



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

FIFTH SECTION

**CASE OF ALTHOFF AND OTHERS v. GERMANY**

*(Application no. 5631/05)*

JUDGMENT  
(Just satisfaction – striking out)

STRASBOURG

27 September 2012

**FINAL**

***27/12/2012***

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



**In the case of Althoff and Others v. Germany,**

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

Dean Spielmann, *President*,

Mark Villiger,

Karel Jungwiert,

Boštjan M. Zupančič,

Ann Power-Forde,

Julia Laffranque, *judges*,

Klaus Köpp, *ad hoc* judge,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 4 September 2012,

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

**PROCEDURE**

1. The case originated in an application (no. 5631/05) against the Federal Republic of Germany lodged on 11 February 2005 with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by nine German nationals, Mrs Edith Althoff and eight others (see full list in annex) (“the applicants”).

2. The applicants were represented by Professor O. Depenheuer of Cologne University and Mr A. Birkmann, a lawyer practising in Erfurt. The German Government (“the Government”) were represented by their Agent, Mrs K. Behr, *Regierungsdirektorin*, of the Federal Ministry of Justice.

3. The applicants alleged in particular that the new version of section 30a(1) of the Property Act and its application by the domestic courts had breached their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1. They further relied on Article 14 of the Convention. Under Article 41 of the Convention they claimed a lump sum of 1,208,740 euros (EUR) in respect of pecuniary damage and EUR 82,727.80 for costs and expenses.

4. Renate Jaeger, the judge elected in respect of Germany who was in office at the time of the application, decided to withdraw from the case (Rule 28 of the Rules of Court). The Government accordingly appointed Mr Klaus Köpp, a lawyer practising in Bonn, to sit as *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1 as then in force).

5. In a judgment of 8 December 2011 (the “judgment on the merits”), the Court found that there had been a violation of Article 1 of Protocol No. 1 (see *Althoff and Others v. Germany*, no. 5631/05, 8 December 2011).

6. As the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicants to submit, within three months from the date on which the judgment became final, their written observations on the matter and, in particular, to notify the Court of any agreement that they might reach (*ibid.*, see point 3 of the operative provisions).

7. In the following, the composition of the Fifth Section sitting on 4 September 2012 was modified in accordance with Rule 25 § 4 of the Rules of Court.

## THE FACTS

8. On the merits, the present dispute was between Germany, which succeeded to the rights of the heirs of the original Jewish owners of the disputed property (the initial injured party in the National-Socialist era – “*Erstgeschädigte*”) under an agreement of 13 May 1992 between Germany and the United States of America on the settlement of certain property claims (the “German-US Agreement”), and the applicants, who are the heirs of a shopkeeper who had acquired the disputed property in 1939. The property was subsequently expropriated at the time of the former German Democratic Republic (GDR). The applicants are thus the heirs of the subsequent injured party – “*Zweitgeschädigte*”.

9. After German reunification, the applicants filed a claim for the restitution of the property in accordance with the relevant provisions of the Law of 23 September 1990 on the resolution of outstanding property issues (the “Property Act”), within the statutory time-limit, initially set at 31 December 1992.

10. On 20 October 1998 the Property Rights Clarification Act retrospectively amended section 30a(1) of the Property Act, providing that the time-limit for the filing of restitution claims did not apply to the rights of the Federal Republic of Germany (FRG) under the German-US Agreement.

11. As a result of the above, the applicants were not able to assert their restitution claims before the domestic courts, on the ground that, as they were the “subsequent” injured party, they were entitled only to compensation under the law of 27 September 1994 on compensation in accordance with the Property Act (the “Compensation Act”).

12. In a judgment of 8 December 2011 the Court found that there had been a violation of Article 1 of Protocol No. 1, because the legislative amendment in question had upset the “fair balance” that had to be struck between the protection of property and the requirements of the general interest. In view of that finding, it observed that it was not necessary to

examine the complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

## THE LAW

13. In a letter of 2 March 2012 the Government informed the Court that negotiations with the applicants with a view to reaching a friendly settlement had failed and they filed a unilateral declaration for the purpose of resolving the question of just satisfaction.

The Government acknowledged that, in the present case, there had been a violation of Article 1 of Protocol No. 1, having regard to the very specific circumstances of the case. For that reason they have accepted the judgment of 8 December 2011 in this specific case and have not requested referral to the Grand Chamber.

In their declaration the Government indicated in particular that they were willing:

“to award compensation in the amount of **[EUR] 210,000** to the Applicants if the Court strikes the Application out of the list, on the condition of payment of the amount, pursuant to Article 37 (1) c) of the Convention. This would be deemed to settle all of the Applicants’ claims in connection with the [present] Application against the Federal Republic of Germany and the *Land* of Brandenburg, including, in particular, compensation for the Applicants’ damage (including non-pecuniary damage [*auch für Nicht-Vermögensschäden*]) as well as costs and expenses. This amount shall be set off [*angerechnet*] in the case that any compensation is awarded to the Applicants pursuant to section 7a (3c), first sentence, section 3 (2) [and] section 1(6) of the Property Act in conjunction with section 1 (1) and (2) of the Compensation Act in the currently pending proceedings before Potsdam Administrative Court under file no. 1 K 821/07.

The amount is payable within three months of notification of the Court’s decision to strike the case out of its list.”

In their observations, the Government indicated in particular that this amount represented fair compensation, having regard to the fact that the impugned interference in this case had been provided for by law, had not been the result of arbitrary expropriation and had taken place in the exceptional context of German reunification. In addition, the measure had served a “public interest”, namely to provide reparation to the heirs of the original Jewish owners, who had been deprived of their property under the National-Socialist regime. In order to ensure that those heirs received rapid compensation, the FRG had signed the “German-US Agreement” and had paid compensation in the amount of 102 million United States dollars (USD) for that purpose. Moreover, the injustice sustained by those original owners had been much greater than that of the applicants, who were the heirs of owners who had acquired the property under advantageous

conditions in the National-Socialist era. Lastly, the severity of the impugned interference had been minor, because the applicants had benefitted from legislation in favour of reparations after German reunification and their claim based on property rights, as subsequent injured parties, was relatively uncertain.

The Government indicated that the proposed sum of EUR 210,000, being substantially larger than the compensation that the applicants could have expected under the Compensation Act, which would have totalled a maximum of EUR 50,000, was divided up as follows:

- EUR 130,000 representing about one fifth (20%) of the sale proceeds for the property in 1997;
- EUR 80,000 for costs and expenses.

This amount covers also all claims for moral damages which the applicants might have had.

14. In a letter of 16 April 2012, the applicants expressed the view that the compensation proposed in the Government's declaration was far too low because it represented less than 10 per cent of the total damage actually suffered.

They challenged all the Government's arguments by referring to the grounds set out by the Court in its judgment on the merits and in particular its finding that the impugned legislative amendment had failed to strike a "fair balance" between the protection of property and the requirements of the general interest (see judgment on the merits, § 74). In addition, the objective of that legislative amendment had not been to provide compensation to the heirs of the original Jewish owners – such compensation had been paid long before – but to correct the mistake, retrospectively and at the applicants' expense, that had been made by the FRG in failing to file a restitution claim within the requisite statutory time-limit. Lastly, regardless of the type of legislation adopted after German reunification, all that mattered was that the applicants had a possession within the meaning of Article 1 of Protocol No. 1 and that there had been a violation of that Article.

Consequently, all the Government's arguments as to why the amount of compensation to be paid to the applicants should be limited were unjustified. Solely the value of the property and the damage incurred by the applicants since its sale in 1997 could therefore serve as the basis for determining the amount of compensation.

The applicants thus claimed just satisfaction for an amount of EUR 1,593,799.13, broken down as follows:

- EUR 1,332,571.33 in respect of pecuniary damage, comprising EUR 664,680 (value of property) and interest accrued for EUR 667,891.33 (5 % above the relevant base interest rate up to 31 March 2012);
- EUR 261,227.80 for costs and expenses.

The applicants indicated that their lawyers' fees in respect of the proceedings before the Court had risen from EUR 15,000 to EUR 165,000 and they submitted in this connection a Fee Agreement dated 16 April 2012.

15. In a letter of 26 April 2012, the Government emphasised that the Fee Agreement of 16 April 2012, which provided for a contingency fee, with reference to a previous Fee Agreement of 2005, had been reached after the Court's judgment on the merits had become binding. The Government doubted that this agreement had any effect under domestic law and argued that the fee in question was not part of the costs of the proceedings to be taken into account for the purposes of Article 41 of the Convention. In addition, the 2005 agreement had concerned representation before the Court, thus including any submissions made in connection with Article 41. Lastly, the Government found the amounts claimed to be excessive and unsubstantiated.

16. The Court reiterates that under Article 37 of the Convention, at any stage of the proceedings it may decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions listed in sub-paragraphs (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c), in particular, allows the Court to strike out a case where:

“for any other reason established by the Court, it is no longer justified to continue the examination of the application”.

17. The Court further reiterates that, in certain circumstances, an application may be struck out of the list under Article 37 § 1 (c) on the basis of a unilateral declaration by the respondent Government, even if the applicant wishes the examination of the application to be continued. Moreover, there is nothing to prevent a respondent Government from filing a unilateral declaration, as in the present case, at the stage of the proceedings concerning Article 41 of the Convention (see, among other authorities, *Racu v. Moldova* (just satisfaction – striking out), no. 13136/07, 20 April 2010, and *Megadat.com SRL v. Moldova* (just satisfaction – striking out), no. 21151/04, ECHR 2011). For that purpose, the Court must examine the declaration closely in the light of the general principles applicable in the context of Article 41 of the Convention (see, *inter alia*, *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 73, 28 November 2002; *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, §§ 60-61, 4 December 2007; and *Megadat.com SRL*, cited above, § 10).

18. The Court notes that in its judgment on the merits it found that, in the present case, the impugned statutory amendment had been provided for by law and served a “public interest”, namely to clarify a legal situation that was uncertain in the eyes of the German legislature and to secure the State's property rights under the German-US Agreement. The aim of that agreement had been to provide for a global settlement of compensation

claims by US citizens and in particular by heirs of the original Jewish owners of property expropriated in the National-Socialist era. The finding of a violation of Article 1 of Protocol No. 1 was not based on the existence of an unlawful deprivation of property, but essentially on the fact that the compensation provided for in the Compensation Act had not been proportionate, having regard to the severity of the impugned interference.

19. In calculating the value of compensation to be awarded to applicants, the Court has previously taken into account the fact that the impugned interference had satisfied the condition of lawfulness and was not arbitrary, but had resulted from a failure to pay an appropriate amount (see, among other authorities, *mutatis mutandis*, *Former King of Greece and Others*, cited above, §§ 74, 77 and 78).

20. Moreover, the Court has held that legitimate “public interest” aims may justify restricting reimbursement to a level below the market value (see, among many other authorities, *Broniowski v. Poland* (Merits) [GC], no. 31443/96, § 182, ECHR 2004-V, and *Wolkenberg and Others*, cited above, § 60).

21. Lastly, the impugned legislative amendment took place in the exceptional context of German reunification, and, as the Court has indicated on various occasions, the State has a broader margin of appreciation as regards the enactment of laws in a context of transition to a new political and economic regime (see, *inter alia*, *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 74, 77 and 110, ECHR 2005-V; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 113, ECHR 2005-VI. Thus, in a case concerning property that had been abandoned on the other side of the Bug River when Poland’s eastern border had been redrawn after the end of the Second World War, the Court found that the Polish Act of July 2005, which had limited the amount of compensation available to the applicants to 20% of the current value of the original property, had “struck a fair balance” between the protection of their right of property and the general interest, in a manner compatible with the requirements of Article 1 of Protocol No. 1 (see *Wolkenberg and Others*, cited above, § 66).

22. As regards costs and expenses, the Court notes that the lawyers’ fees claimed for the proceedings before the Court have increased from EUR 15,000 to EUR 165,000. Like the Government, it considers these amounts excessive and finds that it has not been established that these expenses were necessarily incurred, as required by the Court’s case-law concerning Article 41 of the Convention (see, among many other authorities, *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 109, 14 September 2010).

23. Having regard to the foregoing and to the amount of compensation proposed by the Government, which seems fair in the present case, the Court finds that it is no longer justified to continue the examination of the remainder of the application (Article 37 § 1 (c) – see the *Racu* and *Megadat.com* judgments cited above, §§ 18 and 14 respectively).

24. In addition, in the light of the above considerations, the Court finds that the respect for human rights guaranteed in the Convention and its Protocols does not require it to continue that examination (Article 37 § 1 *in fine*).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Takes note* of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein;
2. *Decides* to strike the remainder of the application out of its list of cases, in accordance with Article 37 § 1 (c) of the Convention.

Done in French and English, and notified in writing on 27 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Dean Spielmann  
President

**Application no. 5631/05**  
**Althoff and Others ./ Germany**

**List of applicants**

| <b>Surname</b>                 | <b>Forename</b>   | <b>Date of birth</b> | <b>Place of birth</b>   |
|--------------------------------|-------------------|----------------------|-------------------------|
| <b>ALTHOFF</b>                 | Edith             | 28.11.1929           | Düsseldorf – Germany    |
| <b>OTLEWSKI</b>                | Ingrid H.         | 11.11.1935           | Krefeld- Germany        |
| <b>SCHMITZ</b>                 | Heinz Ludwig Max  | 08.05.1942           | Goa – India             |
| <b>MIASKOWSKI</b>              | Miriam Helene     | 27.05.1921           | Fairfield – USA         |
| <b>BROICH</b>                  | Hubert Max        | 06.12.1922           | Merced – USA            |
| <b>FISCHER</b>                 | Gertrud Franziska | 25.11.1911           | Nuremberg – Germany     |
| <b>DIETZ</b>                   | Josefine Irmgard  | 31.08.1923           | Dormagen-Gohr – Germany |
| <b>BÖCKER</b>                  | Hans              | 26.03.1910           | Minden – Germany        |
| <b>HOLZHAUSEN-<br/>SPENCER</b> | Louise            | 30.06.1930           | Palm Springs – USA      |