CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF BELLER v. POLAND

(Application no. 51837/99)

JUDGMENT

STRASBOURG

1 February 2005

FINAL

06/06/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Beller v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 11 January 2005,

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

PROCEDURE

1. The case originated in an application (no. 51837/99) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Joanna Beller ("the applicant"), on 11 March 1999.

2. The applicant, who had been granted legal aid, was represented by Mr Wojciech Hermeliński, a lawyer practising in Warszawa. The Polish Government ("the Government") were represented by their Agents, Mr Krzysztof Drzewicki and, subsequently, by Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant complained under Article 6 of the Convention that her right to a fair hearing within a reasonable time had been breached. She also complained that the circumstances of the case amounted to an infringement of her right to the peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1.

4. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 16 December 2003 the Court declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1934 and lives in Warsaw.

A. Facts and decisions before 1990

8. The applicant's father owned the so-called “Kraków Bishops' Palace” situated in the centre of Warsaw and the plot of land on which it stood. The Government submitted that 75 to 80 % of the building had been destroyed during the Second World War.

9. By virtue of the 1945 Decree on the Ownership and Use of Land in Warsaw (*dekret o własności i użytkowaniu gruntów na obszarze m. st. Warszawy*) the Warsaw municipality (and after 1950 the State Treasury) became the owner of all plots of land located in Warsaw. The decree gave the former owners the possibility of obtaining a perpetual lease (after 1946 - temporary ownership) of a plot of land on request.

10. In 1947 the applicant's father concluded, before a public notary, an agreement with a certain state institution, according to which that institution was to obtain the right of use of the property upon its declaration to reconstruct the palace. The Government submitted that the agreement at issue had never been enforced because it was illegal.

11. In 1948 the applicant's father lodged, under the 1945 Decree, a request to be granted the right of temporary ownership of the plot of land formerly owned by him. It was refused by a decision issued in 1949, which was served neither on him, nor on his lawyer.

12. In 1951 the applicant's father died.

13. In 1955 another decision refusing the 1948 request was issued. This decision was also not served.

14. On 14 March 1990 the applicant, as the sole heir to her father's property (the inheritance proceedings were completed in October 1990), filed with the Warsaw Śródmieście District Office (*urząd dzielnicowy*) a petition in which she requested the restitution of her property.

15. Subsequently, the Social Security Board (*Zakład Ubezpieczeń Społecznych*), which occupied the property, requested the administrative authorities to grant it the right of management (*zarząd*) of that property, but to no avail.

B. Proceedings concerning the perpetual use of the land

16. On 16 September 1991 the applicant was served with the decision of 1955 refusing her father the right of temporary ownership of the land.

17. On 24 September 1991 she lodged with the Warsaw Governor (*wojewoda*) a request for the annulment of that decision.

18. On 11 October 1991 the Warsaw Regional Prosecutor (*prokurator wojewódzki*) joined the proceedings, considering that in the light of the gravity of the alleged breaches of the law the participation of the prosecutor was necessary.

19. On 27 July 1992 the applicant lodged with the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) a complaint about the inactivity of the Governor, who had failed to issue a decision concerning her request.

20. On 11 December 1992 the court rejected the complaint, relying on the temporal limits of its jurisdiction.

21. On 24 December 1992 the Minister of Construction (*Minister gospodarki przestrzennej i budownictwa*) quashed the decision of 1955. He found that the impugned decision did not contain any reference to the 1949 decision, whereas they concerned the same matter. The Minister further considered that the reasoning of the decision was not supported by any documents.

22. On 5 October 1993 the Head of the Warsaw District Office (*kierownik urzędu rejonowego*) refused to grant the applicant the right of perpetual use (*użytkowanie wieczyste*, which replaced the former temporary ownership) of the land. He relied, *inter alia*, on the fact that over 70 % of the palace had been destroyed during the Second World War and that it could therefore, after reconstruction, be considered as a new building. Having reconstructed it on its own land, the State had become that building's owner.

23. On 1 March 1994 the Warsaw Governor quashed that decision and discontinued the proceedings, considering that they had become devoid of purpose, because the request of the applicant's father had already been refused by the decision of 1949.

24. On 16 October 1995 the Supreme Administrative Court allowed the applicant's appeal against the decision of 1 March 1994. The court declared the Governor's decision null and void. It found that the Governor had overlooked the fact that the 1949 decision had probably never been served on the applicant's father and that it should not, therefore, have been considered as having valid legal effect.

25. On 18 March 1996 the Governor quashed the decision of the Head of the District Office issued on 5 October 1993 and remitted the case for re-examination.

26. On 18 July 1997 the Warsaw District Office sent to the applicant a copy of the 1949 decision by which her father had been refused temporary ownership.

27. On 1 August 1997 the applicant requested the annulment of that decision.

28. On 25 August 1997 the Warsaw Governor quashed the 1949 decision and remitted the case for re-examination.

29. On 12 November 1997 the Head of the Warsaw District Office re-examined the request lodged by the applicant's father in 1948. He granted the applicant the perpetual use of the land and declared that she retained the ownership of the building located there, in accordance with the 1947 agreement. The Head of the District Office found that a plan for the future use of the building, prepared by the applicant, complied with the existing town-planning scheme.

30. The Social Security Board appealed against that decision.

31. On 25 February 1998 the Warsaw Regional Prosecutor raised an objection (*sprzeciw*) to that decision. She submitted, in passing, that the clause concerning the ownership of the building was only of a declaratory nature, i.e. it confirmed something that had already been stipulated in the 1945 Decree. The contested decision should, in the prosecutor's argument, be set aside because the boundaries between the plots did not correspond to the boundaries between the buildings. Following that objection the Warsaw Governor instituted *ex officio* proceedings for the annulment of that decision.

32. On 3 April 1998 the Governor rejected an appeal against the decision of 12 November 1997 lodged by the Social Security Board. The Governor considered that only the former owners of properties located in Warsaw, or their legal successors, could have standing in proceedings instituted under the provisions of the 1945 Decree. The Board did not have any rights *in rem* to the property concerned and, therefore, had no standing in the proceedings. The Board appealed to the Supreme Administrative Court.

33. On 6 April 1998 the Governor stayed the enforcement proceedings in respect of the decision of 12 November 1997, having regard to the objection lodged by the prosecuting authorities.

34. On 12 April 1999 the Supreme Administrative Court quashed the Governor's decision of 3 April 1998, pointing out that the Governor, having found that the Social Security Board had no standing in the proceedings, should have issued a decision discontinuing the appellate proceedings.

35. On 31 August 1999 the Regional Prosecutor withdrew her objection and subsequently the proceedings concerning the annulment of the decision of 12 November 1997 were discontinued. However, the proceedings concerning the appeal lodged by the Social Security Board were still pending.

36. On 15 December 1999 the Governor discontinued the appeal proceedings, relying on the Social Security Board's lack of standing in the proceedings under the provisions of the 1945 Decree.

37. On 7 January 2000 the applicant, relying on the fact that the appeal proceedings against the award of the right to perpetual use had been discontinued by the decision of 15 December 1999, summoned a representative of the State Treasury to appear before a specified public notary for the purpose of concluding an agreement concerning the grant of perpetual use of the land. No representative of the State Treasury complied with the summons.

38. On 24 January 2000 the applicant requested the Supreme Administrative Court to dismiss the Board's petition to have the enforcement of that decision stayed. In reply, the court informed the applicant that the enforcement had been stayed *ex lege.*

39. On 18 January 2000 the Board appealed against the decision of 15 December 1999, submitting that the buildings it occupied were constructed in such a way that their walls did not run along the boundary between the plots of land underneath and, therefore, the 1997 decision awarding the applicant the right to perpetual use was impossible to enforce. The Board also argued that, being a State-owned entity occupying the property, it should take part in the proceedings in order to ensure the proper representation of the interests of the State.

40. In its pleadings of 13 March 2000 the Governor's Office (*Urząd Wojewódzki*) requested the Supreme Administrative Court to dismiss the Board's appeal, reiterating that it had no rights *in rem* to the property concerned.

41. On 21 November 2000 the Supreme Administrative Court allowed the Social Security Board's appeal and quashed the decision of 15 December 1999. It noted that in 1984 the Board had been granted the use of a neighbouring plot of land and, on the strength of a law enacted in 1998, had become the owner of that plot. The court found that it was necessary to establish whether the plot owned by the Board overlapped with the plot covered by the 1997 decision granting the right to perpetual use to the applicant. If this was the case, the Board should be allowed to take part in the proceedings as a party.

42. On 23 July 2001 the Governor quashed the decision of 12 November 1997. He pointed out that in the course of further proceedings the line of the boundary in question should be established and, consequently, it should be decided whether the Board had standing. The Governor referred to legislation which had entered into force on 1 January 1999, under which the Board had become *ex lege* the owner of lands it had been managing. The applicant appealed against that decision to the Supreme Administrative Court. She stressed that the case had already been examined by that court five times. She also submitted that the Governor could have ruled on the

Board's rights in the proceedings himself on the basis of the ample material already contained in the case-file.

43. Meanwhile, on 26 November 1999 the President of the Office for Housing and Urban Development (*Prezes Urzędu Mieszkalnictwa i Rozwoju Miast*), on the request of the Ministry of Labour, instituted proceedings for the annulment of the decision of 25 August 1997 (quashing the above-mentioned 1949 decision).

44. On 19 October 2001 the applicant lodged with the Supreme Administrative Court a complaint about the inactivity of the President of that office.

45. On 13 December 2001 the President of the Office for Housing and Urban Development annulled the decision of 25 August 1997, by which the 1949 refusal to grant temporary ownership to the applicant's father had been quashed. He considered that the Governor had not been competent to issue that decision as following many legislative changes he was not to be considered as legal successor of the authority which had been competent to give this decision under the provisions of the 1945 Decree.

46. On 18 December 2001 the Supreme Administrative Court asked the applicant whether she was pursuing her complaint about inactivity, despite the fact that the authority concerned had given a decision. She withdrew her complaint.

47. On 30 April 2002 the President of the Office for the Housing and Urban Development, after the re-examination of the case requested by the applicant, upheld his own decision of 13 December 2001. He reiterated that following changes in the legislation concerning the powers of local authorities and their hierarchy, the Warsaw Governor, on the strength of an interpretation of this legislation given on 19 August 1999 by the Prime Minister, had not been competent to issue the decision of 25 August 1997.

48. The applicant lodged an appeal with the Supreme Administrative Court. She submitted that the interpretation relied on by the President of the Office for Housing had been given two years after the decision of August 1997 on the basis of which she could have acquired her rights. She stressed that before that interpretation had been given, the established practice considered that the Warsaw Governor was competent to give decisions such as in her case.

49. On 25 March 2004 the Warsaw Regional Administrative Court dismissed the applicant's appeal. It acknowledged that the interpretation given in 1999 could not have been validly relied on in support of the quashing of the 1997 decision as it had been given in a different case and concerned different legal issues. However, the court, having analysed the evolution of the legislation regulating the powers of local administration since 1938, concluded that it did not change the fact that the Warsaw Governor had lacked competence to give the 1997 decision.

50. The applicant lodged an appeal on points of law against this judgment with the Supreme Administrative Court, arguing that the legal analysis of the lower court as to the competence to give the 1997 decision was erroneous.

51. The proceedings are currently pending before the Supreme Administrative Court.

C. Land and mortgage register

52. In 1990 the applicant enquired about the legal status of the disputed property. She received a certificate from a public notary office stating that in the land-and-mortgage register her father was mentioned as the owner of property no. 496. Although in 1983 the State authorities had requested that an entry be made in the register declaring that the State Treasury was the owner, the request was not granted, as they had failed to submit the 1955 decision refusing the applicant's father the right to temporary ownership with a clause confirming its legal force. In 1985 the proceedings concerning that request were stayed. Another entry in the register concerned the 1945 decree, following which the State Treasury became the owner of the land. The certificate contains a clause stating that it does not concern the ownership rights to the buildings located on the plot.

53. On 28 January 1991 the public notary office refused the applicant's request to make an entry replacing the name of her father by her name in the land register. The office pointed out that, as long as the issue of perpetual use was not decided, it could not make any amendments to the register.

54. Similar information is contained in a certificate issued on 4 April 1996 by the land-and-mortgage register department of the Warsaw District Court.

II. RELEVANT DOMESTIC LAW

A. Decree on the Ownership and Use of Land in Warsaw

55. In accordance with the Decree of 26 October 1945 on the Ownership and Use of Land in Warsaw (*dekret o własności i użytkowaniu gruntów na obszarze m. st. Warszawy*) the ownership of all land was transferred to the municipality. The decree provided in so far as relevant:

> "Article 5. Buildings and other objects located on the land being transferred to the municipality's ownership remain the property of those who have owned them so far, unless specific provisions provide otherwise.

> Article 7. (1) The owner of a plot of land ... can within 6 months after the taking of possession of the land by the municipality file a request to be granted ... the right to a perpetual lease (*wieczysta dzierżawa*) with a peppercorn rent (*czynsz symboliczny*). ...
>
> (2) The municipality shall grant the request if the use of the land by the former owner is compatible with its function set forth in the development plan (*plan zabudowania*). ...
>
> (4) In case the request is refused, the municipality shall offer the person entitled, as long as it has spare land in its possession, a perpetual lease of land of equal value, on the same conditions, or the right to construct on such land.
>
> (5) In case no request, as provided for in paragraph (1), is filed, or the former owner is for any other reasons not granted a perpetual lease or the right to construct, the municipality is obliged to pay compensation pursuant to Article 9.
>
> Article 8. In case the former owner is not granted the right to a perpetual lease or the right to construct, all buildings located on the land shall become the property of the municipality, which is obliged to pay, pursuant to Article 9, compensation for the buildings which are fit to be used or renovated.
>
> Article 9. ... (2) The right to compensation begins to apply six months after the day of taking the land into possession by the municipality of Warsaw and expires three years after that date. ..."

56. Under Article XXXIX of the Decree of 11 October 1946 introducing the Property Law (*prawo rzeczowe*) and the Law on Land and Mortgage Registers, the right to construct and the right to a perpetual lease could be transferred into temporary ownership (*własność czasowa*).

Section 40 of the Law of 14 July 1961 on Administration of Land in Towns and Estates (*ustawa o gospodarce terenami w miastach i osiedlach*) replaced temporary ownership with perpetual use (*użytkowanie wieczyste*).

57. Pursuant to section 33(2) of the Local State Administration Act of 20 March 1950, ownership of property situated in Warsaw was assigned to the State Treasury.

58. The Local Self-Government Act of 10 May 1990 re-established local self-government. Pursuant to section 5(1), ownership of land which had previously been held by the State Treasury and which had been within the administrative territory of municipalities at the relevant time was transferred to the municipality.

B. Perpetual use

59. The right to perpetual use is regulated by the Civil Code. An individual or a legal entity may be granted such a right over land owned by the State or a local authority. The right comprises a right to use the land to the exclusion of others for ninety-nine years, on payment of a yearly fee. The person entitled to the right can dispose of it.

C. Administrative decisions

60. Article 16 of the Code of Administrative Procedure stipulates that those administrative decisions, against which no further appeal is available, are final. A decision becomes final if, *inter alia*, no appeal against it has been lodged with the competent authority within two weeks as laid down by Article 129 of the Code.

D. Participation of prosecuting authorities in administrative proceedings

61. Article 184 of the Code of Administrative Procedure provides that prosecuting authorities can lodge an objection against any final administrative decision if it they consider that it is flawed with procedural or substantive shortcomings such as would justify its annulment under the relevant provisions of the Code. There is no time-limit for the lodging of such an objection.

E. Land register

62. The land registers are run by the Land Register Divisions of the District Courts. Article 24 provides that a separate file shall be opened for each property. Pursuant to Article 25, the files shall be divided into four sections. The first section shall identify the real property. The second chapter shall name its owner or owners. The third section shall list rights *in rem* and other rights of third parties encumbering the property, and the fourth section shall contain entries concerning mortgages.

63. Article 3 of the Land Register Act establishes a legal presumption that the title registered in the land register corresponds to the actual legal status of the property.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

64. The applicant alleged a violation of Article 6 § 1 of the Convention, arguing that the proceedings in which she tried to vindicate her rights to compensation have been excessively lengthy.

65. The relevant provisions of Article 6 § 1 provide:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal ..."

A. Period to be taken into consideration

66. The Court notes that the proceedings began on 14 March 1990 and are still continuing. They have therefore already lasted over fourteen years, of which a period of over eleven years and nine months falls within the Court's temporal competence, Poland having recognised the right of individual petition as from 1 May 1993. Given its jurisdiction *ratione temporis*, the Court can only consider the period which has elapsed since 1 May 1993, although it will have regard to the stage reached in the proceedings on that date (see, among other authorities, *Zwierzyński v. Poland,* no. 30210/96, § 123, ECHR 2000-XI).

B. Reasonableness of the length of the proceedings

67. The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It will also take account of what is at stake for the applicant (see, among many other authorities, *Biskupska v. Poland*, no. 39597/98, § 43, 11 July 2003).

68. The Government submitted that the case was very complex, mainly due to the unclear legal status of the disputed property. The administrative authorities had had to establish whether the decision of 1949 had been properly served on the applicant's father and whether the Social Security Board could participate in the proceedings. They were of the view that the case was dealt with without undue delay.

69. The applicant considered that the Government's contention as to the complexity of the case was not supported by any convincing arguments. She stated that the legal status of the property was clear. The applicant made reference to a number of periods of inactivity on the part of the administrative organs and the Supreme Administrative Court.

70. The Court acknowledges that the case was complex, both as to the facts and to the law. However, as regards the conduct of the authorities, the Court notes that there was a period of fifteen months of inactivity between 1 March 1994 when the decision of the Warsaw Governor was given, and the judgment of the Supreme Administrative Court of 16 October 1995. Subsequently, there was no progress in the proceedings for sixteen months between the date of the subsequent decision of the Warsaw Governor of 18 March 1996 and the date when this decision was executed on 18 July 1997. Later on, twelve months elapsed between April 1998, when the Social Security Board lodged their appeal, and 12 April 1999, when the Supreme Administrative Court gave judgment relating to that appeal. There was a further period of eleven months of inactivity between the date on which another appeal had been lodged with that court and its judgment of

21 November 2000. Lastly, eight months elapsed between that judgment and its execution by the Warsaw Governor. These periods of inactivity, while not excessive by themselves, resulted in an overall length of proceedings exceeding what can be considered acceptable under Article 6 § 1 of the Convention.

71. Consequently, having regard to all the circumstances of the case, the Court considers that the overall length of the proceedings complained of exceeded what was reasonable. There has therefore been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

72. The applicant complained of an infringement of her right to the peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1. The Government contested this.

73. Article 1 of Protocol No. 1 reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

74. The Court observes that the domestic proceedings to determine the applicant's claims are currently pending before the Supreme Administrative Court. Therefore, in so far as the applicant relies on Article 1 of Protocol No. 1 to the Convention, the Court considers that it would be premature to take a position on the substance of this complaint. In so far as the applicant complains about the length of those proceedings, the Court considers that Article 1 of Protocol No.1 complaint does not give rise to any separate issue (see, for example, *Zanghì v. Italy,* judgment of 19 February 1991, Series A no. 194-C, § 23, *Di Pede v. Italy*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 17, § 35).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

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

A. Damage

76. The applicant sought compensation for pecuniary damage in the amount of USD 40,000,000. She argued that this amount represented the income she could have obtained from the rent of the building concerned, together with the applicable legal interest due as from 1 January 1985. As a result of the fact that her case remains undecided, she has lost this prospective income.

77. She further claimed compensation for non-pecuniary damage resulting from the violation of her rights guaranteed by the Convention in the amount of USD 50,000.

78. As to pecuniary damage, the Government submitted that the applicant had not adduced any evidence to show that she suffered any actual loss. In their submission, the applicant claimed highly hypothetical profits which could not be regarded as justified. They further argued that the amounts claimed were excessive.

79. As to non-pecuniary damage, the Government submitted that the amount claimed by the applicant was also excessive.

80. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim. On the other hand the Court is of the view that the applicant must have sustained some non-pecuniary damage, which the mere finding of a violation cannot adequately compensate. The Court decides to award on an equitable basis EUR 7,000 under this head.

B. Costs and expenses

81. The applicant claimed EUR 4,000 for the legal fees incurred in the proceedings before the Court.

82. The Government invited the Court to reject the applicant's claim as excessive.

83. The Court, having regard to the nature of issues before the Court, considers that EUR 2,000 constitutes a reasonable award.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by 6 votes to 1 that there is no need to examine the complaint under Article 1 of Protocol No. 1;
3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement plus any tax that may be chargeable on them:
      (i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros) in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr S. Pavlovschi is annexed to this judgment.

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE PAVLOVSCHI

Unfortunately, and to my great regret, I am not able to subscribe to some of the conclusions reached by the majority in the present case.

I do not have any difficulty whatsoever as far as the finding of a violation of Article 6 § 1 of the Convention is concerned. At the same time, I cannot follow the majority as regards their decision that there was no need in this particular case to examine the complaint under Article 1 of Protocol No. 1.

Giving their reasoning for this decision, the majority stated in paragraph 74 of the judgment that "... the domestic proceedings to determine the applicant's claims are currently pending before the Supreme Administrative Court. Therefore, in so far as the applicant relies on Article 1 of Protocol No. 1 to the Convention, the Court considers that it would be premature to take a position on the substance of this complaint. In so far as the applicant complains about the length of those proceedings, the Court considers that Article 1 of Protocol No.1 complaint does not give rise to any separate issue...".

From this quotation it clearly appears that the Chamber has drawn its conclusion that there is no need for a separate examination of the case under the angle also of Article 1 of Protocol No. 1 to the Convention from the following two premises:

1) "... domestic proceedings to determine the applicant's claims are currently pending... [and therefore] it would be premature to take a position on the substance of this complaint..." and

2) "... In so far as the applicant complains about the length of those proceedings, the Court considers that Article 1 of Protocol No.1 complaint does not give rise to any separate issue...".

I cannot agree that these arguments provide a sufficient basis on which to draw a conclusion that there was no need for the Court to examine the applicant's complaint under Article 1 of Protocol No. 1 to the Convention.

On 16 December 2003 the Court examined the admissibility of both complaints – that is, those made under Article 6 § 1 and Article 1 of the Protocol No. 1- and unanimously declared both of them admissible. At that stage the Court also examined the problem of the alleged non-exhaustion of domestic remedies and held that all the remedies available to the applicant had been exhausted (see decision on admissibility of 16 December 2003, application no.51837/99). I fail to understand how it can be possible on the one hand to state that the complaint under Article 1 of the Protocol 1 was admissible and all the domestic remedies had been exhausted and, on the other hand, to conclude subsequently that the application in this part was "premature" and should be left without any examination.

In practical terms, if an application is "premature" it means that not all the remedies available under domestic law have been exhausted. In this type of situation an application should either be declared inadmissible for failure to exhaust these remedies, or its examination should be postponed pending the results of the domestic proceedings. In no event in this kind of situation should an application be left without any examination after having been declared admissible.

But even this is not decisive. What, in my opinion, really counts here is the following: in this particular case the excessive length of domestic proceedings should not and may not deprive the applicant of effective international protection of her property rights. The Court shall not, by leaving applications partly unexamined, create for national authorities possibilities to use excessive length of proceedings as a tool for unreasonable delays in deciding on the applicant's property rights or, in general, to prevent this Court from examining complaints made under Article 1 of Protocol No.1 in situations where Contracting States fail to comply with their Convention undertakings under Article 6 §1.

In the decision on admissibility given in the present case on 16 December 2003 the Court decided: "... in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits...". In my view, when the determination of complaints really required "an examination of the merits", the next logical step should have been the "examination of the merits" of both complaints under Article 6 § 1 and Article 1 of Protocol No.1, and not leaving one of them without any examination.

In so far as the second argument is concerned, I find it a little bit artificial. In my opinion, a part of an application may remain unexamined only in a situation where the violations found cover also other complaints. A mere finding of a violation of Article 6 § 1 should not by itself exclude a possibility of finding a violation of other provisions of the Convention on the basis of the same facts which have given rise to the violation of Article 6 § 1.

According to the Court's case-law, the excessive length of proceedings can affect other rights guaranteed by the Convention and the Court can examine separately complaints concerning allegations of a violation of various provisions of the Convention due to the excessive length of the proceedings.

In its decision on the admissibility of the present case, the Court found that the failure to try an action within a reasonable time can on occasions have repercussions as regards respect for some other right guaranteed by the Convention (see *Buchholz v. Germany*, judgment of 6 May 1981, Series A no. 42, p. 22, § 65). One and the same fact may fall foul of more than one provision of the Convention and its Protocols. In particular, the fact that the

Court has found a violation of the "reasonable time" requirement, set forth in Article 6 § 1 of the Convention, does not prevent it from examining the length of the proceedings complained of in the light of the guarantees of Article 1 of Protocol No. 1 (see *Erkner and Hofauer v. Austria*, judgment of 23 April 1987, Series A no. 117, p. 66, § 76).

I am fully in agreement with this statement.

In my view, an examination of the complaint made by the applicant under Article 1 of Protocol No. 1 in the present case was not only justified and necessary but even indispensable, as otherwise some very important rights protected by this provision would remain unprotected. The reasons that have led me to this conclusion are the following.

From the description of the factual circumstances of the present case, it is clear that some significant property rights of the applicant were at stake. I am not convinced at all that in this particular situation the infringements of the property rights which the applicant arguably suffered may be remedied and compensated by a finding of a violation of Article 6 § 1 of the Convention.

The provisions of Article 1 of Protocol No. 1 comprise three distinct rules. The first rule, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interests. These rules are not "distinct" in the sense of being unconnected: the second and the third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see *Zwierzyński v. Poland*, no. 34049/96, § 57, ECHR 2001-VI).

Possessions" within the meaning of Article 1 of Protocol No. 1 may be either "existing possessions" or claims in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right.

The concept of "possessions" in Article 1 of Protocol No. 1 has an autonomous meaning. The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant a substantive interest protected by Article 1 of Protocol No. 1, having regard to the relevant points of law and of fact (see *Former King of Greece and Others v. Greece*, no. 25701/94, ECHR 2000-XII, § 60; and *Zwierzynski v. Poland judgment*, cited above, § 63).

As established in the judgment, the applicant's father owned the so-called "Krakow Bishops' Palace" situated in the centre of Warsaw and the plot of land on which it stood.

By virtue of the 1945 Decree on the Ownership and Use of Land in Warsaw the Warsaw municipality (and after 1950 the State Treasury) became the owner of all plots of land located in Warsaw. The decree gave the former owners the possibility of obtaining a perpetual lease (after 1946 - temporary ownership) of a plot of land on request. This decree did not affect citizens' rights of ownership of immovable property situated on the nationalised plots of land.

In the present case I find it necessary to distinguish between two rights - a right to the land and a right to the building situated on it.

In an analysis of the legal situation of the so-called "Krakow Bishop Palace" regard must be had to the fact that the applicant received a certificate from a public notary the authenticity of which has not been contested by the Government. This certificate states that it follows from the land and mortgage register that the applicant's father was – and remains – listed in the register as the owner of property no. 496. Another entry in the register concerned the legal effects of the 1945 Decree, under which the State Treasury had became the owner of the land. The certificate contains a clause stating that it does not affect the ownership of the buildings located on the plot.

In accordance with Article 5 of the Decree of 26 October 1945 On the Ownership and Use of land in Warsaw "...buildings and other objects located on the land being transferred to the municipality's ownership remain the property of those who have owned them so far, unless specific provisions provide otherwise...".

The applicant's rights to the building are quite clear, because she is the sole heir to her father's property, the inheritance proceedings having come to an end in October 1990. It should also be emphasised that under the applicable provisions of Polish law her legal predecessor never lost his ownership of the building situated on the nationalised land.

The Government submitted that under the provisions of the 1945 Decree the applicant's father was expropriated in respect of the plot of land concerned. 75 to 80 per cent of the building situated on the plot was destroyed and its reconstruction was financed exclusively from state funds.

The applicant submitted that the fact that the building at issue had been reconstructed at the expense of the State authorities did not affect her rights. The applicant referred to the provisions of the Civil Code concerning the reimbursement by the owner of outlays incurred by a person in possession of a property. Those provisions could, in the applicant's argument, serve as a basis for any future settlement of accounts between the State and herself.

Personally, I share the applicant's point of view. The 1945 Decree itself does not contain any provision which would reduce or nullify the entitlement of former owners in accordance with the degree to which their properties were destroyed during the war, or with the State's financial involvement in their reconstruction.

The Land and mortgage register still today lists the applicant's late father as the owner of the property concerned, that is, of the buildings. A request made in the 1980s by the State authorities to have this entry amended and to make an entry to the effect that the ownership title to the building had been transferred to the State Treasury has never been granted.

As far as the rights to the land are concerned, the situation is as follows: On 4 September 1997 Polish *Seym* (Parliament) adopted the Law on the Transformation of Perpetual Usufruct Rights of Individuals to Ownership Rights. This law guarantees to individuals who acquired perpetual use of property before 31 October 1998 the right to have that right transformed into ownership. This law entered into force as from 1 January 1998.

On 12 November 1997 the Head of the Warsaw District Office re-examined the request lodged by the applicant's father in 1948. He granted the applicant perpetual use of the land and declared that she retained the ownership of the building located there. It was further observed that the buildings on the plot had been partly destroyed during the war. Any issues linked to the settlement of outlays for the construction of new buildings between the State which financed this construction and the owner of the plots belonged to the jurisdiction of the civil courts and could not be determined in the administrative proceedings.

It is worth mentioning that civil legislation of Poland provides for full ownership (*własność*) which could be compared to freehold in the British legal system. It also provides for the right of perpetual usufruct (*użytkowanie wieczyste*) which may be compared to a long lease under the British system, but also guarantees more extended rights to the property concerned. An individual or a legal entity may be granted such a right over land owned by the State, or by a local authority, situated in urban areas or included in urban special development plans. The right comprises a right to use the land to the exclusion of others for ninety-nine years against payment of a yearly fee. The person entitled to the right can dispose of it. Perpetual usufruct is freely transferable and mortgageable.

The Book 2 of the Polish Civil Code is entitled "Ownership and other property rights" *("Własność i inne prawa rzeczowe")*. This book is, in turn, composed of four titles: Title I. "Ownership" ("Własność"), Title II. "Perpetual use" ("Użytkowanie wieczyste"), Title III. "Limited Rights *in rem*" ("Prawa rzeczowe ograniczone"), Title IV. "Possession" ("Posiadanie"), which set out the legal conditions for enjoyment of these rights.

From an analysis of the structure of the Civil Code it is obvious that the Polish legislator regards "perpetual use" as a form of "other property rights".

Having been granted on 12 November 1997 the perpetual use of the plots concerned the applicant was accordingly granted "other property rights" in

terms of the Polish Civil Code. These property rights must be treated as her possessions in terms of Article 1 of Protocol No. 1.

On 25 February 1998 the Warsaw Regional Prosecutor raised an objection to the decision of 12 November 1997 submitting that the clause concerning the ownership of the building was only of a declaratory nature, that is, it confirmed something that had already been stipulated in the 1945 Decree. The contested decision should, in the prosecutor's argument, be set aside because the boundaries between the plots did not correspond to the boundaries between the buildings.

The right of a public prosecutor to lodge such an objection against any final administrative decision if he or she considers that it has been flawed with procedural or substantive shortcomings such as to justify its annulment is stipulated in Article 184 of the Code of Administrative Procedure. There is no time-limit for the lodging of such an objection.

Following that objection the Warsaw Governor instituted *ex officio* proceedings for the annulment of the decision. On 6 April 1998 the Governor stayed the enforcement proceedings in respect of the decision of 12 November 1997, having regard to the objection lodged by the prosecuting authorities. On 23 July 2001 the Governor quashed the decision of 12 November 1997 and remitted the case for re-examination.

After more then three years of examination by different administrative and judicial authorities the proceedings are currently pending before the Supreme Administrative Court.

As far as the land is concerned, it is obvious to me that starting from 12 November 1997 when the applicant was granted perpetual use of land right and until 23 July 2001 when the Governor, as a result of the Regional Prosecutor's intervention, quashed the decision granting the applicant the right of perpetual use, i.e. for a period of three and a half years, the applicant had been enjoying rights that according to the Polish legislation should be treated as property rights. Moreover, during this period she had been entitled even to have her right of perpetual use transformed, under the applicable provisions of Polish law referred to above, into full ownership.

As far as the building is concerned, the applicant's father, as has already been shown, never lost his ownership of the building and remains registered as its legal owner. The mere fact of being the sole heir to her father's property certainly conferred on the applicant a substantive interest protected by Article 1 of Protocol No. 1.

When deciding on whether the applicant has “possessions” within the meaning of Article 1 of Protocol No. 1, the legal significance of the land register under Polish law as ultimate proof of ownership must be taken into consideration. Article 3 of the Land Register Act establishes a legal presumption that the title registered in the land register corresponds to the actual legal status of the property.

To sum up, having regard to all the relevant points of law and fact, I have no doubt whatsoever that the applicant did have and still has "possessions" as far as her property rights are concerned at least in the form of "claims in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see *Pine Valley Developments and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51 and *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, § 31).

Whether there has been an interference with her property rights and whether this interference was justified should have been examined by the Court. Unfortunately, and much to my regret, this has not been the case.

This is where I disagree with the majority.