CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF GORZELIK & OTHERS v. POLAND

(Application no. 44158/98)

JUDGMENT

STRASBOURG

20 December 2001

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
17/02/2004

In the case of Gorzelik and Others v. Poland,

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

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr V. BUTKEVYCH,
Mr J. HEDIGAN,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 17 May and 5 December 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44158/98) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Polish nationals, Jerzy Gorzelik, Rudolf Kołodziejczyk and Erwin Sowa ("the applicants"), on 18 June 1998.

2. The applicants, who had been granted legal aid, were represented before the Court by Mr S. Waliduda, a lawyer practising in Wrocław, Poland. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, of the Ministry of Foreign Affairs, assisted by Ms R. Kowalska, Mr K.W. Czaplicki and Mr D. Rzemieniewski.

3. The applicants complained that the Polish authorities had arbitrarily refused to register their association under the name of "Union of People of Silesian Nationality". They alleged a violation of Article 11 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 17 May 2001, following a hearing on the admissibility and merits (Rule 54 § 4), the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On an unknown date the applicants (who all describe themselves as "Silesians"), together with one hundred and ninety other persons, decided to form an association (*stowarzyszenie*) entitled "Union of People of Silesian Nationality" (*Związek Ludności Narodowości Śląskiej*). The founders subsequently adopted a memorandum of association. The applicants were elected to the provisional management committee (*Komitet Założycielski*) and were authorised to proceed with the registration of the association.

9. On 11 December 1996 the applicants, acting on behalf of the provisional management committee of the "Union of People of Silesian Nationality", lodged an application for the registration of their association with the Katowice Regional Court (*Sąd Wojewódzki*). They relied on, *inter alia*, section 8(2) of the Law of 7 April 1989 on Associations (hereinafter referred to as the "Law on Associations"). They submitted the memorandum of association along with the other documents required by the Law on Associations. The relevant parts of the memorandum of association read:

> "1. The present association shall be called the "Union of People of Silesian Nationality" (hereinafter referred to as the "Union").
>
> 2. The Union shall conduct its activity within the territory of the Republic of Poland; it may establish local branches.
>
> ...
>
> 6 (1). The Union may join other domestic or international organisations if the aims pursued by [the latter] correspond to the aims pursued by the Union.
>
> ...
>
> 7. The aims of the Union are:
>
> (1) to awaken and strengthen the national consciousness of Silesians;
>
> (2) to restore Silesian culture;
>
> (3) to promote knowledge of Silesia;

(4) to protect the ethnic rights of persons of Silesian nationality; [and]

(5) to provide social care for members of the Union.

8. The Union shall accomplish its aims by the following means:

(1) organising lectures, seminars, training courses and meetings, establishing libraries and clubs, and carrying out scientific research;

(2) organising cultural and educational activities for members of the Union and other persons;

(3) carrying out promotional and publishing activities;

(4) promoting the emblems and colours of Silesia and Upper Silesia;

(5) organising demonstrations or [other] protest actions;

(6) organising sporting events ... and other forms of leisure activities;

(7) setting up schools and other educational establishments;

(8) cooperating with other organisations;

(9) conducting business activities for the purpose of financing the aims of the Union – this may include establishing commercial entities and co-operating with other [commercial] entities;

(10) establishing other entities or [legal] persons with a view to achieving the aims of the Union; and

(11) any other activities.

9. There shall be two categories of members of the Union, namely ordinary members and supporting members.

10. Any person of Silesian nationality may become an ordinary member of the Union.

...”

Paragraph 15 read, in so far as relevant:

“A person shall cease to be a member of the Union if:

…

2. (a) on a reasoned motion by the board of auditors, the management board decides to deprive him of his membership;

(b) the relevant motion of the board of auditors may be based on such reasons as the fact that the member in question has not fulfilled the requirements set out in the

memorandum of association for becoming a member or has failed to perform the duties of members as specified in paragraph 14.

... "

Paragraph 30 provided:

"The Union is an organisation of the Silesian national minority."

10. On an unknown later date the Katowice Regional Court, pursuant to section 13 (2) of the Law on Associations, served a copy of the applicants' application, together with copies of the relevant enclosures, on the Katowice Governor (*Wojewoda*).

11. On 27 January 1997 the Katowice Governor, acting through the Department of Civic Affairs (*Wydział Obywatelski*), submitted his comments on the application to the court. These comments contain lengthy arguments against allowing the association to be registered, the main thrust of which is as follows:

"(i) It cannot be said that there is a 'Silesian' (*Ślązak*), in the sense of a representative of a distinct 'Silesian nationality'. 'Silesian' is a word denoting a representative of a local ethnic group, not a nation. This is confirmed by paragraph 7 (1) of the memorandum of association, which aims merely to 'awake and strengthen the national consciousness of Silesians'. …

(ii) Social research relied on by the applicants to demonstrate the existence of a 'Silesian nationality' does not accord with numerous other scientific publications. Polish sociology distinguishes between two concepts of 'homeland', i.e. a 'local homeland' and a 'ideological homeland'. In German, this distinction is expressed by the terms Heimat (local homeland) and Vaterland (ideological homeland). The research relied on by the applicants merely refers to the self-identification of the inhabitants of Silesia, indicating that their local self-identification takes precedence over their national self-identification. …

(iii) Paragraph 10 of the memorandum of association states that any person of Silesian nationality may become an ordinary member of the association, but does not clearly specify the criteria for establishing whether or not a given person fulfils this requirement. This absence of unambiguous criteria is contrary to section 10 (1) and (4) of the Law on Associations. Moreover, it renders paragraph 15 (2) (b) of the memorandum unlawful, for that provision allows the board of management to deprive a person of his membership in the event of failure to satisfy the conditions set out in the memorandum of association. …

(iv) Paragraph 30 of the memorandum of association, which calls the Union an "organisation of the Silesian national minority", is misleading and does not correspond to the facts. There is no basis for regarding the Silesians as a national minority. Recognising them as such would have been in breach of Articles 67 § 2 and 81 § 1 of the [old] Constitution, which guarantee Polish citizens equal rights. In particular, under the relevant provisions of the Law of 28 May 1993 on Parliamentary Elections (hereinafter referred to as the "Law on Parliamentary Elections") (*Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej*), registration of the Union would give it a privileged position in respect of the distribution of seats in Parliament. The Union would obtain privileges and rights guaranteed to national minorities in respect of

education in their native language and access to the media. Registration of the association would have been to the detriment of other ethnic groups in Poland, such as Cracovians (*Krakowiacy*), Highlanders (*Górale*) and Mazurians (*Mazurzy*); this would have amounted to a return to the tribalism (*podziały plemienne*) which had existed prior to the formation of the Polish State. …

(v) We therefore propose that the memorandum of association should be amended so as to reflect the above observations. In particular, the misleading name of the association should be changed, the criteria for membership should be set out in an unambiguous manner and paragraph 30 should be deleted. In our opinion, these are the conditions for registration of the association."

12. On 13 March 1997 the applicants filed a pleading in reply to those arguments. They asserted that the fact that the majority of Poles failed to recognise the existence of a Silesian nation did not mean that there was no such nation. They cited various scientific publications and went on to explain that the fact that the Silesians formed a distinct group had already been acknowledged at the end of the First World War; moreover, the Silesians had always sought to preserve their identity and had always formed a distinct group, regardless of whether Upper Silesia had belonged to Germany or to Poland. Consequently, any comparison between them and the Cracovians or Highlanders was totally unjustified because the latter groups neither regarded themselves as a national minority, nor had they ever been perceived as such in the past. Finally, the applicants cited certain letters of the Ministry of the Interior, which had been published by the press and which explained that the National and Ethnic Minorities Bill had explicitly stated that a "declaration that a person belongs to a minority shall not be questioned or verified by the public authorities".

13. On 9 April 1997 the Katowice Governor filed a pleading with the court. He maintained his previous position. On 14 April 1997 he produced two letters from the Ministry of the Interior (dated 4 February and 10 April 1997 respectively, and addressed to the Department of Civic Affairs of the Office of the Katowice Governor). The relevant parts of the letter of 4 February 1997 read:

"We share your doubts as to whether certain inhabitants of Silesia should be deemed to be a national minority. We therefore propose that you submit your observations to the court, indicating those doubts, and that you ask the court to grant you leave to join the proceedings as a party.

We propose that you rely on the fact that the Framework Convention for the Protection of National Minorities has not been ratified by Poland, so that its provisions [do not apply in the domestic legal system]. ...

In our view, neither historical nor ethnographical circumstances justify the opinion that the inhabitants of Silesia can be recognised as a national minority."

The relevant parts of the letter of 10 April 1997 read as follows:

> "... The arguments advanced by the provisional management committee of the association [in their pleading of 13 March 1997] do not contain any new elements; [in particular] ... the Framework Convention does not constitute the law applicable in Poland.
>
> Likewise, the letters of the Ministry of the Interior [on the interpretation of the National and Ethnic Minorities Bill] do not change the situation.
>
> The sense of belonging to a nation falls within the realm of personal liberties; it does not in itself entail any legal consequences. [By contrast,] the formation of an organisation of a national minority is a legal fact which entails legal consequences such as, for instance, those referred to in the Law on Parliamentary Elections.
>
> In the circumstances, the registration of the association called the "Union of People of Silesian Nationality" could be allowed provided that the existence of such a nation had been established."

14. On 28 April 1997 the applicants submitted a further pleading to the court. They criticised the arguments of the Ministry of the Interior, pointing out that the latter had failed to indicate any legal basis for rejecting their application. In particular, the authorities had not shown that any provision of the memorandum of association was contrary to the law whereas, under section 1 (2) of the Law on Associations, "the exercise of the right to association may be subject only to such limitations as are prescribed by statute and are necessary for ensuring the interests of national security or public order and for the protection of health or morals, or for the protection of the rights and freedoms of others". Lastly, the applicants stated that they would not to amend the memorandum of association in the manner proposed by the authorities, in particular in respect of the name of the association and the content of paragraph 30. They agreed, however, to amend paragraph 10 of the memorandum and phrased it as follows:

> "Everyone who is a Polish citizen and who has submitted a written declaration stating that he is of Silesian nationality may become an ordinary member [of the Union]."

15. On 23 May 1997 the Katowice Regional Court held an "explanatory session" (*posiedzenie wyjaśniające*) aimed at obtaining comments and clarifications from the parties and settling the matters in dispute.

16. On 27 May 1997 the applicants lodged a pleading with the court, maintaining that in the course of the above-mentioned session the authorities had "*de facto* acknowledged that a Silesian nation exists", in particular by accepting the name of the association and certain provisions of the memorandum (i.e. paragraph 7 (1) and (4) and paragraph 10)". They stressed however that the authorities' insistence on deleting paragraph 30 was "unjustified and illogical" and, consequently, refused to alter or delete that provision.

Later, on 16 June 1997, the Katowice Governor submitted his final pleading to the court, opposing the registration of the association.

17. On 24 June 1997 a single judge, sitting *in camera* as the Katowice Regional Court, granted the applicants' application and registered their association under the name of the "Union of People of Silesian Nationality". The reasons for that decision read, in so far as relevant:

> "... There was a dispute between [the parties] over the concepts 'nation' and 'national minority'. Finally [the authorities concerned] pleaded that the application for registration of the association should be dismissed.
>
> This court has found that the application is well-founded [and as such should be granted].
>
> In the Preamble to the Law on Associations, the legislature guarantees [everyone] a cardinal right, the right to freedom of association, which enables citizens, regardless of their convictions, to participate actively in public life and to express different opinions, and to achieve individual interests.
>
> Freedom of association is one of the natural rights of a human being. [For this reason,] section 1(1) of the Law on Associations does not establish the right to freedom of association but merely sets out the manner and limits of its exercise, thus reflecting Poland's international obligations.
>
> Under section 1(2) of the Law on Associations, the right to form an association may be subject only to such limitations as are prescribed by statute either in the interests of national security or public safety, or in the interests of public order, or for the protection of health and morals, or for the protection of the rights and freedoms of others. No other restrictions may be placed on the exercise of the right to associate with others.
>
> As recently as 16 June 1997, in their pleading, the authorities advanced the argument that the registration of the present association would infringe the rights and freedoms of others because it would result in an unequal treatment of other local communities and would diminish their rights.
>
> This argument is unconvincing since it does not emerge from the content of the memorandum of association that the future activities of the association are aimed at [diminishing] the rights and freedoms of others.
>
> Pursuant to paragraph 7 of the memorandum of association, the aims of the association are [, for example,] to awaken and strengthen the national consciousness of Silesians, to restore Silesian culture, to promote knowledge of Silesia and to provide social care for members of the association. None whatsoever of these aims is directed against the rights and freedoms of others. The means to be used for accomplishing these aims are not directed against the rights and freedoms of others either. Those means include organising lectures and seminars, carrying out scientific research, establishing libraries, organising cultural and educational activities for members and other persons, carrying out promotional and publishing activities, promoting the emblems and colours of Silesia and Upper Silesia, organising demonstrations and protest actions, organising sporting events, setting up schools and other educational establishments, conducting business activities and co-operating with other organisations.

In sum, the argument that the association would infringe the rights and freedoms of others must definitely be rejected. Moreover, it should be noted that this argument refers to [a mere possibility] because only practical action taken by the association could possibly demonstrate whether, and if so to what extent, the [future] activities of the association would necessitate the use of measures aimed at protecting the rights of others.

As regards the terms 'Silesian nationality' or 'Silesian national minority', the problems involved in the determination of their proper meaning cannot be examined by this court in detail.

This court must, pursuant section 13(1) of the Law on Associations, rule on the present application within a period not exceeding three months from the date on which it was lodged. It is therefore not possible [in the course of the present proceedings] to determine such complicated issues (which involve problems falling within the sphere of international relations).

It is, however, possible to assume, for the purposes of making a ruling in these proceedings, that the nationality of an individual is a matter of choice for him; moreover, it is a matter of common knowledge that the original inhabitants of Silesia constitute a minority in Upper Silesia – at least for anyone who has ever spent some time in this region and has been willing to perceive this fact. After all, the authorities, although they rend their garments [sic], complaining that the applicants dared to establish an association, do not contest the fact that [the Silesians] are an ethnic minority.

In view of the foregoing this court, finding that the provisional management committee complied with the requirements laid down in sections 8(4), 12 and 16, read in conjunction with section 13 (2) of the Law on Associations and Article 516 of the Code of Civil Procedure, holds as in the operative part of the decision".

18. On 2 July 1997 the Katowice Governor lodged an appeal with the Katowice Court of Appeal (*Sąd Apelacyjny*), asking that the first-instance decision be quashed, that the case be remitted to the court of first instance, and that expert evidence be obtained in order to determine the meaning of the terms "nation" and "national minority". In his appeal, he alleged that the court of first instance had violated sections 1(1) and 2 of the Law on Associations and unspecified provisions of the Code of Civil Procedure. The reasons for the appeal read, in so far as relevant:

"[The court of first instance] formally recognised and legally sanctioned the existence of a distinct Silesian nation constituting a 'Silesian national minority'.

In our opinion, such an important and unprecedented ruling, which is of international significance, could not and should not be given without defining the concepts of 'nation' and 'national minority'. The Regional Court, leaving this issue aside – merely because of certain statutory time-limits –simplified the proceedings in an unacceptable manner. This led, in itself, to a failure on the part of the court to establish all the circumstances relevant to the outcome of the case and, furthermore, provided a sufficient basis for this appeal.

The appellant admits that Polish law does not define the terms 'nation' and 'national minority'. This, however, does not justify the conclusion of the Regional Court that 'the nationality of an individual is a matter of choice for him'.

The appellant does not contest the right of a person to decide freely to belong to a national minority; however, a precondition for making such a choice is the existence of a 'nation' with which that person identifies himself.

The decision appealed against proclaims the opinion that the subjective feelings of the person concerned suffice for the purposes of creating a 'nation' or a 'nationality. Having regard to the potential social repercussions of such an approach, it is not possible to agree with it.

In these circumstances, prior to making any decision on the registration of the 'Union of People of Silesian Nationality', it is necessary to determine whether a 'Silesian nation' exists – a distinct, non-Polish nation – and whether it is admissible in law to create a 'Silesian national minority'.

In the appellant's opinion, there are no objective arguments in favour of the finding that a distinct Silesian nation exists. In case of doubt, ... this question should be resolved by obtaining evidence from experts.

In the contested decision, the lower court in principle focused on determining whether the aims of the association and the means of accomplishing those aims were lawful. … The appellant does not contest the majority of these aims; it must be said that such activities as restoring Silesian culture, promoting knowledge of Silesia or providing social care for members of the association are worthy of respect and support. However, these aims can fully be accomplished without the contested provision of the memorandum of association, i.e. paragraph 30 ... . In addition, the applicants were not prevented from incorporating the above-mentioned aims into the memorandum of an existing association called the 'Movement for the Autonomy of Silesia' (*Ruch Autonomii Śląska*), the more so as the applicants belong to influential circles of the latter organisation.

The fact that the applicants have failed to do so but [instead] are creating a new association, and are describing themselves as a 'Silesian national minority', clearly demonstrates what their real objective is. In fact, their objective is to circumvent the provisions of the Law of 28 May 1993 on Parliamentary Elections, under which parties or other organisations standing in elections must reach a threshold of 5% or 7% of the vote in order to obtain seats in the Parliament. ...

Legal acts – including the act of adopting a memorandum of association – are null and void under Article 58 § 1 of the Civil Code if they aim at evading or circumventing the law. Legal theory formulates the opinion that defects in legal acts, as defined in Article 58 of the Civil Code, may constitute a basis for refusing to register an association.

Sanctioning the rights of the 'Silesian national minority' amounts to discrimination against other regional and ethnic groups or societies. This will be the case at least as regards electoral law and will be contrary to Article 67 § 2 of the Constitution. …"

19. The Katowice Court of Appeal heard the appeal on 24 September 1997. The Katowice Prosecutor of Appeal (*Prokurator Apelacyjny*)

appeared at the hearing and asked the court to grant him leave to join the proceedings as a party intervening on behalf of the Katowice Governor. The leave was granted. The court next heard addresses by the appellant, the prosecutor (who requested the court to set aside the first-instance decision and dismiss the applicants' application) and the representative of the applicants. On the same day the court set aside the first-instance decision and dismissed the applicants' application for their association to be registered. The reasons for that decision read, in so far as relevant:

> "... The lower court, by registering the association entitled 'Union of People of Silesian Nationality', approved paragraph 30 of the memorandum of association, which states that the Union is an organisation of the Silesian national minority. We therefore agree with the appellant that the Union, on the basis of the above-mentioned paragraph, would have the right to benefit from the statutory privileges laid down in section 5 of the Law on Parliamentary Elections. ...
>
> Furthermore, recognising the Silesians as a national minority may also result in further claims on their part [for privileges] granted to national minorities by other statutes. ...
>
> Contrary to the opinion expressed by the lower court, it is possible to determine whether or not the Silesians constitute a national minority in Poland; it is not necessary to obtain expert evidence in that connection.
>
> Under Article 228 § 1 of the Code of Civil Procedure, facts that are a matter of common knowledge, i.e. those which every sensible and experienced citizen should know, do not need to be proved. Common knowledge includes historical, economical, political and social phenomena and events.
>
> It is therefore clear that at present no legal definition of 'nation' and 'national minority' is commonly accepted in international relations,. ...
>
> On the other hand, an 'ethnic group' is understood as a group which has a distinct language, a specific culture and a sense of social ties, is aware of the fact that it differs from other groups, and has its own name.
>
> Polish ethnographic science of the 19th and 20th centuries describes 'Silesians' as an autochthonous population of Polish origin residing in Silesia – a geographical and historical region. At present, as a result of political and social changes, the term 'Silesians' refers equally to immigrant inhabitants who have been residing in this territory for several generations and who have been identifying themselves with their new region of residence. It also refers to the German-speaking population, linked with Silesia by [such factors as] birth, residence and tradition (see the Encyclopaedia published by the Polish Scientific Publishers in 1996). ...
>
> The applicants derive the rights they claim from the principles set out in the [Framework Convention for the Protection of National Minorities], stating that every person belonging to a national minority has the right freely to choose to belong or not to belong to such a minority. ... In invoking European standards, they fail, however, to remember that a national minority with which a given person identifies himself must exist. There must be a society, established on the basis of objective criteria, with

which this person wishes to identify. No one can determine his national identity in isolation from a fundamental element, which is the existence of a specific nation.

It emerges from the above-mentioned definition of a 'nation' that a nation is formed in a historical process which may last for centuries and that the crucial element which forms a nation is its self-identification, that is to say its national awareness established on the basis of the existing culture by a society residing on a specific territory.

Certainly, the Silesians belong to a regional group with a very deep sense of identity, including their cultural identity; no one can deny that they are distinct. This does not, however, suffice for them to be considered as a distinct nation. They have never commonly been perceived as a distinct nation and they have never tried to determine their identity in terms of [the criteria for a 'nation']. On the contrary, the history of Silesia unequivocally demonstrates that autochthonous inhabitants [of this region] have preserved their distinct culture and language (the latter having Polish roots from an ethnic point of view,), even though their territories were not within the borders of the Polish State and even though they were under strong German influence. They are therefore Silesians – in the sense of [inhabitants of the] region, not in the sense of [their] nationality. Thus, Upper Silesia, in its ethnic roots [sic], remained Polish; that was, without a doubt, demonstrated by three uprisings. The role played by the Silesians in building and preserving the Polish character of Silesia, even though they remained isolated from their homeland, is unquestionable.

However, a given nation exists where a group of individuals, considering themselves a 'nation', is in addition accepted and perceived as such by others. In the common opinion of Polish citizens, both the Silesians and other regional groups or communities [e.g. Highlanders or Mazurians] are perceived merely in terms of local communities. In the international sphere Poland and, similarly, France and Germany, are perceived as single-nation States, regardless of the fact that there exist distinct ethnic groups (e.g. the inhabitants of Alsace or Lorraine in France, or the inhabitants of Bavaria in Germany).

On the whole, sociologists agree that the Silesians constitute an ethnic group and that the autochthonous inhabitants [of Silesia] do have some features of a nation but that those features are not fully developed. That ... means that the awakening of their national identity is still at a very early stage. A nation exists only when there are no doubts as to its right to exist. ... In Poland national minorities do constitute only a small part of the society, that is to say about 3-4%. They comprise – and this has never been denied – Germans, Ukrainians, Belarusians, Lithuanians, Slovaks, Czechs, Jews, Roma, Armenians and Tatars.

In the Polish tradition, national minorities are perceived as groups linked to a majority outside Poland; in other words, a minority is an ethnic group which has support amongst a majority [residing] abroad. Moreover, traditionally, our society has not considered that groups which preserve a distinct culture but which do not belong to any State can be deemed to be national minorities. Accordingly, for a long time the Roma people were regarded as an ethnic, not a national group. ...

The applicants' opinion that the mere choice of the individual concerned is decisive for his nationality is reflected in paragraph 10 of the memorandum of association. Acceptance of this opinion would consequently lead to a situation in which the aims pursued by the association could be accomplished by groups of members who did not have any connection or links with Silesia and who had become members of the Union

solely to gain an advantage for themselves. Undoubtedly, such groups of members cannot [be allowed] to accomplish the aims of an association of a national minority. ...

The applicants have relied on the results of sociological research carried out in 1994 in Katowice Province. Indeed, the research demonstrates that 25% of persons requested to declare their ethnic and regional identity replied that they were Silesians. However, it transpires from [the material collected in the course of another piece of sociological research of 1996 which was submitted by the applicants during the appellate hearing] that two years later the number of persons considering themselves to be Silesians had decreased to 12.4% and that, moreover, the majority of inhabitants of Katowice Province considered themselves to be Poles (i.e. 81.9%, including 18.1% who stated that they were 'Polish Silesians'; only 3.5% of inhabitants considered themselves to be Germans, including 2.4 % who stated that they were 'German Silesians').

In the light of the above research it cannot be said that such a poorly established self-identity of a small (and decreasing) group of Silesians, as demonstrated by their refusal to declare that they belong to the [Polish] nation, provides a basis for recognising that all Silesians (who have lived in Silesia for generations and state that they belong to the Polish nation) constitute a separate nation. This would be contrary to the will of the majority, a will well known to the applicants.

We therefore find that the appellant is right in submitting that granting the applicants' application for their association to be registered is unjustified because the memorandum of association is contrary to the law, i.e. Article 5 of the Civil Code. Thus, the application is aimed at registering an organisation of a minority which cannot be regarded as a national minority and at circumventing the provisions of the Law on Parliamentary Elections and other statutes conferring particular privileges on national minorities. Granting such a request could lead to granting unwarranted rights to the association in question. This would, moreover, place their organisation at an advantage in relation to other regional or ethnic organisations.

In these circumstances, under section 14 of the Law on Associations and Article 58 of the Civil Code, read in conjunction with Articles 386 § 1 and 13 of the Code of Civil Procedure and section 8 of the Law on Associations, the appeal must be allowed ... ."

20. On 3 November 1997 the applicants lodged a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy*). They alleged that the Katowice Court of Appeal had wrongly interpreted the relevant provisions of the Law on Associations and that the impugned decision had contravened Article 84 of the Constitution, Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the Convention. Their arguments may be summarised as follows:

"The principal issue to be determined by the Court of Appeal was whether the memorandum of the applicants' association complied with the statutory requirements. since a refusal to register an association could be justified only if an activity specified in the memorandum of association was banned by the law. That was clearly not the case and the court's fear that the registration of the applicants' association would in future lead to discrimination against other national or ethnic minorities was based on mere speculation. In any event, the Law on Associations [in sections 8(2), 25 et seq.]

provided for various means whereby the activity of an association could be supervised by the competent State authorities or, in the event that its activity was unlawful, the association could be dissolved.

However, the Court of Appeal, instead of assessing formal requirements of the registration, firstly decided that the core issue in the proceedings was to establish whether a Silesian nation existed. It consequently went on to lay down its own arbitrary and controversial definition of 'nation' and 'national minority' and finally concluded that there was no 'Silesian nation'. It did so without any effort to obtain expert evidence in respect of such an important matter."

21. On 27 November 1997 the Katowice Governor filed a pleading in reply to the applicants' cassation appeal. The relevant arguments may be summarised as follows:

"The refusal to register the applicants' association was fully justified. In the course of the proceedings at first instance, the Governor eventually proposed that the applicants amend paragraph 30 of the memorandum of association and alter the name of their association by deleting the word 'nationality'. Those arguments were based on section 10(1)(1) of the Law of Associations, which provides that a memorandum of association should enable the association in question to be differentiated from other associations. This means that the name of an association should not be misleading. Since the requirement set out in the above-mentioned section was not complied with, the refusal to register the applicants' association was justified under section 14(1).

It must be stressed that even in the explanatory report to the Framework Convention for the Protection of National Minorities it is clearly stated that the individual's subjective choice to belong to a national minority is inseparably linked to objective criteria relevant to the person's identity. That means that a given nation must exist prior to the individual making a decision to belong to this nation. That being so, the applicants' application for their association to be registered must be seen as a thoughtless and incomprehensible attempt to exploit the distinct characteristics [of the Silesians] with a view to achieving political aims."

22. On 28 November 1997 the Katowice Prosecutor of Appeal filed a pleading in reply to the applicants' cassation appeal. He submitted, *inter alia*, that it was clear that the content of the memorandum of association was contrary to the law since it explicitly stated that the Union was an association of a national minority, and thus ignored the fact that the Silesians could not be regarded as a minority of that kind. The Silesians, being merely an ethnic group, could not exercise the rights conferred on national minorities, in particular those referred to in the Law on Parliamentary Elections.

23. On 18 March 1998 a panel of three judges, sitting as the Administrative, Labour and Social Security Chamber of the Supreme Court, dismissed the applicants' cassation appeal. The relevant parts of the reasons for this decision read as follows:

"… [A] necessary prerequisite for the registration of an association is the conformity of its memorandum of association with the entire domestic legal order, including conformity with [the provisions of] international treaties ratified by Poland.

In the present case the Court of Appeal had no doubts as to the lawfulness of the aims pursued by [the applicants'] association but refused to register the association for the sole reason that [the applicants], in the memorandum of association, used such terms as 'Silesian nation' and 'Silesian national minority'.

We agree with the opinion [of the Court of Appeal]. 'National minority' is a legal term (Article 35 of the Constitution of 2 February 1997) although it is not defined either in Polish law, or in the conventions relied on in the cassation appeal. However, the explanatory report to the Framework Convention for the Protection of National Minorities states plainly that the individual's subjective choice of a nation is inseparably linked to objective criteria relevant to his national identity. That means that a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question. …

An individual has the right to choose his nation but this, as the Court of Appeal rightly pointed out, does not in itself lead to the establishment of a new, distinct nation or national minority.

There was, and still is, a common perception that an ethnic group of Silesians does exist; however, this group has never been regarded as a national group and it has not claimed to be regarded as such. …

Registration of the association, which in paragraph 30 of its memorandum of association states that it is an organisation of a [specific] national minority, would be in breach of the law because it would result in a non-existent 'national minority' taking advantage of privileges conferred on [genuine] national minorities. This concerns, in particular, the privileges granted by the Law on Parliamentary Elections ... such as an exemption from the requirement that a party or other organisation standing in elections should receive at least 5% of the vote, which is a prerequisite for obtaining seats in Parliament ... [or] ... privileges in respect of the registration of electoral lists; thus, it suffices for an organisation of a national minority to have registered its electoral lists in at least five electoral constituencies [whereas the general requirement is to register an electoral list in at least a half of the electoral constituencies in the whole of Poland].

Pursuant to the relevant ruling of the Constitutional Court (*Trybunał Konstytucyjny*) on the interpretation of the Law on Parliamentary Elections, ... the privileges [referred to above] are conferred on electoral committees of registered national minorities and, in the event of any doubt [as to whether or not an electoral committee represents a national minority], the State Electoral College may request evidence.

The simplest means of proving the existence of a specific national minority is to present a memorandum of association confirming that fact. It is true that under the new Constitution resolutions of the Constitutional Court on the interpretation of statutes no longer have universally binding force; however, in view of the persuasiveness of the reasons given by the Constitutional Court and the requirements of practice, [we consider that] a memorandum of association still remains basic evidence demonstrating the existence of a national minority.

[Furthermore,] conferring on the Silesians, an ethnic group, the rights of a national minority would be contrary to Article 32 of the Constitution, stating that all persons are equal before the law, [because] other ethnic minorities would not enjoy the same rights.

The memorandum of association is contrary to section 10(1)(4) of the Law on Associations, which stipulates that a memorandum of association must set out rules concerning acquisition and loss of membership, and the rights and duties of members. Paragraph 10 of the memorandum provides that everyone who is a Polish citizen and has submitted a written declaration stating that he is of Silesian nationality, may become a member of the Union, whereas paragraph 15 states that a person ceases to be a member of the Union if, *inter alia*, he has not fulfilled the membership requirements set out in the memorandum of association. Since no Silesian nation exists, no one would, lawfully, be able to become a member of the Union because his declaration of Silesian nationality would be untrue. …

Furthermore, it must be pointed out that the refusal to register the association does not contravene Poland's international obligations. Both the International Covenant on Civil and Political Rights ... and the Convention for the Protection of Human Rights and Fundamental Freedoms allow [the State] to place restrictions on the freedom of association, [in particular such as] are prescribed by law and are necessary in a democratic society in the interests of national security or public safety or for the protection of health and morals or for the protection of the rights of others.

It is contrary to the public order to create a non-existent nation that would be able to benefit from the privileges conferred solely on national minorities. Such a situation would also lead to the infringement of the rights of others, not only national minorities but also all other citizens of Poland. Granting privileges to a [specific] group of citizens means that the situation of the other members of society becomes correspondingly less favourable.

This is particularly so in the sphere of election law: if certain persons may become members of Parliament [because of their privileged position], it means that other candidates must obtain a higher number of votes than what would be required in the absence of privileges [in that respect].

It also has to be noted that the essential aims of the association can be accomplished without the contested provisions of the memorandum and without the [specific] name of the association. Under the provisions of the Constitution of the Republic of Poland national and ethnic minorities have equal rights as regards their freedom to preserve and develop their own language, to maintain their customs and traditions, to develop their culture, to establish educational institutions or institutions designed to protect their religious identity and to participate in the resolution of matters relating to their cultural identity (Article 35). …"

II. RELEVANT DOMESTIC LAW

1. Constitutional provisions

24. Article 12 of the Constitution (which was adopted by the National Assembly on 2 April 1997 and entered into force on 17 October 1997) states:

"The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational farmers' organisations, societies, citizens' movements, other voluntary associations and foundations."

Article 13 of the Constitution reads:

> "Political parties and other organisations whose programmes are based upon totalitarian methods or the models of nazism, fascism or communism, or whose programmes or activities foster racial or national hatred, recourse to violence for the purposes of obtaining power or to influence State policy, or which provide for their structure or membership to be secret, shall be forbidden."

Article 32 of the Constitution provides:

> "1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
>
> 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

Article 35 of the Constitution provides:

> "1. The Republic of Poland shall ensure that Polish citizens belonging to national or ethnic minorities have the freedom to preserve and develop their own language, to maintain customs and traditions, and to develop their own culture.
>
> 2. National or ethnic minorities shall have the right to establish educational and cultural institutions and institutions designed to protect religious identity, as well as to participate in the resolution of matters relating to their cultural identity."

Article 58 of the Constitution, proclaiming the right to freedom of association, reads:

> "1. The freedom of association shall be guaranteed to everyone.
>
> 2. Associations whose purposes or activities are contrary to the Constitution or statute shall be prohibited. The courts shall decide whether to register an association and/or whether to prohibit an [activity of] an association.
>
> 3. Categories of associations requiring court registration, the procedure for such registration and the manner in which activities of associations may be monitored shall be specified by statute."

25. Chapter III of the Constitution, entitled "Sources of Law", refers to the relationship between domestic law and international treaties.

Article 87 § 1 provides:

> "The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international treaties and ordinances."

Article 91 states:

> "1. As soon as a ratified international treaty has been promulgated in the Journal of Laws of the Republic of Poland, it shall constitute a part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
>
> 2. An international treaty ratified after prior consent has been given in the form of a statute shall have precedence over statutes where the provisions of such a treaty cannot be reconciled with their provisions.

3. Where a treaty ratified by the Republic of Poland establishing an international organisation so provides, the rules established by it shall be applied directly and have precedence in the event of a conflict of laws."

2. Law of 7 April 1989 on Associations (as amended)

26. Section 1 of the Law, in the version applicable at the material time, prescribed:

"1. Polish citizens shall exercise the right of association in accordance with the Constitution ... and the legal order as specified by statute.

2. The [exercise of the] right of association may be subject only to such limitations as are prescribed by law and are necessary for ensuring the interests of national security or public order and for the protection of health and morals or for the protection of the rights and freedoms of others.

3. Associations shall have the right to express their opinion on public matters."

Section 2 provides, in so far as relevant:

"1. An association is a voluntary, self-governing, stable union pursuing non-profit-making aims.

2. An association shall freely determine its objectives, its programmes of activity and organisational structures, and shall adopt internal resolutions concerning its activity.

... ".

Section 8, in the version applicable at the material time, stated, in so far as relevant:

"1. An association shall register itself in the National Court Register …, unless statute provides otherwise.

[Subsections 2-4 were repealed on 20 August 1997]

5. The activities of associations shall be supervised by [the Governor of the relevant Province], who shall be referred to hereinafter as 'supervisory organ'.

The relevant part of section 10 provides:

"1. An association's memorandum shall in particular specify:

(1) the name of the association which shall differentiate it from other associations, organisations or institutions;

...

(4) the conditions for the admission of members, the procedure and grounds for the loss of membership, and the rights and obligations of members."

Section 12 reads as follows:

"The management committee of an association shall lodge with the competent court an application for the registration of their association together with a memorandum of association, a list of the founders containing their first names, surnames, dates and places of birth, their places of residence and signatures, a record of the election of the management committee and the address of their provisional headquarters."

Section 13 stipulates:

"1. A court dealing with an application for the registration of an association shall rule on such an application promptly; a ruling should be given within three months from the date on which the application was lodged with the court.

2. The court shall serve a copy of the application for the registration, together with the accompanying documents specified in section 12 on [the relevant] supervisory organ. The supervisory organ shall have the right to comment on the application within fourteen days from the date of service and, with the court's leave, to join the proceedings as a party."

Section 14 reads:

"The court shall refuse to register an association if it has not fulfilled the conditions laid down in [this] Law."

Section 16 provides:

"The court shall allow an application for registration of an association if it is satisfied that the latter's memorandum of association is in conformity with the law and its members comply with the requirements laid down in [this] Law."

27. Chapter 3 of the Law, entitled "Supervision of associations", provides, in sections 25 et seq., for various means of monitoring the activities of associations and lays down the conditions for the dissolution of an association.

Under section 25 the relevant supervisory organ is entitled to request the management committee of an association to submit, within a specified time-limit, copies of resolutions passed by the general meeting of the association or to ask the officers of an association to provide it with "necessary explanations".

In the event that such requests are not complied with, the court, under section 26 and a motion from the supervisory organ, may impose a fine on the association concerned.

Under section 28, a supervisory organ, if it finds that activities of an association are contrary to the law or infringe the provisions of the memorandum of association in respect of matters referred to in section 10(1) and (2), may request that such breaches cease, or issue a reprimand, or request the competent court to take measures under section 29.

Section 29 provides, in so far as relevant:

"1. The court, at the request of a supervisory organ or a prosecutor, may:

(1) reprimand the authorities of the association concerned;

(2) annul [any] resolution passed by the association if such a resolution is contrary to the law or the provisions of the memorandum of association;

(3) dissolve the association if its activities have demonstrated a flagrant or repeated failure to comply with the law or with the provisions of the memorandum of association and if there is no prospect of the association reforming its activities so as to comply with the law and the provisions of the memorandum of association."

3. Law of 28 May 1993 on Parliamentary Elections (repealed after the entry into force of the Law of 12 April 2001 on Elections to the Sejm and Senate of the Republic of Poland)

28. Section 3 of the Law (hereafter referred to as the "1993 Law on Parliamentary Elections") provided:

"1. In the distribution of seats [in the Parliament] account shall be taken only of those regional electoral lists of electoral committees which have received at least 5% of the valid votes cast in the whole [of Poland].

2. The regional electoral lists of electoral committees referred to in section 77(2) (electoral coalitions) shall be taken into account in the distribution of seats [in Parliament], provided that they have received at least 8% of the valid votes cast in the whole [of Poland]."

Section 4 prescribed:

"In the distribution of seats among national electoral lists account shall be taken only of those lists of electoral committees which have received at least 7% of the valid votes cast in the whole [of Poland].

Section 5 stipulated:

"1. Electoral committees of registered organisations of national minorities may be exempted from one of the conditions referred to in section 3(1) or in section 4, provided that, not later than the fifth day before the date of the election, they submit to the State Electoral College a declaration to that effect.

2. The State Electoral College shall promptly acknowledge receipt of the declaration referred to in subsection 1. This declaration shall be binding on electoral colleges."

Section 91 provided, in so far as relevant:

"…

2. An electoral committee which has registered its regional electoral lists in at least half of the constituencies [in the whole of Poland] … shall be entitled to register a national electoral list.

3. Electoral committee[s] of organisations of national minorities shall be entitled to register a national electoral list, provided that [they] ha[ve] registered their regional electoral lists in at least five constituencies."

4. Civil Code

29. Article 5 of the Civil Code states:

> "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*). No act or omission [fulfilling this description] on the part of the holder of the right shall be deemed to be the exercise of the right and shall be protected [by law]."

Article 58 provides, in so far as relevant:

> "1. A[ny] act which is contrary to the law or aimed at evading the law shall be null and void, unless a statutory provision provides for other legal effects, such as the replacement of the void elements of such an act by elements provided for by statute.
>
> 2. Any act which is contrary to the principles of co-existence with others, shall be null and void."

5. Framework Convention for the Protection of National Minorities

30. At the material time Poland was a signatory to the Framework Convention for the Protection of National Minorities (ETS No. 157); the date of signature was 1 February 1995. Poland ratified that Convention on 20 December 2000. It has been in force since 1 April 2001.

31. The Framework Convention contains no definition of the notion of "national minority". Its explanatory report mentions that it was decided to adopt a pragmatic approach, based on the recognition that at that stage it was impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States.

32. A number of the member States made declarations setting out definitions of "national minority" for the purposes of the Framework Convention. Poland, at the time of the deposit of the instrument of ratification, made the following declaration:

> "Taking into consideration the fact that the Framework Convention for the Protection of National Minorities contains no definition of the national minorities notion, the Republic of Poland declares that it understands this term as national minorities residing within the territory of the Republic of Poland at the same time whose members are Polish citizens."

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

33. The applicants complained that the Polish authorities had arbitrarily refused to register their association under the name "Union of People of Silesian Nationality". They alleged a breach of Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Whether there has been an interference

34. All those appearing before the Court accepted that the refusal to register the applicants' association amounted to an interference with their freedom of association. The Court takes the same view.

B. Whether the interference was justified

35. Such an interference will contravene Article 11 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 of that Article and was "necessary in a democratic society" for achieving them.

1. "Prescribed by law"

(a) The parties' submissions

i. The applicants

36. The applicants argued that the interference with their right to associate with others had not been "prescribed by law".

It was true, they maintained, that under the Law on Associations and the constitutional provisions courts might refuse to register an association. That

was only the case, however, if they found that a memorandum of association was not in conformity with the law.

That finding could not be of a general character. The courts were obliged to rely on specific legal provisions, which were, or would have been, infringed by the content of the memorandum of association before them. In the applicants' submission, neither the courts dealing with their case nor the Government had relied on any such provisions.

ii. The Government

37. In the Government's submission, there could be no doubt as to the fact that the interference in question was "prescribed by law". The courts had based their decisions on a number of domestic legal provisions, in particular on sections 14 and 16 of the Law on Associations. The former section provided that a court should refuse to register an association if it did not satisfy the conditions laid down in that Law. Moreover, constitutional provisions forbade the registration of associations whose purposes or activities were contrary to the Constitution or to statutes.

Lastly, the Government pointed out that the provisions setting out the conditions for the registration of associations were sufficiently clear and precise to allow a person to determine his or her conduct and, consequently, met the criterion of the "foreseeability" of the law" for the purposes of the Convention.

(b) The Court's assessment

38. The Court notes that the Supreme Court and the Katowice Court of Appeal, in refusing to register the applicants' association, relied on a number of domestic legal provisions, in particular on Article 32 of the Constitution, Articles 5 and 58 of the Civil Code and sections 8, 10(1)(4) and 14 of the Law on Associations (see paragraphs 19 and 23 above). It accordingly holds that the interference was "prescribed by law".

2. "Legitimate aim"

(a) The parties' submissions

i. The Government

39. The Government pointed out that the interference in question had pursued the legitimate aims of the prevention of disorder and the protection of the rights and freedoms of others.

As to the first limb of their contention, they argued that the applicants – in order to circumvent the provisions of the electoral law – had used the legal procedure designed for the registration of associations to obtain "national minority" status. That should not, in the Government's view, be

an avenue through which persons could seek to have themselves recognised as a "national minority".

40. The Government further stressed that – as the competent courts had correctly held in their decisions – the registration of the applicants' association as an organisation of a national minority would have entailed serious consequences for the legal order of the State. It would have enabled the Silesians – who were not a "nation" but only one of several ethnically distinct groups of Poles – to claim several privileges granted by Polish law to genuine national minorities. Most notably, the applicants' association would inevitably have acquired the special rights provided for by the 1993 Law on Parliamentary Elections. Under that Law, electoral committees of registered organisations of national minorities had had a right to be exempted from the 5 per cent threshold of votes required to participate in the distribution of seats in Parliament.

41. The Government went on to argue that the authorities had also had to pay due regard to the adverse consequences that the registration of the applicants' association would have entailed for the rights of other ethnic groups in Poland. Had the Silesian ethnic group acquired the status of a national minority through the procedure for the registration of their association, the principle of equality before the law would have been infringed. Other ethnic groups of Polish citizens, for instance Highlanders, Kashubians or Mazurians, would evidently have been discriminated against.

ii. The applicants

42. The applicants considered that the Government's submissions were based on several far-fetched presumptions and hypotheses, but not on documentary evidence produced by the founders of the Union of People of Silesian Nationality before the Polish courts.

They maintained that there had been nothing in their memorandum of association to suggest that the members of the Union had in reality sought to obtain judicial recognition of a national minority with the aim of benefiting from privileges granted by Polish law to such minorities.

Moreover, in the applicants' opinion, anticipating a situation where members of other ethnic minority groups would be discriminated against depended on additional prerequisites. First, those minorities would have had to declare aspirations similar to those of the Union of People of Silesian Nationality. Second, their aspirations would have had to be denied. Only in such circumstances could one speak of an infringement of the principle of equality before the law.

43. In conclusion, the applicants asked the Court to reject the Government's argument that the interference in question had pursued the aims of upholding the principle of equality before the law and of preventing discrimination against other ethnic or regional groups.

(b) The Court's assessment

44. The Court observes that both the Supreme Court and the Court of Appeal held that allowing to register the applicants' association would be contrary to the law, especially as the name of the association, which in their view was linked to a non-existent nation, would mislead the public. The courts also considered that registering the Union as an organisation of a national minority would entail serious consequences for other ethnic groups in Poland (see paragraphs 19 and 23 above).

The impugned measure was, accordingly, taken in furtherance of "the prevention of disorder" and "the protection of the rights of others", which are legitimate aims for the purposes of Article 11 of the Convention.

3. "Necessary in a democratic society"

(a) The parties' submissions

i. The applicants

45. The applicants maintained that the refusal to register their association had not been necessary to achieve the aims allegedly pursued by the authorities. In their submission, the arguments advanced by the Government and, earlier, by other domestic authorities did not correspond to the concept of a "pressing social need" as interpreted by the Court.

Nor had there been a reasonable balance of proportionality between the measure applied and the objectives pursued. In that context, the applicants stressed that the refusal to register their association had been based on the single fact that its proposed name had contained the expression "nationality". That term, in the authorities' view, could not apply to the Silesians as they allegedly were only an ethnic minority. However, their opinion was arbitrary because Polish legislation did not define the terms "ethnic" or "national" minority and did not provide for any procedure whereby minorities could seek legal recognition.

46. In that connection, the applicants strongly criticised the authorities for having used the procedure established for the registration of associations to prejudge the question of whether the Silesians were a "minority", instead of settling the issue before them, namely, whether the association had satisfied the conditions laid down in the Law on Associations and whether its memorandum of association had been in conformity with the law, as required by sections 14 and 16 of that Law.

47. Relying on the Court's case-law on the subject, the applicants further argued that what should have been relevant for a decision on whether or not to register their association was the content of its programme, setting out the intentions of its founders. There had been nothing in the memorandum of association to suggest that they were going to stand for parliamentary

elections. There had been no evidence to demonstrate that their true intentions had been different from those declared, or incompatible with the principles of the democratic State and the rule of law.

48. In any event, the applicants added, had their association been registered and had its subsequent activities been found incompatible with the legal order, or with the provisions of its memorandum of association, the authorities had powerful means at their disposal to ensure compliance with the law. They could, for instance, have had recourse to measures such as the annulment of unlawful resolutions passed by the association or the dissolution of the latter, pursuant to section 29 of the Law on Associations.

49. In the light of the foregoing, the applicants considered that the impugned interference with their right to associate with others had not been necessary in a democratic society for the prevention of disorder or for the protection of the rights of others.

ii. The Government

50. The Government accepted that the exceptions set out in Article 11 of the Convention should be interpreted strictly and that only compelling reasons justified restrictions on the freedom of association. They stressed, however, that States had a certain margin of appreciation in that sphere and that they had to be satisfied that the aims and activities of an association were in conformity with national law.

51. Consequently, the Government continued, the authorities had had to take steps in order to ensure that the name of the applicants' association would not be misleading for the public and would not arouse unnecessary controversy among the other members of society.

52. The Government acknowledged that an individual had a right to choose whether or not he or she wished to belong to a minority group. Yet that could not endow the group in question with the status of a national minority and, as the Supreme Court and the Court of Appeal had rightly held, the choice in question had to relate to an existing nation or nationality. That was not the case of the Silesians, who were merely an ethnic group.

53. Admittedly, the Government added, neither the Polish Constitution nor any other statute provided for any specific procedure whereby a minority could seek legal recognition. It was, however, possible for a group of persons to obtain such recognition through the procedure for the registration of associations. In the course of those proceedings the courts examined, as they had done in the present case, whether a given group fulfilled the requirements for recognition as a minority.

Apart from that, some national minorities – such as Germans, Belarusians, Ukrainians, Lithuanians, Slovaks and Czechs – had formally been recognised in bilateral treaties on good neighbourliness and friendly co-operation which Poland had concluded in recent years.

54. In conclusion, turning to the circumstances surrounding the refusal to register the applicants' association, the Government attached considerable importance to the fact that the applicants had refused to amend – even slightly – the most controversial provision of their memorandum of association and the name of their organisation. Had the applicants deleted or altered the disputed paragraph 30 of the memorandum, their association would have been registered without any difficulty.

In the Government's opinion it had not been disproportionate to require the applicants to delete that single provision, especially as the averred objectives of their association could have been achieved without it.

Against that background, the Government concluded that the interference with the applicants' right to associate with others could not be deemed to be so severe as to constitute a breach of Article 11.

(b) The Court's assessment

i. General principles deriving from the Court's case-law

55. The Court recalls at the outset that the right to form an association is inherent in the right laid down in Article 11, even if that provision only makes express reference to the right to form trade unions.

The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning.

The way in which national legislation protects the freedom of association and the manner in which the State authorities apply the relevant provisions in practice give an indication of the development of democracy in the country concerned.

While it is true that States are entitled to satisfy themselves that an association's objectives and activities are in conformity with the domestic legal order, they must do so in a manner compatible with their obligations under the Convention and subject to the Court's review (see the Sidiropoulos and Others v. Greece judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1614-15, § 40).

56. The Convention requires that any interference with the exercise of the right to freedom of association must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying such interference is, therefore, one which may claim to spring from democratic society (see the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 21, § 45).

57. The term "necessary" in Article 11 does not have the flexibility of expressions such as "useful" or "desirable". In addition, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although

individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 25, § 63; and *Chassagnou and Others v. France* [GC], nos. 25088/95, 28331/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

58. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.

Thus, in determining whether a necessity within the meaning of Article 11 § 2 exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous supervision by the Court. That supervision embraces both the law and the decisions applying it, including those given by independent courts (see the Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, p 1258, § 50).

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities, but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. That does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. It must also look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".

In so doing, the Court also has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the United Communist Party of Turkey and Others v. Turkey judgment cited above, in § 47).

59. In that connection, the Court further recalls that the freedom of association is not absolute and that in certain cases it has accepted that the need to protect Convention rights may lead States to restrict other rights or freedoms likewise set forth in the Convention (see, *mutatis mutandis*, the Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, pp. 18 and 19, §§ 47 and 50). The balancing of conflicting individual interests and rights is a difficult exercise. It may involve consideration of political and social issues on which opinions within a democratic society differ significantly.

In that sphere the Contracting States must have a broad margin of appreciation because, given their knowledge of the country, their authorities are in principle better placed than the European Court to assess whether or

not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention (see, *mutatis mutandis*, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48).

60. Still in that context, the Court has also held that the nature and severity of the impugned measure are factors to be taken into account when assessing the proportionality of the interference (see, *mutatis mutandis*, *Okçuoğlu v. Turkey* [GC], no. 24246/94, ECHR 1999-IV, § 49 *in fine*).

It has, moreover, accepted that in some cases the application of radical or even drastic measures, including the immediate and permanent dissolution of an organisation and confiscation of its assets, may be justified under Article 11 (see the Socialist Party and Others v. Turkey judgment cited above, § 51; and *Refah Partisi and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, §§ 81 et seq., ECHR 2001-...).

ii. Application of the above principles to the instant case

61. The Court notes at the outset that the Polish authorities, in justifying their refusal to register the applicants' association under the name "Union of People of Silesian Nationality", relied on the ground that both the intended name and certain provisions of the Union's memorandum of association, which characterised Silesians as a "national minority", implied that their real intention was to circumvent the provisions of the electoral law (see paragraphs 19 and 23 above).

They also attached considerable importance to the fact that, had the members of the Union been recognised as a "national minority" in the process of the registration of their association, they would automatically have been afforded an unqualified and legally enforceable claim to special privileges granted to national minorities by the relevant legislation (see paragraphs 19, 23 and 40 above).

In that regard, the authorities relied heavily on a further argument - which was rejected by the applicants – that the Silesians were neither a "nation" nor a "national minority", but simply one of several ethnic groups of Polish citizens. They accordingly considered that the name chosen by the applicants for their association would be deceptive for the public and contrary to the law. In particular, they invoked the principle of equality before the law, holding that the registration of the applicants' association in the manner suggested by them would amount to discrimination against other ethnic groups (see paragraphs 19, 23 and 41 above).

62. The Court observes that it is not its task to express an opinion on whether or not the Silesians are a "national minority", let alone to formulate a definition of that concept. Indeed, the formulation of such a definition would have presented a most difficult task, given that no international treaty – not even the Council of Europe's Framework Convention for the

Protection of National Minorities – defines the notion of "national minority".

Nor did Polish law define that term at the material time. In the context of parliamentary elections it did, however, make a reference to "registered associations of national minorities" and provide for a number of privileges for such associations under the electoral law (see paragraph 28 above). But there was no legal procedure at the domestic level whereby a national or other minority could seek recognition (see paragraphs 45 *in fine* and 53).

Consequently, groups which were not recognised as national minorities by the bilateral treaties on good neighbourliness referred to in paragraph 53, could only obtain "indirect" recognition through the procedure for the registration of associations.

63. While the Court considers that that lacuna in the law left a degree of legal uncertainty for individuals and a degree of latitude for the authorities, especially since persons claiming to belong to a minority, in order to be recognised as such, had to make use of a procedure which was not designed for that purpose, it does not find that that fact in itself had consequences for the applicants' rights under Article 11. The Court considers that the central issue lies in a different aspect of the case.

64. That aspect consist in assessing whether the applicants would have been denied the opportunity of forming an association for the purposes listed in paragraph 7 of their memorandum of association – which included, for instance, the awakening and strengthening of the "national consciousness of Silesians" (see paragraph 9 above) – had they been prepared to compromise on points that were particularly sensitive for the State.

Those points concerned, as has already been mentioned, the name of the association and the content of paragraph 30 of its memorandum of association (see paragraphs 11, 13, 16 and 18 above).

It is further noted that the authorities' concern in that regard would not seem to have lacked a reasonable basis. Paragraph 30 of the memorandum of association stated that "The Union is an organisation of the Silesian national minority". The three crucial words in that phrase, namely "organisation", "national" and "minority", are precisely those also found in section 5(1) of the Law on Parliamentary Elections, laying down conditions for exemption from the threshold of votes required to participate in the distribution of seats in Parliament (see paragraph 28 above).

This coincidence, together with the name proposed for the applicants' association, gives the impression that in future the members of the association might, in addition to the pursuit of the objectives expressly set out in their programme, aspire to stand in elections.

65. In that connection, the Court cannot but note that the applicants could easily have dispelled the doubts voiced by the authorities, in particular by slightly changing the name of their association and by sacrificing, or

amending, a single provision of the memorandum of association (see paragraph 16 above). Those alterations would not, in the Court's view, have had harmful consequences for the Union's existence as an association and would not have prevented its members from achieving the objectives they set for themselves.

66. The Court would also point out that pluralism and democracy are, by the nature of things, based on a compromise that requires various concessions by individuals and groups of individuals. The latter must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole. This is particularly true as regards the electoral system, which is of paramount importance for any democratic State.

The Court accordingly considers that, in the particular circumstances of the present case, it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the State, a system which is an indispensable element of the proper functioning of a "democratic society" within the meaning of Article 11.

There has therefore been no breach of that provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 20 December 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President