to a minimum and the

applicant was entitled to claim compensation should any damage result from the maintenance of such equipment; (d) the applicant had his case examined on the merits by two levels of domestic court in fully adversarial proceedings (see *Piekarska*, cited above, §§ 94-107).

29. The Court firstly observes that, unlike the applicant in the case of *Piekarska*, cited above, the applicant in the instant case acquired his land free from any burdensome utility installations. It must nevertheless be noted that the possibility of installing utilities grid on farm land in Sitno was envisaged in the 2002 local master plan and that the actual gas pipeline, running diagonally across the applicant's land, was featured in the 2009 legally-binding plan. The applicant did not imply that he had not been aware of the commune's plans to have the utilities grid installed on his land or that he had not had any time to react to that new situation. To this end, it must be noted that already in 2008 the applicant was negotiating a contract on transmission easements with the KSG company (see paragraph 6 above).

30. Secondly, the surface area which is to be taken up by the underground gas pipeline and the protective zone is a strip measuring 745 metres in length and 6 metres in width (see paragraph 13 above). Even though, such a surface cannot it itself be viewed as insignificant, in the Court's calculation, it only constitutes approximately 1.875 % of the applicant's land. Moreover, although the installation in question would diagonally divide the applicant's land in two parts (see paragraph 5 above), which understandably, would pose some difficulty to the applicant, he would still be left with two large and more or less equal parts of land, in the Court's calculation, each measuring approximately 11-12 hectares.

31. Thirdly, the Court observes that the underground pipeline would not constitute a significant impediment to the sale or use of the land for agricultural purposes under its current designation and use. There is also no indication that the legal regime in respect of the applicant's property would entail actual financial losses for the applicant beyond and above the compensation awarded. To this end, it must be noted that the 2002 local master plan for the area clearly classifies the applicant's property as farming land (see paragraphs 3 and 4 above), leaving the owner a choice between various types of agriculture, which indeed include creation of a garden or an orchard, or construction of greenhouses. The gas installation in question would not ordinarily affect the applicant's current type of farming, namely using the land as a field for beetroots, millet or similar crops. On the other hand, it would indeed have a hampering effect if the applicant decided to switch to greenhouse-agriculture, which is what he evokes in his application. Even then, however, the obstacle would be minimal as it would only result in the impossibility to place greenhouses directly in the 6-metre-wide protective zone or to block access to the KSG's installation (see paragraph 21 above). It follows that, in the Court's calculation, the applicant is unrestricted in the use of approximately 98% of his land for any

type of farming which he may wish to develop in the future. The same reasoning could extend to the applicant's argument that the gas pipeline would impede the construction of his second family house. In the circumstances of the case, however, it is uncertain that the relevant provision of the 2002 master plan, which allows for development of existing dwellings, actually applies to the applicant's situation. In particular, on the basis of the case materials, it does not appear that the applicant has his principal house and dwellings on the estates which are the subject of the easement.

32. In addition, the re-classification of the applicant's farming land to residential property was at the relevant time merely a theoretical possibility and, as such, it could not have been taken into consideration when the assessment of compensation was made.

33. The Court fourthly notes that, like in the case of *Piekarska*, the applicable law protects the applicant in the event any damage resulted from the laying and maintenance of the gas pipeline. The owner of the utility installations would be under a duty to reduce any interference with the applicant's use of his property to a minimum.

34. Lastly, the applicant had his case examined on the merits by two levels of domestic court in fully adversarial proceedings. The decision regarding how much money to award for the granting of the easements to the KSG company was based on the report of an independent court-appointed expert, who complied with the standard rules issued by the Polish Federation of the Boards of Property Appraisers (see paragraph 10 above). Following the applicant's challenge of the report, the domestic courts twice obtained additional information from the expert (see paragraph 12 and 16 above) to ultimately refute the applicant's allegations about the unknown comparative sales or the wrong "K-coefficient" without the need to seek another report from a new expert. The first-instance court also ordered the Sitno Commune Office to provide information as to the current designation of the applicant's land in the local master plan (see paragraph 12 above). It must be observed that the flagrant difference between the calculation of the court-appointed expert and that of the real estate-appraiser contracted by the applicant stemmed not so much from the estimation of the average market price of one hectare of land (PLN 22,000 vs PLN 16,710), but mainly resulted from the fact that the loss of the land's value was calculated either against the surface of 24 hectares or of 0.4470 hectare. On this point the Court cannot but reiterate its observations from paragraphs 30 and 31 above that the applicant is still entitled to the undisturbed use of the vast majority of his land. Lastly, it appears that the overall compensation awarded to the applicant corresponded to the awards usually granted in connection with transmission easements in proceedings for compensation for non-contractual use of the land by the energy company (compare with *Piekarska*, cited above, § 17).

35. In the light of the above considerations, the Court considers that a "fair balance" has been struck between the demands of the general interest of the community (access to utilities across the country) and the requirements of the protection of the applicant's fundamental property rights.

36. The application is therefore 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.

Done in English and notified in writing on 30 March 2017.

Andrea Tamietti
Deputy Registrar

Nona Tsotsoria
President