



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF PLECHANOW v. POLAND

(Application no. 22279/04)

JUDGMENT
(Merits)

STRASBOURG

7 July 2009

FINAL

07/10/2009

This judgment may be subject to editorial revision.

In the case of Plechanow v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 June 2009,

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

PROCEDURE

1. The case originated in an application (no. 22279/04) 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 three Polish nationals, Mr Jerzy Plechanow, Ms Ariadna Plechanow and Mr Andrzej Plechanow (“the applicants”), on 3 June 2004.

2. The applicants were represented by Ms M. Lechna-Piotrowska, a lawyer practising in Warszawa. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that they were deprived of a fair trial on account of the Supreme Court’s refusal to examine their cassation appeal (Article 6); they also complained about the alleged breach of their property rights (Article 1 of Protocol No. 1).

4. On 11 December 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The applicant and the Government filed observations on the admissibility and merits of the application (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Background to the case

6. The applicants, Jerzy, Ariadna and Andrzej Plechanow, are Polish nationals who were born in 1953, 1924 and 1955 respectively and live in Warszawa.

7. The applicants' predecessor owned a plot of land with a residential building situated in Warsaw. The applicants are his heirs.

8. By virtue of the Decree of 26 October 1945 on the Ownership and Use of Land in Warsaw ("the 1945 Decree") the ownership of all private land was transferred to the City of Warsaw.

9. The applicants' predecessor requested to be granted the right of temporary ownership (*własność czasowa*) of the property pursuant to section 7 of the 1945 Decree.

10. On 6 January 1964 the Board of the Warsaw National Council (*Prezydium Rady Narodowej*) refused the request. The Board also stated that the ownership of all buildings situated on the property had been transferred to the State Treasury. The property was subsequently divided into smaller plots.

11. Between 1975 and 1992 the State Treasury sold several apartments in the residential building (together with shares in the right of perpetual use of the land) to third parties.

12. In 1991, 1994 and 1995 the Warsaw Governor declared that on 27 May 1990 the Warsaw Municipality had acquired *ex lege* the ownership of the plots of land and the building thereon (with the exception of the previously sold apartments).

13. On 12 March 1997 the Board of the Praga-Południe District of the Warsaw-Centre Municipality adopted a resolution on the basis of which it published a list of flats which could be sold to the tenants. In September and November 1997 they sold two apartments.

14. On 5 March 1998 the Praga-Południe District Office informed the applicants of the above resolution and of the possibility of exercising a right of pre-emption in respect of the remaining flats. The right of pre-emption had been introduced as from 1 January 1998 on the basis of section 34 of the Act of 21 August 1997 on the management of real estates (*ustawa o gospodarce gruntami*).

15. On 18 March 1998 the applicants informed the municipality that the third applicant would buy the flat he had occupied so far. At the same time they requested that the further sale of other flats be stayed. They enclosed a

decision of the Warsaw District Court of 5 March 1991 declaring them to be heirs of F.P., K.P. and P.P.

16. On 17 June 1998 the municipality allowed the applicants' request.

2. Proceedings in which the applicants sought to have the expropriation decision declared null and void

17. On 30 November 1999 the Local Government Board of Appeal (*Samorządowe Kolegium Odwoławcze*) declared the decision of 6 January 1964 null and void in respect of part of the property. However, the Board could not annul the decision in respect of the remaining part of the property in question, since the ownership rights to 19 apartments and respective shares in the right of perpetual use of the land had been sold in the meantime to third parties. Thus, in view of the irreversible legal consequences of the 1964 decision, the Board only declared that, in this respect, the decision had been issued in breach of law.

18. The Board noted that the obligations of the Warsaw National Council resulting from a breach of law had been taken over by the Warsaw Municipality.

19. The Board further noted that its decision entitled the applicants to seek compensation for damage caused by the administrative decision having been issued in breach of law.

3. Proceedings for compensation under Article 160 of the Code of Administrative Procedure

20. In March 2000 the applicants lodged compensation claims with the Mayor of the Warsaw District (*Starosta Powiatu Warszawskiego*) and the President of Warsaw in respect of the relevant 19 apartments.

21. On 9 June 2000 the Mayor of the Warsaw District transferred the claim to the Warsaw Local Government Board of Appeal in view of the latter organ's competence. In November 2000 and December 2000 the Board issued several decisions concerning particular apartments in which it refused to award compensation.

22. On 21 December 2000 the applicants lodged compensation claims with the Warsaw Regional Court against the Warsaw municipality under Article 160 of the Code of Administrative Procedure.

23. On 21 March 2002 the Regional Court dismissed the action. The court acknowledged that the applicants had sustained damage as a result of the 1964 decision (the court heard evidence, including an expert witness, who estimated the loss at PLN 1,025,970). However, the court eventually found that the State Treasury should have been sued instead of the municipality. The court noted that according to the Supreme Court judgment of 7 January 1998 the municipality had the legal capacity to be sued for compensation for damage resulting from an administrative decision

issued before 27 May 1990. However, in the court's view, this interpretation had become obsolete in view of the subsequent interpretation of section 36 of the Local Government (Introductory Provisions) Act of 10 May 1990 (*Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych*).

24. On 19 June 2002 the applicants' lawyer lodged an appeal. He referred *inter alia* to the Supreme Administrative Court resolution of 15 April 1996, OPK 9/96, which, in his opinion, justified the responsibility of the local government administration in the present case. In this context he also invoked section 36 § 2 of the 1990 Local Government (Introductory Provisions) Act and relied on the judgment of the Supreme Court of 7 January 1998 arguing that the first-instance court had been wrong to consider the judgment obsolete.

25. On 11 April 2003 the Warsaw Court of Appeal dismissed the applicants' appeal. The court upheld the lower court's arguments, finding that the State Treasury should have been sued for damages because the Governor (the State's administration body) was the legal successor of the National Council.

26. The applicants lodged a cassation appeal. They submitted, *inter alia*, that the judgment was in breach of relevant substantive law on account of an erroneous interpretation and application of the provisions of the Local Government Act. They also invoked Article 393 of the Code of Civil Procedure arguing that the examination of the cassation appeal was justified because:

- the case raised a significant legal issue (i.e. the question to what extent and in respect of which competences the obligations of the national councils had been taken over by communities), and
- the need for an authoritative interpretation of provisions which had been interpreted differently in the courts' case-law (in particular section 36 § 3 of the 1990 Local Government (Introductory Provisions)), and
- the need to clarify the inconsistency of the Court of Appeal's judgment with the case-law invoked by the applicants and the alleged guidance provided by the decision of the Local Government Board of Appeal of 30 November 1999.

27. On 10 December 2003 the Supreme Court refused to entertain the cassation appeal. The decision was taken by a single judge sitting *in camera*. The written reasons provided as follows:

According to Article 393 of the Code of Civil Procedure, when the challenged judicial decision does not manifestly breach the law or the proceedings are not invalid in law (§ 2), the Supreme Court may refuse to entertain a cassation appeal if there is no appearance of a significant legal issue in the case, there is no need for the interpretation of provisions raising serious doubts or causing discrepancies in the courts' case-law or the cassation appeal is manifestly ill-founded (§ 1).

In the present case none of the circumstances set out in Article 393 § 2 was present and consequently the Supreme Court, having considered the grounds set out in § 1, found it justified to refuse to entertain the cassation appeal.

28. On 8 March 2004 the applicants lodged a constitutional complaint with the Constitutional Court, alleging a breach of their right of access to court and to a fair hearing on account of an erroneous application of Article 393 of the Code of Civil Procedure.

29. On 19 July 2005 the Constitutional Court discontinued the proceedings on the grounds that it had already examined the same issue in its judgment of 31 March 2005 (SK 26/02).

4. Proceedings under Article 7 of the 1945 Decree

30. On 3 March 2000 the applicants requested the Mayor of Warsaw to grant them the right of perpetual use of the remaining apartments which had not been sold. They relied on the decision of the Warsaw Local Government Board of Appeal of 30 November 1999.

31. On 25 April 2002 the applicants' lawyer submitted a certificate of the mortgage writer (*pisarz hipoteczny*) of 24 November 1937 certifying the ownership title of F.P. on that day.

32. The proceedings are pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Relevant provisions concerning a cassation appeal

33. A party to civil proceedings could, at the material time, lodge a cassation appeal with the Supreme Court against a judicial decision of a second-instance court. A party had to be represented by an advocate or a legal adviser.

34. Article 393¹ of the Code of Civil Procedure as applicable at that time listed the grounds on which a cassation appeal could be lodged. It read as follows:

“The cassation appeal may be based on the following grounds:

- 1) a breach of substantive law as a result of its erroneous interpretation or wrongful application;
- 2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case.”

35. Article 393³ specified the requirements of a cassation appeal. It read in its relevant part:

“§ 1. A cassation appeal should include:

- 1) an indication of the decision under appeal together with information as to whether the appeal is lodged against this decision in its entirety or in part only;

- 2) an indication of the grounds for the cassation appeal;
- 3) arguments showing that its examination would be justified;
- 4) a motion to have the decision under appeal quashed or amended, specifying also the scope of the motion.”

36. Pursuant to Article 393¹³ the Supreme Court, having allowed a cassation appeal, could quash the challenged judgment in its entirety or in part and remit the case for re-examination. Where the Supreme Court failed to find non-conformity with the law, it dismissed the cassation appeal.

37. Pursuant to Article 393⁷ a cassation appeal, in principle, was examined during a hearing by a panel of three judges; the court could, however, reject a cassation appeal on formal grounds at a sitting. The judgment or decision had to be accompanied by written reasons.

38. On 24 May 2000 a law was enacted amending the Code of Civil Procedure. It entered into force on 1 July 2000. It introduced, *inter alia*, the following provision (amended Article 393) – the so-called “pre-judgment” (preliminary assessment of a cassation appeal):

“§ 1. The Supreme Court may refuse to entertain the cassation appeal, if:

- 1) there is no appearance of any significant legal issue in the case,
- 2) there is no need for the interpretation of provisions raising serious doubts or causing discrepancies in the courts’ case-law,
- 3) the appeal is manifestly ill-founded.

§ 2. Paragraph 1 shall not apply if the challenged judicial decision manifestly breached law or when the proceedings are invalid at law.”

39. Pursuant to amended Article 393⁷ the decision to refuse to entertain a cassation appeal or to reject it on formal grounds could be taken *in camera*, in a single judge formation.

40. Although the legal provisions did not expressly provide for such a possibility, usually the written reasons accompanying such decisions were limited to a simplified, schematic formula which did not contain any legal analysis, did not indicate the specific grounds for the decision, did not invoke grounds of appeal and did not refer to any facts or circumstances which would allow the identification of a particular case.

41. On 6 February 2005 new provisions on a “cassation complaint” came into effect, replacing the provisions governing the cassation appeal.

2. The judgment of the Constitutional Court

42. In its judgment of 31 March 2005 (SK 26/02) the Constitutional Court examined a number of constitutional complaints challenging the provisions of Article 393 of the Code of Civil Procedure.

43. The Constitutional Court held that although the Constitution did not guarantee a right to cassation as such, the fact that it was provided for by the

Code of Civil Procedure meant that it had to meet the requirements of the rule of law and procedural justice.

44. The Constitutional Court observed, *inter alia*, that certain terms describing the conditions which a cassation appeal had to meet under Articles 393 *et seq.* of the Code (“significant legal issue”, “provisions raising serious doubts or causing discrepancies in the courts’ case-law”, “arguments showing that examination of the cassation appeal would be justified”) were drafted in the broadest terms. It noted that the judicial practice regarding their application had given rise to serious interpretational difficulties and discrepancies in the case-law of the Supreme Court. The Constitutional Court considered the relevant requirements of Article 393 and their interpretation by the Supreme Court to be vague and subjective and, in practice, known exclusively to the Supreme Court but not to those who wished to lodge a cassation appeal.

45. According to the Constitutional Court, if the conditions for admissibility of a claim (preliminary assessment of a cassation appeal) were formulated in imprecise terms, the right of access to a court could not be exercised effectively because of the risk of arbitrariness of the assessing body.

46. In this context the court criticised, in particular, the practice of “simplified reasons”. It held that the use of open-ended concepts by the legislator could not be considered, in itself, as unconstitutional, as it allowed the courts a certain flexibility, to better-tailor their decisions to circumstances at hand. However, in such case the obligation to substantiate the legal norm was shifted to the stage of its application. This gave the courts a certain discretion which was not to be confused with an absolute freedom from external supervision. Consequently, a general and imprecise procedural clause required a strong justification and indication of specific circumstances.

47. The practice of formulaic justification in the preliminary assessment of a cassation appeal created a situation where nobody could identify how, if at all, the Supreme Court had performed the necessary assessment to substantiate those vague terms. The case-law providing guidance on their application was thus practically non-existent. The court informed the addressee of its decision that the requirements of the given article had not been met, but did not indicate any circumstances which justified this conclusion. As a result, a principle of trust has been breached. Moreover, it was impossible for lawyers in general to recognise the Supreme Court’s understanding of those requirements for the purpose of effectively lodging a cassation appeal in the future.

48. Consequently, the “pre-judgment” did not guarantee procedural predictability to the party, who has lodged a cassation appeal meeting all formal requirements. The right of access to a court had thus been transformed into a pretence of this right.

49. Nevertheless the Constitutional Court found that it was the practice of the Supreme Court that deserved disapproval and not the relevant provisions, and the wording of those provisions could not be considered unconstitutional. In this context the court observed that the practice was not uniform and certain chambers of the Supreme Court justified their decisions in a much more elaborate and substantive way. The court further observed that the challenged provisions had already ceased to exist prior to the delivery of the present judgment.

50. Accordingly, the Constitutional Court refused to decide on the compatibility of those provisions with the Constitution and discontinued the proceedings in this respect.

3. The individual constitutional complaint

51. Article 79 § 1 of the Constitution, which entered into force on 17 October 1997, provides as follows:

“In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution.”

52. Article 190 of the Constitution, insofar as relevant, provides as follows:

“1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court, ... shall be published without delay.

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. ...

4. A judgment of the Constitutional Court on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a final and enforceable judicial decision or a final administrative decision ... was given, shall be a basis for re-opening of the proceedings, or for quashing the decision ... in a manner and on principles specified in provisions applicable to the given proceedings.”

53. Article 39 of the Constitutional Court Act reads:

“1. The Court shall, at a sitting in camera, discontinue the proceedings:

1) if the pronouncement of a judicial decision would not serve any purpose or is inadmissible;

2) in consequence of the withdrawal of the application, question of law or constitutional complaint;

3) if the normative act has ceased to have effect ... prior to the delivery of a judicial decision by the Tribunal.

2. If these circumstances come to light at the hearing, the Tribunal shall take a decision to discontinue the proceedings.

3. Item 1 (3) of the present Article does not apply if giving a decision on the compatibility with the Constitution of a normative act which has already lost its validity is necessary for the protection of the constitutional freedoms and rights.”

4. Re-opening of civil proceedings following a judgment of the Constitutional Court

54. Article 401¹ of the Code of Civil Procedure provides that a party to civil proceedings which have ended with a final judgment on the merits can request that these proceedings be re-opened, if the Constitutional Court has found that the legal provision on the basis of which this judgment was given was incompatible with the Constitution. Such a request can be lodged with the competent court within one month from the date of the judgment of the Constitutional Court.

5. The 1945 Decree on real property in Warsaw and the Local Government Act of 10 May 1990

55. The Decree of 26 October 1945 on real property in Warsaw expropriated real property situated in Warsaw and transferred ownership to the municipality of Warsaw.

56. 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.

57. A very significant reduction in the State Treasury’s land resources was brought about by legislative measures aimed at reforming the administrative structure of the State.

58. The Local Government (Introductory Provisions) Act of 10 May 1990 (*Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych* – “the 1990 Act”), which came into force on 27 May 1990, and other related statutes enacted at that time, re-established local government and municipalities and transferred to them powers that had previously been exercised solely by the local State administration. 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.

59. Section 36 § 3 (3) of the Act provides, as far as relevant:

“The State Treasury takes over:

3) obligations and receivables of local bodies of state administration (...) resulting from final and binding court rulings and administrative decisions delivered before 27 May 1990 (...).”

6. Compensation for damage caused by an administrative decision subsequently annulled or declared null and void

60. Article 155 of the Code of Administrative Procedure permits the amendment or annulment of any final administrative decision at any time where necessary in the general or individual interest, if this is not prohibited by specific legal provisions. In particular, pursuant to Article 156, a final administrative decision is subject to annulment if it has been issued by an authority which had no jurisdiction, or if it is without a legal basis or contrary to the applicable laws.

61. Article 160 of the Code of Administrative Procedure, as applicable at the material time, read in its relevant part:

“A person who has suffered a loss on account of the issuing of a decision in a manner contrary to Article 156 § 1 or on account of the annulment of such a decision shall have a claim for compensation for actual damage, unless he has been responsible for the circumstances mentioned in this provision.”

62. An administrative decision in respect of the compensation claim could be appealed against in a civil court.

7. Resolution and judgments of the Supreme Administrative Court and the Supreme Court concerning the legal capacity to be sued

63. In its resolution adopted on 11 December 1995 (VI SA 9/95) the Supreme Administrative Court concluded that disputes instituted under Article 7 of the Decree of 26 October 1945 concerning the right of perpetual use of a plot of land presently owned by the municipality, should be resolved by a competent mayor [a local government body].

64. Section 36 § 3 (3) of the 1990 Act raised doubts as to which legal entity was liable for damages caused by an unlawful administrative decision issued before the administrative reform. The problem was subject to divergent judicial interpretation.

65. On 7 January 1998 the Supreme Court delivered a judgment (II CKN 550/97) in which it concluded that the municipality should be sued for compensation for damages caused by an administrative decision delivered before 27 May 1990.

66. On 16 November 2004 a panel of three judges of the Supreme Court adopted a resolution (no. III CZP 64/04), finding that the municipality – and not the State Treasury – had the legal capacity to be sued for damages resulting from an administrative decision issued before 27 May 1990, provided that the decision had been annulled or declared unlawful after that date.

67. In its resolution of 7 December 2006 (no. III CZP 99/06), adopted by a panel of seven judges, the Supreme Court concluded that the State Treasury had the capacity to be sued for damages caused by an administrative decision delivered before 27 May 1990, even if the decision had been annulled or declared null and void after that date. The resolution was adopted following a legal question referred to the Supreme Court by another Court of Appeal having a similar case before it.

68. The Supreme Court confirmed this stance in several subsequent judgments, delivered in cases similar to the present one (see below).

8. Examples of subsequent jurisprudence of the domestic courts

a. Judgment of the Supreme Court of 25 January 2007, ref no. V CSK 425/06

69. On 21 March 2001 the Opolskie Governor declared that the decision of 1983 of the Head of municipality D. had been adopted in breach of law. The plaintiff's claim for compensation against the State Treasury (Opolskie Governor) was dismissed by the first- and second-instance courts. In particular, the Court of Appeal, invoking the resolution of the Supreme Court of 16 November 2004 (ref no. III CZP 64/04), considered that the State Treasury did not have the legal capacity to be sued in that case since municipality D. had taken over its obligations under Article 36 § 1 of the 1990 Introductory Provisions Act.

The Supreme Court quashed the appellate judgment and remitted the case, relying on the above-mentioned resolution of 7 December 2006.

b. Judgment of the Supreme Court of 14 March 2007, ref no. I CSK 247/06

70. In 1951 the Presidium of the Warsaw National Council refused to grant the right of perpetual use of land covered by the operation of the 1945 Decree. Subsequently, the State Treasury sold three flats in the building. On 22 September 1994 the Minister of Construction declared that the decision of 1951 had been adopted in breach of law.

The plaintiffs lodged a civil action for compensation against the State Treasury. The Warsaw Regional Court allowed their claim in part and awarded compensation from the State Treasury.

On 31 January 2006 the Warsaw Court of Appeal amended the first-instance judgment and dismissed the claim against the State Treasury finding that it lacked legal capacity to be sued in the case.

On 14 March 2007 the Supreme Court quashed the appellate judgment and remitted the case, invoking the resolution of 7 December 2006.

9. Resolution and judgment of the Supreme Court concerning the character of the compensation claim

71. In its judgment of 27 November 2002 (no. I CKN 1215/00), the Supreme Court ruled that there was a causal link between an administrative decision, taken under the 1945 Decree, refusing to grant the previous owner of a real property (a land with a building) the right of temporary ownership (perpetual use) of that property and the sale of apartments in the building by the State Treasury.

72. On 21 March 2003 the Supreme Court adopted a resolution (no. III CZP 6/03) in which it found that financial loss resulting from a decision under the 1945 Decree refusing to grant the right of perpetual use, which had been issued in breach of law, constituted a loss within the meaning of Article 361 § 2 of the Civil Code and an actual damage within the meaning of Article 160 of CAP.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION AND ARTICLES 6 AND 13 OF THE CONVENTION

73. The applicants complained under Article 1 of Protocol No. 1 and under Article 6 of the Convention that as a result of the shortcomings in the decisions of the domestic courts and the lack of legal certainty, they were deprived of compensation for damage caused by an unlawful administrative decision.

74. The applicants also complained under Articles 6 and 13 of Convention that they were deprived of a fair hearing (in particular that they were denied access to a court) and an effective remedy in respect of their allegations under Article 1 of Protocol No. 1 in that the Supreme Court had refused to entertain their cassation appeal without giving adequate reasons.

75. These provisions provide in their relevant part:

Article 6

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

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 1 of Protocol No. 1

“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.”

A. Admissibility*1. Compatibility ratione temporis*

76. The Government submitted that the complaints should be rejected as being incompatible *ratione temporis* with the provisions of Article 1 of Protocol No. 1. They submitted that the damage suffered by the applicants had been caused by the decision of 1964 and therefore constituted an instantaneous act which had occurred before 10 October 1994 (the date of entry into force of Protocol No. 1 in respect of Poland). They further argued that according to a recent interpretation of the relevant law, the 1999 decision of the Local Government Board of Appeal (see paragraph 17 above) only opened a possibility of seeking compensation for the damage caused in 1964.

77. The applicants maintained that the violations in question were of a continuing nature.

78. The Court’s jurisdiction *ratione temporis* covers only the period after the date of ratification of the Convention and its Protocols by the respondent State. After ratification, the State’s acts must conform to the Convention or its Protocols and subsequent facts fall within the Court’s jurisdiction even where they are merely extensions of an already existing situation (see, for example, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 43, ECHR 2000-I). Accordingly, the Court is competent to examine the facts of the present case for their compatibility with the Convention only in so far as they occurred after 10 October 1994, the date of ratification of Protocol No. 1 by Poland. It may, however, have regard to facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (see *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 147-153, ECHR 2006-...).

79. The Court notes that the applicants’ complaint does not concern a deprivation of property by virtue of the decision of 1964. In the present case, the applicants complain about the inability to effectively enforce their

compensation claim stemming from the fact that the 1964 decision had been issued in breach of law. Even if the entitlement to compensation had been created by the original interference (namely the adoption of the flawed 1964 decision), the 1999 ruling of the Local Government Board of Appeal confirmed their entitlement and enabled the applicants to seek redress for the interference.

Therefore, in so far as the applicants' complaints are directed against the acts and omissions of the State in relation to the enforcement of the compensation claim to which they were entitled under Polish law – an entitlement which continued to exist after 10 October 1994 having regard to the above-mentioned 1999 ruling – the Court has temporal jurisdiction to entertain that complaint (cf. *Broniowski v. Poland* (dec.) [GC], no. 31443/96, §§ 75-76, ECHR 2002-X; *Vajagić v. Croatia*, no. 30431/03, § 24, 20 July 2006).

80. The Government's objection must therefore be dismissed.

2. Compatibility ratione materiae – existence of possessions within the meaning of Article 1 of Protocol No. 1

81. The Government argued that the complaints were also incompatible *ratione materiae* with the Convention, as the applicants had not proved that they had any "possessions" within the meaning of Article 1 of Protocol No. 1. They submitted that the Convention did not guarantee a right to the return of property which had been expropriated before the date of ratification of the Convention. Further, the fact that the applicants were entitled to pursue a claim for compensation under Article 160 of the CAP did not mean that they had a "legitimate expectation of obtaining effective enjoyment of a property right". In this respect they argued that the applicants had not obtained a ruling confirming, in particular, that they had sustained damage and that there was a causal link between the adoption of the flawed administrative decision and the damage. Moreover, the applicants could not have expected to have their claim allowed if they had sued the wrong defendant.

82. The applicants did not comment.

83. The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I). The concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least "legitimate expectation" of obtaining effective enjoyment of a

property right (see, for example, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII).

Where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (*Kopecký v. Slovakia* [GC], no. 44912/98, §§ 52, ECHR 2004-IX; *Draon v. France* [GC], no. 1513/03, § 68, 6 October 2005; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, 11 January 2007).

Where that has been established, the concept of “legitimate expectation” can come into play, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a final judicial decision (see *Draon*, cited above, § 65, and *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, § 73, ECHR 2002-VII).

84. Turning to the circumstances of the present case the Court observes that in the 1999 ruling the Local Government Board of Appeal established that the 1964 decision had been issued in breach of law and this fact entitled the applicants to seek compensation for damage. The Court notes that the entitlement was expressly provided for in domestic law and the domestic courts’ established case-law confirmed the existence of a casual link between a flawed administrative decision and loss sustained in result thereof (see paragraphs 71-72 above). Only the extent of the alleged loss and the amount of compensation remained to be established in judicial proceedings.

Therefore, in the Court’s view, the applicants could be considered to have a “legitimate expectation” that their claim would be dealt with in accordance with the applicable laws and, consequently, upheld (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, § 31; *S.A. Dangeville v. France*, no. 36677/97, § 46 48, ECHR 2002-III).

85. Accordingly, the applicants had a pecuniary interest which was recognised under Polish law and which was subject to the protection of Article 1 of Protocol No. 1.

86. It is true that the existence of such a claim does not exempt the applicants from pursuing that claim diligently and suing the appropriate defendant. This issue, however, goes to the merits of the case and shall be examined at that stage.

87. Accordingly, the Government’s objection in this regard must be dismissed.

3. *Compatibility ratione personae*

88. In the Government’s opinion, the applicants failed to submit to the Court documents proving their standing in the present case – they did not prove their status as legal successors of F.P. and also failed to submit documents proving F.P.’s title to the property at issue. Consequently, in the Government’s view, the present complaint should be rejected as

incompatible *ratione personae* with the Convention and the Protocol at issue.

89. The Court reiterates that the applicants' complaint does not concern the deprivation of property but their claim for damages. The Court notes that the applicants were parties to the compensation proceedings, as well as to the proceedings in which they sought to have the 1964 decision declared null and void. Their legal standing in both sets of proceedings was never disputed (see paragraphs 15 and 31 above).

90. Accordingly, the Court rejects the Government's objection.

4. Compliance with the six month rule

91. The Government further requested the Court to reject the application for non-compliance with the six months' time-limit. In their view, the applicants should have lodged their application with the Court following the decision of the Local Government Board of Appeal of 30 November 1999.

92. The Court observes that the applicants lodged their application within six months of the decision of the Supreme Court of 10 December 2003, which constituted the final decision in the compensation proceedings. The Court therefore concludes that they have filed their application within the six months' time-limit as required by Article 35 § 1 of the Convention and accordingly rejects the Government's objection.

5. Exhaustion of domestic remedies

93. Finally, the Government submitted that the applicants had not exhausted domestic remedies. In this context they argued, in particular, that the applicants had not availed themselves properly of the possibility to seek compensation under Article 160 of the CAP, since they had sued the municipality instead of the State Treasury.

94. The Court considers that this objection is closely linked to the substance of the applicant's complaint and that its examination should therefore be joined to the merits.

6. Conclusion

95. The Court will join to the merits the Government's objection to admissibility based on non-exhaustion of domestic remedies. It notes that the applicants' complaints under the provisions relied on are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 1 of Protocol No. 1

a. The parties' submissions

96. The applicants complained that as a result of the shortcomings in the decisions of the domestic courts and the lack of legal certainty, they were deprived of compensation to which they were entitled under domestic law.

They alleged that the domestic courts unfairly dismissed their claim on the grounds that they had not sued the right legal entity, without giving proper consideration to the case-law invoked by them.

The applicants further submitted that the Supreme Court had refused to entertain their cassation appeal although the applicants had indicated that all statutory requirements justifying the examination of the cassation appeal on the merits had been met, in particular there was a need for interpretation of a significant legal issue causing discrepancies in the courts' case-law.

97. The Government contested those arguments. They referred to the Supreme Court resolution of 7 December 2006 and subsequent jurisprudence and claimed that the Supreme Court's decision could not have had any negative consequences for the applicants, as in accordance with later jurisprudence, their claim directed against the municipality was bound to be dismissed.

The Government further submitted that neither the Convention nor the Polish Constitution guaranteed a right to have a civil case examined by three judicial instances. Nevertheless, the Government were of the view that the Supreme Court's so-called "pre-judgment" practice pursued the legitimate aim of expediting the examination of non-meritorious appeals. They also argued that the applicants had not sufficiently proved the alleged discrepancies in the case-law.

Lastly, they stated that it was not for the Government or the Court to assess whether the cassation appeal had been meritorious or whether the Supreme Court's decision had been sufficiently reasoned.

b. The Court's assessment

i. Existence of possessions within the meaning of Article 1 of Protocol No. 1

98. The Court has found that the applicants' claim "constituted an asset" and therefore amounted to a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1, which is accordingly applicable in the present case.

ii. Compliance with Article 1 of Protocol No. 1

99. The Court reiterates that the genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State's duty not to interfere, but may give rise to positive obligations (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII, and *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V; *Blumberga v. Latvia*, no. 70930/01, § 65, 14 October 2008).

100. Such positive obligations may entail the taking of measures necessary to protect the right to property, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions, even in cases involving litigation between private entities. This means, in particular, that States are under an obligation to provide a judicial mechanism for settling effectively property disputes and to ensure compliance of those mechanisms with the procedural and material safeguards enshrined in the Convention. This principle applies with all the more force when it is the State itself which is in dispute with an individual.

Accordingly, serious deficiencies in the handling of such disputes may raise an issue under Article 1 of Protocol No. 1.

101. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of.

102. While they have a wide margin of appreciation in assessing the existence of a problem of public concern warranting specific measures and in implementing social and economic policies (see *Kopecký*, cited above, § 37), where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see *Beyeler*, cited above, §§ 110 *in fine*, 114 and 120 *in fine*; *Broniowski*, cited above, § 151; *Sovtransavto Holding*, cited above, §§ 97-98; *Novoseletskiy v. Ukraine*, no. 47148/99, § 102, ECHR 2005-II; *Blücher v. the Czech Republic*, no. 58580/00, § 57, 11 January 2005; and *O.B. Heller, a.s., v. the Czech Republic* (dec.), no. 55631/00, 9 November 2004).

103. The Court reiterates that the Convention imposes no specific obligation on States to right injustices or harm caused before they ratified the Convention. However, once such a solution has been adopted by a State, it must be implemented with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the persons concerned by the measures to implement it.

In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is an important factor to be taken into account in assessing the State's conduct (see *Broniowski*, cited above, § 151).

104. Turning to the circumstances of the present case, the Court notes that the applicants' claim failed because, in the domestic courts' view, they sued the wrong defendant. The applicants lodged their claim against the municipality on the basis of the hitherto prevailing case-law, which the courts considered later to be obsolete.

105. The Court further observes in this context that numerous court actions, such as those instituted by the applicants, have been brought before domestic courts. Due to several major administrative reforms which had been implemented in Poland during the past fifty years, the courts have been required to determine the authority responsible for taking over the competencies of bodies which had existed previously. The interpretation of provisions of relevant laws introducing the administrative reforms have constantly changed, which has led to varying judicial rulings by different domestic courts on the same legal question (see paragraphs 63-70 above). As a result, the case-law at the domestic level, including the Supreme Court judgments and resolutions, has often been contradictory.

106. The examples of the case-law submitted both by the applicants and the Government show that the question of liability for damages resulting from flawed administrative decisions was by no means clear at the time the applicants' claim was examined and the divergences in case-law continued several years later (see paragraphs 69-70 above).

107. The Court has already held that divergences in case-law are an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, and that the role of a supreme court is precisely to resolve conflicts between decisions of the courts below (see *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 59, ECHR 1999-VII). In the instant case, however, even the Supreme Court failed to have a uniform case-law on the legal questions in issue (see paragraphs 65-68 above).

108. The Court does not deny the complexity of the problems with which the courts were faced as a result of the fundamental changes in the competencies of all the various authorities at the local and State administrative levels. It considers, however, that shifting the duty of identifying the competent authority to be sued to the applicants and depriving them of compensation on this basis was a disproportionate requirement and failed to strike a fair balance between the public interest and the applicants' rights.

109. In the Court's view, when a public entity is liable for damages, the State's positive obligation to facilitate identification of the correct defendant is all the more important.

110. In the Court's opinion, the applicants seem to have fallen victims of the administrative reforms, the inconsistency of the case-law and the lack of legal certainty and coherence in this respect. As a result, the applicants were unable to obtain due compensation for damage suffered.

111. In the light of the foregoing, the Court considers that the State has failed to comply with its positive obligation to provide measures safeguarding the applicants' right to the effective enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1, thus upsetting the "fair balance" between the demands of the public interest and the need to protect the applicants right (see, *mutatis mutandis*, *Sovtransavto Holding*, cited above, § 96).

112. Consequently, there has been a violation of Article 1 of Protocol No. 1 and the Government's objection based on non-exhaustion of domestic remedies (see paragraphs 93 and 94 above) must accordingly be rejected.

2. *Articles 6 and 13 of Convention*

113. Having regard to the particular circumstances of the present case and to the reasoning which led the Court to find a violation of Article 1 of Protocol No. 1, the Court considers that a separate examination of the merits of the case under Articles 6 and 13 of Convention is not necessary.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. 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."

115. The applicants claimed 1,025,970 PLN (approx. 248,010 EUR) in respect of pecuniary and non-pecuniary damage. They did not claim costs and expenses.

116. In the Government's opinion, the applicants failed to prove a causal link between the alleged pecuniary damage and the violations of the Convention and had not substantiated their claim.

117. In the circumstances of the case and having regard to the parties' submissions, the Court considers that the question of the application of Article 41 of the Convention as regards pecuniary and non-pecuniary damage is not ready for decision and reserves it, due regard being had to the possibility that an agreement between the respondent State and the applicant may be reached (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection based on non-exhaustion of domestic remedies and *declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No 1 to the Convention and *dismisses* the above-mentioned objection;
3. *Holds* that there is no need to examine separately the applicants' complaints under Articles 6 and 13 of the Convention;
4. *Holds* that as far as any pecuniary and non-pecuniary damage is concerned, the question of the application of Article 41 is not ready for decision and accordingly:
 - (a) *reserves* the said question;
 - (b) *invites* the Government and the applicants to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 7 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President