



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

FOURTH SECTION

CASE OF ŻEBROWSKI v. POLAND

(Application no. 34736/06)

JUDGMENT

STRASBOURG

3 November 2011

FINAL

04/06/2012

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Żebrowski v. Poland,

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

Ljiljana Mijović, *President*,

Lech Garlicki,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 11 October 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34736/06) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Kazimierz Żebrowski (“the applicant”), on 11 August 2006.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that he had been deprived of access to a court competent to examine the merits of his compensation claim and of access to the Supreme Court.

4. On 18 October 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1928 and lives in Szczytno.

6. On 15 December 1946 the applicant’s parents’ house and farm were destroyed and burned down by the Security Office (*Urząd Bezpieczeństwa*) in the framework of a campaign against anti-communist resistance to which

the applicant, his father and his brother belonged. Subsequently, his father and brother were convicted and prison sentences were imposed on them.

7. In 1993 the applicant's brother requested that the decisions given in his criminal case be declared null and void on the strength of the Law of 23 February 1991 on annulment of convictions of persons persecuted for activities aimed at achieving independence for Poland (*Ustawa o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego* – “the 1991 Act”, see paragraphs 32 and 33 below). After six years of proceedings, a decision in the applicant's brother's favour was ultimately given in 1999.

8. On 31 January 2003 the applicant and his siblings filed a civil claim against the State Treasury with the Ostrołęka Regional Court. They claimed compensation for the destruction of their parents' farm.

9. During the proceedings the State Treasury raised an objection of prescription against the compensation claim.

10. On 11 February 2004 the first-instance court held that the claim against the State Treasury was time-barred and dismissed the claim. The court observed that it was not in dispute that the farm had been burned to the ground by agents of the Security Office in the circumstances described by the plaintiffs. It further accepted that it had been a Stalinist crime. It was also an event which could give rise to the State's liability in tort. The court confirmed that the applicant's brother and father had subsequently been imprisoned.

11. The court went on to state that the State Liability Act (*ustawa o odpowiedzialności Państwa za szkody wyrządzone przez funkcjonariuszów państwowych*) adopted on 15 November 1956 (“the 1956 Act”) had had the specific purpose of creating a special legal framework making it possible for victims of Stalinist crimes to seek redress for damage they had suffered. It provided for a one-year time-limit for submitting relevant compensation claims (see paragraph 26 below). That time-limit had started to run on 28 November 1956, the date of publication of the 1956 Act.

12. The court further referred to a resolution given by the Supreme Court (III CZP 76/96, 11 October 1997; see paragraph 35 below). The Supreme Court had acknowledged that for general political reasons it might have been impossible for the victims to vindicate compensation claims in respect of Stalinist crimes having been committed before 4 June 1989, the date on which the first partially-free elections to parliament had been held and in respect of which it has been widely accepted that it had marked the collapse of the communist regime. Before that date victims of Stalinist persecution and also victims of later persecution against the State's political opponents could legitimately fear that bringing such cases before the courts would provoke the State's ire. Hence, it could be accepted that the one-year time-limit fixed by the provisions of the 1956 Act could be said to have

started to run only on 4 June 1989. However, as the applicant had brought his case to the courts in 2003, his claim was time-barred.

13. The court further held that the provisions of the Civil Code adopted in 1964 governing the State Treasury's liability in tort provided for a three-year time-limit. However, they were not applicable in the applicant's case because compensation claims for Stalinist crimes were governed by the special liability regime created by the 1956 Act.

14. The court further observed that it was also possible to accept that the one-year time-limit, fixed by the provisions of the 1956 Act, should be understood as having started to run only from the date on which the plaintiffs had obtained the 1999 judicial decision confirming that the applicant's family had been the victims of political repression. It could not be excluded that it had been only after that judgment that they had realised that their attempts to seek compensation for the damage suffered in 1946 and later years were not doomed to fail. However, their civil claim had been lodged with the court more than three years later.

15. The court further held that the State Treasury's objection that the claim was time-barred did not amount to an abuse of rights within the meaning of Article 5 of the Civil Code (see paragraph 38 below).

16. The applicant, represented by a legal-aid lawyer, appealed. He submitted, *inter alia*, that given the particular factual and historical context of the case, the court had erred in holding that the State Treasury's objection of prescription should not be seen as an abuse of rights within the meaning of Article 5 of the Civil Code. He stressed that it was not in dispute that the applicant and his family had been victims of political repression by the totalitarian regime. The destruction of the farm by the communist secret police had not been disputed. Hence, the objection made by the State, which had resulted in the applicant's claim failing, had to be seen as an abuse of rights incompatible with the "principles of social co-existence". It was precisely that objection, dictated by the fiscal interests of the State, which had made it possible for the State to leave people seriously wronged in the past by its own agents without any compensation for its use of violence and for manifest and undisputed damage wrought for political reasons.

17. The judgment was upheld on 25 November 2005 by the Warsaw Court of Appeal. That court approved the findings of fact made by the lower court as to the destruction of the applicant's parents' farm and the imprisonment of the applicant's family members. However, it also accepted the lower court's conclusion that the compensation claim was time-barred. It concurred that the events giving rise to the damage, which were not in dispute, were governed as to the issue of liability by the special regime created in respect of Stalinist crimes by the 1956 Act. It further agreed that in the conditions of a non-democratic regime the running of the time-limit could be considered to have been stayed until the collapse of communism in 1989.

The court further noted that the 1991 Act had not been applicable to the applicant's civil case because it only concerned matters arising in connection with wrongful and politically-motivated criminal convictions handed down by the Stalinist authorities. It could only be resorted to in order to have criminal convictions declared null and void, but was not applicable in the context of civil cases and compensation claims.

18. The court endorsed the conclusions of the lower court, relying on the same resolution of the Supreme Court. It observed that even if the time-limit was considered as having started to run in 1989, the claim also had to be declared time-barred.

19. The court further shared the conclusions of the lower court that the State Treasury had had the right to submit the objection of prescription and that such an objection in the applicant's case had not amounted to a breach of Article 5 of the Civil Code, in so far as that provision prohibited abuse of one's civil rights to the detriment of other persons.

20. On 26 November 2005 the applicant requested the Warsaw Court of Appeal to prepare written grounds for its judgment and announced his intention to lodge a cassation appeal against it.

21. On 29 December 2005 the applicant requested the Warsaw Court of Appeal to grant him legal aid for the purposes of lodging a cassation appeal with the Supreme Court.

22. On 14 February 2006 the Court of Appeal served the judgment, with its written grounds on the applicant's privately hired lawyer, who had apparently replaced the legal-aid lawyer representing the applicant earlier. On 16 February 2006 that lawyer informed the applicant that he had thirty days to lodge a cassation appeal. At that time, the relevant time-limit was in fact sixty days (see paragraph 41 below). It was therefore due to expire on 14 April 2006.

23. On 27 February 2006 the court allowed the applicant's request to be granted legal aid for the purposes of the proceedings before the Supreme Court (see paragraph 21 above).

24. On 3 March 2006 O.Z., the lawyer assigned to the applicant's case under the legal-aid scheme, was informed that she had been assigned to the case.

25. In her written opinion of 7 April 2006 O.Z. explained to the applicant why she considered that there were no grounds on which a cassation appeal could be based and refused to prepare such an appeal on the applicant's behalf.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Specific regime of civil liability of the State for Stalinist repression

26. Domestic law provides for a specific individual entitlement for victims of persecution during Stalinist times (*ustawa o odpowiedzialności Państwa za szkody wyrządzone przez funkcjonariuszów państwowych*) to bring a civil claim under the State Liability Act passed on 15 November 1956. It provided for a one-year time-limit, running from the date of that law's entry into force on 28 November 1956, for submitting compensation claims to the civil courts for damage caused by wrongful arrest, detention, conviction and torture.

B. State liability for tort

27. Articles 415 et seq. of the Polish Civil Code, which entered into force in 1964, provide for liability in tort. Under this provision, anyone who through his or her fault causes damage to another is required to redress such damage.

28. Article 77 § 1 of the 1997 Polish Constitution, which entered into force on 17 October 1997, states, in so far as relevant, as follows:

“Everyone shall have the right to compensation for any harm done to him or her by any act of a public authority in breach of the law.”

1. Provisions of the Civil Code applicable from 10 October 1994 to 1 September 2004

29. Articles 417 et seq. of the Civil Code (*Kodeks cywilny*) provide for the State's liability in tort. In the version applicable until 1 September 2004, Article 417 § 1, which lays down a general rule, read as follows:

“1. The State Treasury shall be liable for any damage caused by a State official in the performance of his or her duties.”

2. Provisions of the Civil Code applicable from 1 September 2004

30. On 1 September 2004 the Civil Code (Amendment) Act, passed on 17 June 2004 (“the 2004 Amendment”), entered into force. The relevant amendments were in essence aimed at enlarging the scope of the State Treasury's liability for tort under Article 417 of the Civil Code – including the addition of a new Article 417¹ – and provision for the State's tortious liability for failure to enact legislation, a concept known as “legislative omission” (*zaniechanie legislacyjne*).

31. Under the transitional provisions of section 5 of the 2004 Amendment, Article 417 as applicable before 1 September 2004 applies to all events and legal situations that subsisted before that date.

C. Redress for victims of political repression by the communist authorities

32. The Act of 23 February 1991 on the annulment of convictions of persons persecuted for activities aimed at achieving independence for Poland (*Ustawa o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego* – “the 1991 Act”) sets out rules concerning the conditions under which certain politically-motivated convictions rendered from 1 January 1944 to 31 December 1956 can be declared null and void, and also provides for the State’s civil liability for such convictions. Section 1 paragraph 1 of the 1991 Act provides, insofar as relevant:

“Convictions or other decisions rendered by the Polish judicial, prosecuting or extra-judicial authorities during the period ... lasting from 1 January 1944 to 31 December 1956 shall be declared null and void if the offence with... which the person concerned was charged or convicted related to activities undertaken by him or her with the aim of achieving independence for Poland, or if the decision in question was taken on the grounds that he had undertaken such activity. The same applies to persons convicted of resisting the collectivisation of farm land and compulsory contributions of foodstuffs.”

33. Under section 2 of the 1991 Act, regional courts or, in cases concerning military offences, regional military courts, are competent to deal with requests lodged under section 3 of the 1991 Act. Section 3 states, insofar as relevant:

“3. A party entitled to file an application under section 1 paragraph 1 shall be entitled to appeal against a decision on whether or not the original decision should be declared null and void.

According to section 2 paragraph 1 *in fine* of this Law, a decision declaring the original conviction null and void shall be tantamount to a verdict of acquittal. If such a conviction is declared null and void, a victim of repression is entitled, under section 8 paragraph 1 of this Law, to compensation from the State Treasury for his wrongful conviction.”

D. Case-law of the domestic courts on compensation for victims of Stalinist repression

34. Against the background of the 1956 Act, a body of case-law evolved after 1989 concerning the compensatory entitlements of victims of Stalinist persecution. This case-law also dealt with the manner in which the beginning of the time-limit was determined (e.g. the Supreme Court

decisions in the cases of: V CKN 1725/00, delivered on 29 November 2001; I CKN 1049/000, delivered on 2 February 2001; I CKN 988/00, delivered on 1 October 2001; and I CKN 1151/00, delivered on 29 May 2001).

35. In its Resolution III CZP 76/96 given on 10 October 1996, the Supreme Court examined a legal question put to it by the Warsaw Court of Appeal as to the date on which the prescription time-limit in respect of Stalinist crimes had started to run. It held that the general political situation prior to 1989 could be equated to a denial of access to justice regarding claims originating in Stalinist crimes. The Supreme Court stated that the time-limit for seeking compensation for damage caused by such crimes should be examined in the light of the provisions of civil law. In particular, in each individual case the court was obliged to examine whether the time-limit should be seen as not having started to run until 4 June 1989 or whether its running should be seen as having been stayed until that date. It stated, *inter alia*:

“Hence, taking into account the historical truth about the communist regime in Poland, it is necessary to examine whether the State’s responsibility has not been sought only because of circumstances which could be controlled by the interested persons, or because of reasons of an objective character, amounting to a denial of justice. The latter would consist in an impossibility to provide evidence in respect of facts covered up and censored by the communist authorities. ... When such impossibility is shown, the court can, by analogy, apply the provisions which provide for the running of the prescription time-limit being stayed in situations where the judicial system does not function [and the citizens’ right of access to court is denied.]”

36. In its judgment of 14 July 2004 (SK 8/03) the Constitutional Court examined a constitutional complaint of a claimant who had challenged the compatibility with the Constitution of Article 6 of the 1956 Act, instituting a time-limit of one year after 28 November 1956 for the submission of compensation claims in respect of civil wrongs caused by State agents prior to the entry into force of that Act. The complainant argued that that period had been unreasonably short, to the detriment of victims, and that in the political realities of the system its short duration had made it impossible for them to effectively vindicate their well-founded compensation claims originating in Stalinist oppression. As a result, the system created by that Act had been nothing more than a sham.

37. The Constitutional Court noted, *inter alia*, that there existed various time-limits for the lodging of claims in respect of various kinds of damage resulting from the State’s acts. The mere fact that there were differences in the length of those time-limits was insufficient for a finding that the time-limit concerned in the claimant’s case had been discriminatory. It further held that, in the examination of the constitutionality of the provision in issue in the complaint, it was necessary to have regard to the manner in which it was interpreted in judicial practice. It referred to the practice of the Supreme Court – in particular, to its resolution of 11 October 1996. It noted, firstly, that the Supreme Court had been of the view that the political

situation during the communist times could legitimately be seen as creating a “denial of justice”, justifying the staying of the prescription time-limit. Secondly, the Supreme Court had not excluded that grounds for such a stay could, in individual cases, persist even after June 1989. Thirdly, the Supreme Court had often emphasised that the courts were obliged to examine whether the State Treasury’s reliance on prescription of a compensation claim was compatible with the prohibition of abuse of one’s rights, stipulated by Article 5 of the Civil Code. This approach by the Supreme Court had tremendous importance for the effective litigation of compensation claims by persons wronged by the communist regime.

E. Prohibition of abuse of rights

38. Article 5 of the Civil Code reads:

“No one shall exercise any right of his in a manner contrary to its socio-economic purpose or to the principles of co-existence with others (*zasady współżycia społecznego*). An act or omission [fulfilling this description] on the part of the holder of the right shall not be deemed to be the exercise of the right and shall not be protected [by law].”

F. Prescription

39. Article 117 of the Civil Code, in so far as relevant, reads as follows:

1. (...) [P]ecuniary claims are subject to prescription.

2. After the prescriptive period has elapsed, the defendant can avoid meeting [such a claim], unless the defendant waives the plea of prescription.

40. Under paragraph 3 of that provision, which lost its binding force in 2000, the courts were obliged to examine on their own motion whether a claim had become prescribed. After that provision was repealed, the courts have to examine the issue of prescription upon an objection submitted by a party.

G. Cassation appeals to the Supreme Court

41. Provisions of civil law and the case-law of the domestic courts concerning cassation appeals have been extensively summarised in the judgments in the cases of *Siałkowska v. Poland*, no. 8932/05, 22 March 2007; *Staroszczyk v. Poland*, no. 59519/00, 22 March 2007; and *Bąkowska v. Poland*, no. 33539/02, 12 January 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS PRESCRIPTION OF THE APPLICANT’S CLAIM

42. The applicant complained that the decisions given by the courts in his case had been in breach of his right of access to court guaranteed by Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] tribunal ...”

A. Admissibility

43. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

44. The applicant complained that the courts had given judgments flying in the face of any notion of justice by refusing to award compensation for the destruction of property obviously and indisputably caused by State agents and wrought within the framework of a campaign aimed at destroying all opposition against the inception of the communist regime. It had not been in dispute in the proceedings that the applicant’s family had suffered serious damage at the hands of State agents and that this damage had been inflicted on grounds of political repression. The situation of the applicant’s family had seriously deteriorated as a result of the destruction of their property and their subsequent imprisonment. Their life prospects had also considerably worsened as a result of their being branded at that time as political enemies of the regime. The courts in the present case had confirmed that in their judgments. Nonetheless, the courts had found that the applicant’s claim was time-barred, essentially relying on provisions providing for a very short time-limit for the submission of compensation claims, namely merely one year from November 1956. As a result, the applicant had been deprived of access to a court competent to examine the merits of his compensation claim.

The applicant argued that the events of December 1946 were such as to have amounted to a communist crime within the meaning of section 2 of the

Institute of National Remembrance Act 1998 (*Ustawa o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni Przeciwko Narodowi Polskiemu*). Under the provisions of that Act, criminal responsibility for communist crimes was not subject to prescription. Hence, there had been no good grounds on which civil liability for such crimes should be extinguished by way of prescription.

45. The applicant further argued that that time-limit had manifestly been unreasonably short, given that in 1956 and until the collapse of the communist regime people had simply been afraid of going to the courts against the State.

46. All the provisions of domestic law, taken together, as applied by the courts in his case, had led to a situation in which the damage which his family and he had suffered had remained uncompensated. The uncontested communist crime committed against his family had gone unpunished. The failure of the State to acknowledge its responsibility for persecutions inflicted on the applicant's family in the past had amounted to a breach of his rights. The manner in which the courts had applied the law in his case had conferred undue protection on the fiscal interests of the State. The courts had completely disregarded the legitimate interests of victims of the relentless persecution of citizens involved in the fight for the independence of Poland after the Second World War and had barred the applicant's access to justice.

47. The applicant submitted that the authorities had stressed the importance of the fight for Poland's independence before 1989. However, their attitude had merely paid lip service to those involved in that struggle. On the one hand, significant funds had been allocated to construction of monuments and organisation of festive events, while, on the other hand, people seriously and lastingly wronged in the past had been refused compensation on the grounds that the State was too poor to create a fair compensation scheme for the victims of communist repression.

48. The Government submitted that the applicant's case had been examined on the merits by courts at two instances, each of them having full jurisdiction. The courts had conducted the proceedings in compliance with domestic procedural rules and with domestic law. The mere fact that the decisions given in the applicant's case had not been in his favour was not tantamount to his having been deprived of access to court.

49. The courts had held that it was not in dispute that the farm had been burned to the ground by the Security Office. They had accepted that this had been a Stalinist crime and an event which could give rise to liability in tort. However, the Ostrołęka Regional Court had noted that the 1956 Act was still technically binding. The Government emphasised that the courts, when determining the date from which the one-year time-limit specified in that Act could be said to have started to run, had examined whether circumstances existed which would have allowed them to find for the

applicant. In so doing, the Ostrołęka Regional Court had referred to the Supreme Court's resolution of 11 October 1996 (see paragraph 35 above). That court had accepted that before 4 June 1989 it might have been impossible for political reasons to vindicate claims against the Security Office. It had therefore held therein that the one-year time-limit could be said to have only started to run on that date and had expired on 4 June 1990. The applicant's submission that the courts had overlooked the historical aspects of the case was therefore ill-founded.

50. The Government submitted that, when making the objection that the applicant's claim was time-barred, the State Treasury had availed itself of its procedural rights and had complied with its obligation to do so.

51. The Government argued that the applicant had brought his case before the courts twelve years after the expiry of the time-limit. In addition, he had failed to indicate any circumstances which might have justified that delay in lodging his compensation claim with the courts.

52. The Government further submitted that the domestic courts' decision that the claim was time-barred could not be seen as an abuse of rights within the meaning of Article 5 of the Civil Code. Hence, the decisions given in his case had not breached the applicant's right of access to court guaranteed by Article 6 of the Convention.

2. *The Court's assessment*

(a) *The general principles*

53. The right of access to court in issue in the present case is derived from Article 6 and was established in *Golder v. the United Kingdom* (21 February 1975, §§ 28-36, Series A no. 18), in which the Court established, by reference to the principles of the rule of law and the avoidance of arbitrary power underlying the Convention, that the right of access to court was an inherent aspect of the safeguards enshrined in Article 6. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court.

54. The Court refers to its settled case-law to the effect that "Article 6 § 1 extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 192, Series A no. 102; and *The Holy Monasteries v. Greece*, 9 December 1994, § 80, Series A no. 301-A). The Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 116-17, ECHR 2005-X). Article 6 will, however,

apply to disputes of a “genuine and serious nature” concerning the actual existence of a right, as well as to the scope or manner in which it is exercised (see *Bentham v. the Netherlands*, 23 October 1985, § 32, Series A no. 97, and *Z and Others v. the United Kingdom*, cited above, § 87).

55. The right of access to court is not, however, absolute. It may be subject to legitimate restrictions such as statutory limitation periods, security for costs orders, and regulations concerning minors and persons of unsound mind (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-IV; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§ 62-67, Series A no. 316-B; and *Golder*, cited above, § 39). Where the individual’s access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93; *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, § 29, ECHR 2004-IX; *Szwagrún-Baurycza v. Poland*, no. 41187/02, § 49, 24 October 2006). If the restriction is compatible with these principles, no violation of Article 6 will arise (see *Z and Others v. the United Kingdom*, cited above, §§ 92-93).

56. The Court has examined cases in which applicants complained that domestic provisions on prescription of criminal responsibility amounted to a breach of their rights of access to court. In *Stubbings and Others v. the United Kingdom*, the Court dealt with limitation periods under Article 6 of the Convention. It found that a non-extendable time-limit of six years from the applicants’ eighteenth birthdays to bring an action concerning allegations of sexual abuse during childhood did not impair the very essence of the applicants’ right of access to court (judgment cited above, § 52). The Court held that limitation periods in personal injury cases were a common feature of the domestic legal systems of the Contracting States. They served several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (*ibid.*, § 51).

(b) Application of the principles to the circumstances of the case

57. The Court first notes that in the present case it is not in dispute between the parties that Article 6 is applicable to the circumstances of the case.

58. It further observes that the applicant claimed compensation for acts of Stalinist repression against his family. It was not in dispute before the

domestic authorities or before the Court that in 1948 agents of the communist Security Office destroyed and burned the applicant's parents' farm and subsequently imprisoned the applicant's brother and father. Nor was it disputed that this had been an act of political repression.

59. The Court notes that the thrust of the applicant's complaint is that he was denied access to court in respect of his compensation claim arising from the acts of violence and persecution referred to above. The Court observes, firstly, that the applicant was not prevented in any practical manner from bringing his claims before the domestic courts. Indeed, the case was litigated with vigour before two judicial instances (see *Markovic and Others v. Italy* [GC], no. 1398/03, § 105, ECHR 2006-XIV).

60. The courts held that the applicant's civil claim arising from the destruction of the farm was time-barred. The courts referred, first, to the specific legislative measure adopted in 1956 in the aftermath of massive political changes in Poland and in other countries under communist rule at that time, commonly referred to as the "thaw" (*odwilż*). The Act, which entered into force on 28 November 1956, was aimed at making it possible for victims of Stalinist repression to claim compensation for damage if the claim was filed within one year from the Act's entry into force (see paragraph 26 above).

61. It is not necessary, in the circumstances of the present case, for the Court to take a stand on the applicant's argument that this period was too short to afford a realistic opportunity for the numerous victims of Stalinist repression, including those who had been imprisoned and convicted on fabricated and politically-motivated charges, to seek compensation before its expiry. It is true that this one-year time-limit was shorter than the three-year time-limit generally applicable in the context of liability in tort. However, the Court has held that there is no general obligation for States to compensate wrongs inflicted in the past under the general cover of State authority (see *Woś v. Poland*, no. 22860/02, § 72, ECHR 2006-VII; *Klaus and Iouri Kiladzé v. Georgia*, no. 7975/06, § 53, 2 February 2010). In any event, in the present case, the courts did not hold that the time-limit for lodging the applicant's claim had started to run when the 1956 Act entered into force in 1956 and had expired in 1957. In the applicant's case, the courts expressly acknowledged that before the ultimate collapse of the communist regime in Poland in 1989 it might have been either difficult or simply impossible for the victims of Stalinist repression to have had recourse to the 1956 Act. The victims could at that time have legitimately been afraid of taking proceedings against the State, particularly in the context of such a heavily political issue as redress for Stalinist repression of political opposition. The courts observed that the time-limit could therefore be said to have started to run only as from 4 June 1989, the date commonly accepted as having marked the end of the repressive regime and opening the way for the applicant to seek redress openly and without fear.

62. The Court is therefore satisfied that the courts were aware of the difficulties which the applicant might have had in the past in vindicating his compensation claim against the communist regime, that they acknowledged them and that they accepted that these difficulties could and should have had a bearing on the running of the one-year time-limit provided for by the 1956 Act.

63. Furthermore, the courts also examined another possibility for determining the beginning of the one-year prescription time-limit in the present case, a method even more favourable to the applicant. They noted that in 1999 the applicant's brother obtained a judgment to the effect that his arrest and subsequent detention and imprisonment had to be declared null and void as an act of political repression. The 1991 Act applied in that case put in place a special legal scheme designed to examine the validity of judicial decisions given by the communist authorities in the past which had been intended to repress political opponents. The courts accepted that the applicant could have become aware of the fact that his efforts to have the damage compensated offered prospects of success only after that judgment was given in 1999.

64. However, the courts observed that, even assuming that in the circumstances of the case the time-limit could be said to have started to run only in 1999, the applicant had in any event failed to bring his compensation claim before the court within one year from the date on which that judgment became final. It is further noted that, even assuming that the three-year time limit, generally applicable in the context of liability in tort (see paragraph 61 above) was applicable to the circumstances of the case, the applicant's compensation claim was, in any event, brought before the courts in 2003, after the three-year period it had already expired.

65. The Court is therefore of the view that, by also taking into consideration other possible modes of calculating the time-limit, the courts made reasonable efforts to accommodate the difficulties which the applicant might have had in seeking compensation from the State; all to no avail because they found that in any event the claim had been brought before the courts too late.

66. The Court further observes that the extensive reasoning given by the courts shows that they carefully considered the applicant's submissions on their merits, point by point.

67. The Court further reiterates that, in assessing whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to an impugned restriction on an applicant's access to court, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on

the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusions reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z. and Others v. the United Kingdom*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law. In this connection, the Court notes that the domestic courts, when examining the applicant's case, had regard to the case-law of the Supreme Court. The Supreme Court had already, by the time the applicant's case was examined by the courts, considered the issues arising in connection with compensation claims brought by victims of political repression in the past. The domestic courts had regard to the reasoning which the Supreme Court developed in its Resolution given in 1996 (see paragraphs 12 and 35 above).

68. To sum up, the Court is satisfied that the essence of the applicant's right of access to court was not breached.

69. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS LACK OF ACCESS TO THE SUPREME COURT

70. The applicant complained under Article 6 § 1 of the Convention that he had been denied access to the Supreme Court.

Article 6 § 1 reads, in so far as relevant:

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

A. Admissibility

71. The Government submitted that the applicant had failed to exhaust relevant domestic remedies. They asserted that he should have brought a civil action for compensation against the legal-aid lawyer, referring to either Article 415 or Article 448 of the Civil Code. They were of the view that a civil action was an effective remedy where a lawyer, either appointed through legal aid or privately hired, had been negligent in carrying out his or her duties regarding legal representation in judicial proceedings. They also referred to a complaint to the local Bar Association under Articles 28 or 80 of the Bar Act.

The applicant did not address this issue.

72. The Court observes that the remedies referred to by the Government are merely of a retrospective character. They could only, and if the applicant had been successful, have resulted either in the courts granting damages or

in the Bar Association finding the lawyer to have been at fault. Such retrospective measures alone are not sufficient to ensure effective access to a court competent to determine the applicant's civil rights and obligations. The Court therefore rejects the Government's objection.

73. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

74. The applicant submitted he had been deprived of access to the Supreme Court because his legal-aid lawyer had refused to prepare a cassation appeal against the second-instance judgment.

75. The Government argued that in so far as the applicant had complained of erroneous advice as to the time-limit for lodging of a cassation appeal given by his privately hired lawyer, the State could not be held responsible for it. They further argued that the sixty-day time-limit for lodging of that appeal had in the present case started to run on 14 February 2006, when the applicant had been served with the written grounds of the second-instance court's judgment. The applicant's request for legal aid had been allowed on 27 February 2006. The legal-aid lawyer had been assigned to the case on 3 March 2006, forty-two days before the time-limit within which to lodge a cassation appeal was scheduled to expire. On 7 April 2007, one week before the expiry of the time-limit, she had informed the applicant of her refusal. Therefore, the applicant had been represented by the legal-aid lawyer in a proper manner.

2. The Court's assessment

76. The Court has already had occasion to set out at length the relevant principles derived from its case-law in this area (see *Staroszczyk v. Poland*, §§ 121-129; *Siałkowska v. Poland*, §§ 101-107 and *Bąkowska v. Poland*, §§ 44-48; cited above; *Smyk v. Poland*, no. 8958/04, §§ 54-59, 28 July 2009; and *Zapadka v. Poland*, no. 2619/05, §§ 57-61, 15 December 2009). It adopts those principles for the purposes of the instant case.

77. In those cases, the Court has examined the situation of legally-aided parties faced with their lawyers' refusals to prepare cassation appeals in the context of criminal, as well as civil, procedure. As far as the former is concerned, it was established that – under the established case-law of the Supreme Court – the time-limit for lodging a cassation appeal should run *de novo* from the day on which the applicant has been informed of the legal-aid

lawyer's refusal to lodge a cassation appeal. This approach was found to satisfy Convention standards, provided that the applicant has been properly informed about his/her procedural rights at the time when the lawyer's refusal was communicated to him or her (*Kulikowski v. Poland*, no. 18353/03, § 69-71, ECHR 2009-... (extracts), and *Antonicelli v. Poland*, no. 2815/05, § 44-45, 19 May 2009).

78. In the context of civil procedure, the Court has found that the civil courts' approach to the calculation of the time-limit for submitting a cassation appeal was stricter. Thus, the service on the party of information that a legal-aid lawyer had refused to prepare the appeal does not trigger the running of the time-limit *de novo*. That approach was regarded by the Court as being incompatible with Convention standards, save for situations where the refusal of the legal-aid lawyer was notified to the applicant well before the deadline was due to expire (see *Smyk v. Poland*, cited above, §§ 63-65).

79. In the present case, the applicant's privately hired lawyer was served with the written grounds of the court of appeal's judgment on 14 February 2006 and it was on that date that the time-limit started to run. Subsequently, the court granted the applicant's request for legal aid on 27 February 2006 and assigned the lawyer to the case on 3 March 2006.

80. The Court notes that the applicable domestic regulations do not specify the time-frame within which the applicant should be informed of any refusal to prepare a cassation appeal (see *Siałkowska*, cited above, § 114, and *Smyk v. Poland*, cited above, § 60). In the present case, the legal-aid lawyer informed the applicant that she had found no grounds on which a cassation appeal could be prepared on 7 April 2006, over a month after she had been assigned to represent the applicant. It has not been shown or even argued that this delay was justified by any special circumstances.

The Court observes that the applicant was informed of the legal-aid lawyer's refusal only seven days before the time-limit was due to expire. Hence, he was left with so little time to have a cassation appeal prepared and lodged with the Supreme Court as to be deprived of a realistic opportunity of having his case brought to and argued before that court (see *Jędrzejczak v. Poland*, no. 56334/08, 11 January 2011, where the applicant was informed of a legal-lawyer's refusal to lodge an appeal six days before the expiry of the time-limit; compare and contrast with *Smyk v. Poland*, cited above, where after the refusal to assign a second legal-aid lawyer to the case, the applicant had twenty-four days left).

81. Having regard to the above considerations, the Court concludes that in the present case there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage, costs and expenses

83. The applicant claimed in general terms compensation for pecuniary and non-pecuniary damage which he had sustained in connection with the case.

84. The Government contested his claim.

85. The Court finds no link between the violation complained of and the pecuniary damage alleged. It cannot speculate about the outcome of the proceedings had the applicant's claim been examined. The Court therefore rejects the claim in its entirety.

86. However, the Court accepts that the violation found cannot be compensated by the mere finding of that violation. Therefore, the Court finds that the applicant has suffered non-pecuniary damage. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 1,500.

87. The applicant did not make any claim in respect of costs and expenses.

B. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention as regards prescription of the applicant's claim;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's right of access to the Supreme Court;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Ljiljana Mijović
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Mijović is annexed to this judgment.

L.M.
F.A.

CONCURRING OPINION OF JUDGE MIJOVIĆ

As emphasised in my previous concurring/dissenting opinions in nine recent cases,¹ and in the joint dissenting opinion in *Smyk v. Poland*, no. 8954/04, 28 July 2009, I see the problem of the refusal of lawyers appointed under legal-aid schemes to represent legally-aided persons on the ground that the claim has no reasonable prospects of success as the general one, related not only to criminal, but also to civil and administrative proceedings. To avoid repetition, I refer to the detailed reasoning of those opinions.

1. *Kulikowski v. Poland*, no. 18353/03, ECHR 2009-... (extracts); *Antonicelli v. Poland*, no. 2815/05, 19 May 2009, *Arciński v. Poland*, no. 41373/04, 15 September 2009, *Zapadka v. Poland*, no. 2619/05, 15 December 2009; *Jan Zawadzki v. Poland*, no. 648/02, 6 July 2010, *Subicka v. Poland*, no. 29342/06, 14 September 2010, *Bąkowska v. Poland*, no. 33539/02, 12 January 2010, *Słowik v. Poland*, no. 31477/05, 12 April 2011, *Subicka v. Poland* (n° 2) nos. 34043/05 and 15792/06, 21 June 2011; *Teresa Kowalczyk v. Poland* no. 23987/05, 11 October 2011; *Dombrowski v. Poland*, no. 9566/10, 18 October 2011.