



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

FOURTH SECTION

CASE OF KROSTA v. POLAND

(Application no. 36137/04)

JUDGMENT

STRASBOURG

2 February 2010

FINAL

02/05/2010

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

In the case of Krosta v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 12 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 36137/04) 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 a Polish national, Mr Roman Krosta (“the applicant”), on 27 August 2004.

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

3. The applicant alleged a breach of Article 6 § 1 of the Convention in respect of the proceedings before the Polish-German Reconciliation Foundation.

4. On 24 January 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1922 and lives in Nowe Brzesko.

6. In March 1940 the applicant was deported to Germany where he was subjected to forced labour on three different farms until the end of the Second World War. He worked on the same farm as M.P., his future wife. On 30 April 1945 their daughter was born in Germany. After the end of the

war they all returned to Poland. They registered their daughter as having been born in Poland on 13 May 1945, for fear of negative consequences had they revealed that she was born in Germany.

A. Proceedings before the Polish-German Reconciliation Foundation concerning the applicant

7. On 9 June 2001 the applicant applied to the Polish-German Reconciliation Foundation (“the Foundation”) for compensation on account of his forced labour during the war. That request was made under the scheme for slave and forced labourers (“the second compensation scheme”) established under the Joint Statement of 17 July 2000, the German Law of 2 August 2000 on the Creation of the “Remembrance, Responsibility and Future” Foundation (“the German Foundation Act”) and the subsequent Agreement of 16 February 2001 between the Remembrance, Responsibility and Future Foundation (“the German Foundation”) and the Polish-German Reconciliation Foundation.

8. It appears that on 1 July 2004 the Foundation’s Verification Commission found that the applicant was eligible for benefits, as his persecution fell under the 4th category, which included persons who had been deported to Germany and subjected to forced labour in agriculture. It consequently awarded him the sum of EUR 1,124.84. The applicant did not appeal against that decision.

B. Proceedings before the Polish-German Reconciliation Foundation concerning the applicant’s daughter

9. On an unspecified date the husband of the applicant’s daughter applied to the Polish-German Reconciliation Foundation for compensation on account of her birth at a time when her parents had been forced labourers in Germany. That request was made under the second compensation scheme. On 28 August 2003 the Foundation’s Verification Commission refused the request by the applicant’s daughter. The applicant appealed against that refusal. He relied on a number of statements provided by his fellow forced labourers. On 23 July 2004 the Foundation’s Appeal Commission upheld the refusal. The applicant was informed that during the negotiations in the framework of the so-called “openness clause” it was agreed that children born to parents deported to Germany and subjected to forced labour there were eligible for benefits. However, according to the documents in the file, including his daughter’s identity card, she had been born on 13 May 1945 in Poland. Furthermore, there were no other documents in the file to confirm the applicant’s assertion that his daughter had been born in Germany and had returned with her parents to Poland.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional provisions

10. Article 9 of the Constitution, which was adopted by the National Assembly on 2 April 1997 and entered into force on 17 October 1997, states:

“The Republic of Poland shall respect international law binding upon it.”

Article 45 § 1 of the Constitution reads:

“Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.”

Chapter VIII of the Constitution contains provisions related to the judiciary. Article 175§ 1 of the Constitution provides:

“The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the ordinary courts, administrative courts and military courts.”

Article 177 of the Constitution states:

“The ordinary courts shall implement the administration of justice concerning all matters save for those statutorily reserved for other courts.”

Article 184, in so far as relevant, provides:

“The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration.”

B. The Agreement of 16 October 1991 and the establishment of the Polish-German Reconciliation Foundation (first compensation scheme)

11. On 16 October 1991 the Governments of the Federal Republic of Germany and the Republic of Poland concluded an agreement on the basis of which the German Government declared that, prompted by humanitarian considerations, it was prepared to contribute DEM 500 million for the benefit of the Polish-German Reconciliation Foundation. The Foundation was to be established by the Government of Poland with a view to providing financial assistance to victims of Nazi persecution who had been particularly wronged. The Foundation was to determine the necessary criteria for the granting of payments, having regard both to serious damage to the victims' health and to difficulties in their current financial situation. The Government of Poland declared that it would not pursue further individual claims by Polish citizens arising out

of Nazi persecution. Both Governments indicated that their agreement should not amount to limitation of the rights of citizens of either country.

12. Subsequently, on 27 November 1991, the Minister–Head of the Cabinet Office (*Minister – Szef Urzędu Rady Ministrów*) acting as a Founder¹, made a declaration before the State Notary on the establishment of the Foundation. He declared that, acting on the initiative of the Government of the Republic of Poland and on behalf of the State Treasury, he was establishing the Polish-German Reconciliation Foundation. The Foundation’s aim was to provide assistance to the victims of Nazi persecution and to undertake other activities for the benefit of those persons. The Minister also declared that the Foundation’s capital fund consisted of DEM 500 million, contributed by the German Government to the Polish Government. The Polish-German Reconciliation Foundation was established in accordance with the Foundations Act of 6 April 1984, which regulates the activities of foundations in Poland. In principle, supervision of a foundation’s activities is exercised by the regional governor (*Wojewoda*) or the competent minister.

13. The Foundation’s organs were the Supervisory Board (*Rada Nadzorcza*) and the Management Board (*Zarząd*). The members of those organs were appointed and dismissed by the Founder (government minister) who exercised full control in this respect. The two other organs of the Foundation were the Verification Commission (*Komisja Weryfikacyjna*), and the Appeal Commission (*Odwolawcza Komisja Weryfikacyjna*).

C. Compensation scheme for slave and forced labourers (second compensation scheme)

14. From 1998 to 2000 international negotiations took place on the issue of compensation for persons subjected to slave or forced labour by Nazi Germany. The government of Poland was one of the parties to these negotiations. They were prompted by a number of lawsuits against certain German companies before the courts in the United States in which compensation was sought on account of forced labour during the Second World War. The German companies against which the lawsuits had been brought wished to bring them to an end and secure legal peace. The negotiations concluded on 17 July 2000 with the adoption of a Joint Statement which was signed by all the parties to the negotiations, including the government of Poland².

1. On an unspecified later date the function of Founder was assumed by the Minister of the State Treasury.

¹ The other parties being the governments of the Federal Republic of Germany, the United States of America, the Republic of Belarus, the Czech Republic, the State of Israel, the Russian Federation and Ukraine, and the Foundation Initiative of German Industry, the

15. The parties to the Joint Statement acknowledged the intention of the Government of Germany and of the German companies concerned to accept moral and historic responsibility arising from the use of slave and forced labourers and from other injustices committed during the National Socialist era and the Second World War. They affirmed their consensus of 17 December 1999 on the establishment of the Remembrance, Responsibility and Future Foundation, which was to be a means of providing funds for victims from central and eastern Europe, most of whom had benefited little from prior German compensation and restitution programmes. The parties to the Joint Statement further agreed to base their decisions regarding the distribution of funds on the eligibility criteria set out in the German Foundation Act.

16. According to the Joint Statement, the Government of Germany and the German companies concerned undertook to contribute DEM 5 thousand million to the Remembrance, Responsibility and Future Foundation. The Joint Statement stipulated that the governments of the participating central and eastern European States, including Poland, and the government of Israel agreed to implement the necessary specific measures within the framework of their national legal systems to achieve legal peace.

17. Subsequently, on 2 August 2000 the German parliament enacted the Law on the creation of the Remembrance, Responsibility and Future Foundation (*Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"*; the German Foundation Act; the GFA). It came into force on 12 August 2000. However, the disbursement of payments only started on 30 May 2001, once the relevant guarantees had been secured by the German companies concerned with regard to the dismissal of the lawsuits filed against them in the United States courts.

18. The relevant parts of the Law on the creation of the Remembrance, Responsibility and Future Foundation provide:

"Preamble

Recognising

that the National Socialist State inflicted severe injustice on slave labourers and forced labourers, through deportation, internment and exploitation, which in some cases extended to destruction through labour, and through a large number of other human-rights violations,

that German companies which participated in the National Socialist injustice bear a historic responsibility and must accept it,

that the companies which have come together in the Foundation Initiative of German Industry [*Stiftungsinitiative der deutschen Wirtschaft*] have acknowledged this responsibility,

that the injustice committed and the human suffering it caused cannot be truly compensated by financial payments,

that the Law comes too late for those who lost their lives as victims of the National Socialist regime or have died in the meantime,

the German *Bundestag* acknowledges political and moral responsibility for the victims of National Socialism. The *Bundestag* also intends to keep alive the memory of the injustice inflicted on the victims for coming generations. (...)

Section 1 – Establishment and headquarters

(1) A legally recognised Foundation with the name ‘Remembrance, Responsibility and Future’ shall be established under public law. (...)

Section 2 – Purpose of the Foundation

(1) The purpose of the Foundation is to make financial compensation available through partner organisations to former forced labourers and to those affected by other injustices from the National Socialist period. (...)

Section 9 – Use of Foundation Resources

(...) (8) In concert with the Board of Trustees, the partner organizations may subdivide the category of forced labourers, within its quota, in accordance with Section 11, Paragraph 1, Sentence 1, Number 1, insofar as this involves persons interned in other places of confinement, as well as affected persons within the meaning of Section 11, Paragraph 1, Sentence 1, Number 2, into subcategories depending on the severity of their fate and may set correspondingly gradated maximum amounts. This shall also apply to the eligibility of legal successors. (...)

Section 10 – Distribution of resources through partner organisations

(1) The approval and disbursement of one-off payments to those persons eligible under section 11 will be carried out through partner organisations. The Foundation is neither authorised nor obligated in this regard. The board of trustees may opt for another mode of payment. (...)

Section 11 – Eligible persons

(1) Eligible under this Law are:

1. persons who were held in a concentration camp as defined in section 42(2) of the German Indemnification Act [*Bundesentschädigungsgesetz*] or in another place of confinement outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labour;

2. persons who were deported from their homelands into the territory of the German Reich within the borders of 1937 or to a German-occupied area, subjected to forced labour in a commercial enterprise or for public authorities there, and held under conditions other than those mentioned in paragraph 1, or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions; (...)

(2) Eligibility shall be demonstrated by the applicant by submission of documentation. The partner organisation shall take into account relevant evidence. If no relevant evidence is available, the claimant's eligibility may be substantiated in some other way.

Section 13 – Application Eligibility

(1) Awards under section 11, paragraph 1, sentence 1, numbers 1 or 2, or sentence 2 or sentence 5 are strictly personal and individual and must be applied for in one's own name. In a case where the eligible person has died after February 15, 1999, or where an award under Section 11, Paragraph 1, Number 3 or Sentence 4 is being applied for, the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings. (...)

Section 19 – Appeals Process

The partner organizations are to create appeals organs that are independent and subject to no outside instruction. The appeals process itself is to be free of charge. However, costs incurred by the applicant are not to be reimbursed.”

D. Judgment of the German Federal Constitutional Court of 28 June 2004

19. The Federal Constitutional Court examined a constitutional complaint against various provisions of the GFA which had been filed, among others, by a former Italian military internee and a civilian who had been subjected to forced labour³. The complainants alleged, *inter alia*, that prior to the entry into force of the GFA they had had claims for compensation for forced labour against the Federal Republic of Germany, under German civil law in conjunction with international public law. They contended that the exclusion of judicial review of decisions by the International Organisation for Migration (one of the partner organisations) had violated their right to an effective remedy under Article 19 § 4 of the German Basic Law. Furthermore, they argued that the exclusion of former

³ For details, see the decision in the case *Associazione Nazionale Reduci Dalla Prigione dall'Internamento e dalla Guerra di Liberazione (A.N.R.P.) v. Germany*, no. 45563/04, 4 September 2007.

prisoners of war from the ambit of compensation under the Foundation Act was discriminatory.

20. On 28 June 2004 the Federal Constitutional Court held that the complaint was partly admissible, but unfounded. Referring to the Hague Convention on the Laws and Customs of War on Land (“The Hague Convention”) the court held that international public law had not established individual claims for compensation for forced labour. It noted, however, that it was not excluded that national law might establish such claims, but that in such a case the legislator enjoyed wide discretion. The court held further that the exclusion by section 11 § 3 of former prisoners of war from the scope of those eligible for benefits under the Foundation Act had not been discriminatory, since under the Hague Convention prisoners of war could be compelled to perform labour. In this respect the court observed that the legislator was allowed to distinguish, when awarding compensation, between victims of general hardships caused by the war and victims of particular ideological persecution by the Nazi regime, especially as the funds of the Foundation were limited.

21. In respect of the exclusion of judicial review by the Foundation Act, the Federal Constitutional Court found that Article 19 § 4 of the Basic Law required that a right did in fact exist, whose alleged violation could be examined by the courts. The court concluded that the legislator was free to decide not to establish an individual’s claims *vis-à-vis* a public-law foundation and to exclude judicial review in this connection.

E. Implementation of the second compensation scheme by Poland

22. On 10 August 2000 the Polish government submitted to Parliament a bill on the exemption from tax and duties of payments received in connection with Nazi persecution. In the explanatory memorandum to the bill, the government stated that payment of benefits in respect of forced labour for the Nazi regime had been agreed in the course of negotiations involving the respective governments, German companies and the victims. They further stated that, as a result of the agreement with the Germans, Poland would receive more than DEM 1.8 thousand million. On 21 September 2000 the Polish parliament enacted the Law on exemption of payments received in connection with Nazi persecution from tax and duties. That Law also exempted the Polish-German Reconciliation Foundation from taxes due on funds received by the Foundation for the distribution of payments. The Law came into force on 17 November 2000.

23. On 16 February 2001 an agreement was concluded between the Remembrance, Responsibility and Future Foundation and the Polish-German Reconciliation Foundation (“the partnership agreement”). Under its terms the Polish-German Reconciliation Foundation was to act as a partner organisation of the German Foundation, with a view to securing

prompt disbursement of compensation payments to slave and forced labourers (paragraph 1 of the agreement). Both parties agreed to implement fully the provisions of the GFA and declared that their agreement was in compliance with the Joint Statement of 17 July 2000.

24. The above agreement further stipulated that the Polish Foundation, as a partner organisation, was entrusted with determining eligibility for compensation payments in respect of all claimants who resided on the territory of Poland on 16 February 1999 (paragraph 2). The partner organisation was to verify and determine whether the relevant conditions for awarding payment had been established or substantiated in some other way (paragraph 5.1). A claimant could appeal against a decision taken by the partner organisation in respect of the grounds of the decision or the amount of payment awarded before an independent appeal body established within the partner organisation (paragraph 5.5). Under paragraph 6.3 of the agreement, decisions taken by the appeal body were final and could not be challenged before a court (paragraph 3).

25. The Agreement of 16 February 2001 was accompanied by three annexes. Annex no. 3 contained a declaration by the Polish government with regard to responsibility for the disbursement of payments. The relevant parts provide:

“Since 1998 the government of the Republic of Poland has made exceptionally concerted efforts to secure payment of compensation for slave and forced labour imposed by Nazi Germany. In the negotiations, the government has played a significant role on behalf of the representatives of the victims. Due to the government’s efforts, former slave and forced labourers will receive in total DEM 1,812 thousand million, which constitutes a very positive outcome to the negotiations.

The government of the Republic of Poland will endeavour to ensure that the payments from the Remembrance, Responsibility and Future Foundation, handled by the Polish-German Reconciliation Foundation with the participation of Polish financial institutions, will be processed properly. To that end the Polish authorities will take steps with regard to the Polish-German Reconciliation Foundation within their founding and supervisory competences.”

26. The statutes of the Polish-German Reconciliation Foundation was amended on the initiative of its founder, namely the Minister of the State Treasury, with a view to implementing the provisions of the GFA and the Agreement of 16 February 2001; those amendments were subsequently registered by the Warsaw District Court on 26 June 2001.

27. The amended statutes stipulated that the Foundation was to disburse payments to the victims specified in section 11 of the GFA from the funds contributed by the German Foundation on the basis of the same Act (paragraphs 6.2 and 9.2). It further specified that the Foundation’s decisions in individual cases were to be taken on the basis of internal regulations. A decision in an individual case could be appealed against; however,

a decision taken after an appeal had been considered was final and no appeal lay against it (paragraphs 6.4 and 6.5).

28. Pursuant to paragraph 20 of the amended statutes, the Verification Commission (*Komisja Kwalifikacyjna*) was to determine individual claims for assistance filed by victims of Nazi persecution. Members and the president of the Verification Commission were to be appointed and dismissed by the Foundation's management board (paragraph 21.1). Detailed regulations as to the organisation of the Verification Commission and the rules and criteria on the granting of assistance were specified in the internal regulations of the Verification Commission, drafted by the management board and adopted by the supervisory board (paragraph 21.2).

29. Decisions taken by the Verification Commission could be appealed against to the Appeal Commission (*Komisja Odwoławcza*). Its president and members are appointed and dismissed by the Foundation's management board, having consulted the supervisory board. The Appeal Commission operates on the basis of internal regulations drafted by the management board and adopted by the supervisory board (paragraph 23.2). The amended statutes stipulated that the decisions of the Appeal Commission were final (paragraph 23.3).

30. On 31 December 2006 the Foundation terminated the disbursement of payments under the second scheme.

F. Case-law of the Polish courts

31. In 1997 the Ombudsman referred to the Supreme Court a question of law (*pytanie prawne*), as to whether decisions given by the organs of the Foundation could be appealed to the Supreme Administrative Court and, if not, whether they could be subjected to judicial review in civil proceedings. On 31 March 1998 the Supreme Court adopted Resolution no. III ZP 44/97, holding that, since administrative functions could only be delegated by statute, which was not the case with regard to the Polish-German Reconciliation Foundation, its decisions did not meet the requirements of an administrative decision and thus could not be appealed to the Supreme Administrative Court. However, the Supreme Court refused to give a definite answer as to whether the Foundation's decisions could be subject to judicial review in civil proceedings. It nevertheless observed that entitlement to receive a benefit from the Foundation did not fall within the scope of civil law, and thus could not be raised before a civil court. In exceptional cases, such as where the claimant's eligibility had been established but the benefit was not paid, a claim could arise under civil law.

32. In Resolution no. OPS 3/01 of 3 December 2001, the Supreme Administrative Court upheld the earlier case-law to the effect that it did not have jurisdiction to review the decisions of the Foundation and observed that:

“The Polish-German Reconciliation Foundation, which awards benefits to the victims of Nazi persecutions using the financial resources allocated to it by foreign entities, does not perform functions in the area of public administration. Thus, the source of the entitlement to receive an award from the Foundation does not stem from actions of the public administration.”

It further observed:

“There is no doubt that the Agreement of 16 October 1991, concluded between the Polish and German Governments, which was not ratified, as well as subsequent acts [starting with the Joint Statement and the German Foundation Act] concerning grants of financial assistance by the Foundation on account of Nazi persecution do not fulfil the criteria which would make it possible to classify them as sources of binding Polish law. No administrative-law relation arises between a claimant and the Foundation on the basis of the aforementioned acts, and consequently the Foundation is not an organ of public administration established by law to determine cases in the sphere of public administration.”

G. The Poznań Court of Appeal’s decision of 14 January 2005, no. I ACz 3043/04

33. The Poznań Court of Appeal examined an interlocutory appeal against a first-instance judicial decision rejecting a plaintiff’s claim against the Foundation based on Article 189 of the Code of Civil Procedure. It quashed the decision under appeal and remitted the case. The Court of Appeal held that a decision determining whether the Foundation had been obliged to pay benefits to a claimant was a decision on the merits of a claim. Accordingly, it should have been determined by way of a judgment.

H. The Supreme Court’s Resolution of 27 June 2007, no. III CZP 152/06

34. On 27 June 2007 the Supreme Court adopted Resolution no. III CZP 152/06 in response to a question of law put forward by the Ombudsman. It revisited its earlier case-law on the interpretation of the notion of a “civil case” laid out in Article 2 of the Code of the Civil Procedure in relation to claims against the Foundation⁴. The Supreme Court held that:

“The [civil] courts have jurisdiction in the case where a claimant – due to an unfavourable decision by the “Polish-German Reconciliation” Foundation – is seeking a payment [from the Foundation] in respect of Nazi persecution.”

In the reasons for its Resolution the Supreme Court found, *inter alia*,

⁴ The Supreme Court made a survey of the relevant case-law of the civil and administrative courts. It noted, as an exception to the dominant trend in the case-law, the Poznań Court of Appeal’s decision of 14 January 2005 and the Szczecin Court of Appeal’s judgment of 12 July 2006.

that:

“The procedure concerning examination of claims under the first and the second German fund ... may not be currently instituted. The relevant funds were allocated and the disbursement of payments has been finally concluded. (...)

There is no doubt that the current state of affairs resulting from the relevant case-law, under which those persons interested in challenging before a court the Foundation’s refusal to grant them a suitable payment are deprived of such a possibility, cannot be accepted in the light of the binding constitutional and Convention standards. Article 184 § 1 in conjunction with Article 177 of the Constitution establishes a presumption in favour of jurisdiction of the ordinary courts which indicates – at least indirectly – that a possible jurisdiction of the administrative courts should be based on a specific statutory rule. (...)

The need for extensive interpretation of the individual’s access to a court, or in other words, the right to bring an action (the right to a court) follows also from Article 6 § 1 of the Convention and Article 14 § 1 of the International Covenant on Civil and Political Rights, which stipulate that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law in the determination of his civil rights and obligations. It may be assumed from the established case-law of the European Court of Human Rights that Article 6 § 1 of the Convention guarantees to everyone the inalienable right to submit for a judicial determination any claims concerning civil rights and obligations.... Obviously, the right to a court does not denote the right to “win” a case, but it signifies that the filed claim should be examined by a court and determined on the merits (judgment of the Supreme Court of 3 January 2007, no. IV CSK 312/06, unpublished).

The results of interpretation of Articles 1 and 2 of the Code of Civil Procedure thus require us to acknowledge that the [civil] court has jurisdiction where a case has the features of a civil case in the substantive sense and where no particular provision delegates its examination and determination to a different organ than an ordinary court. The [civil] court also has jurisdiction where a case has the features of a civil case only in the formal sense.”

I. The Constitutional Court’s decision of 14 November 2007 in case no. SK 53/06

35. A certain S.K. filed a constitutional complaint with the Constitutional Court after the administrative court rejected his appeal against inactivity of the Foundation, stating that it did not have jurisdiction. He challenged the constitutionality of certain provisions of the Law of 25 July 2002 on the Structure of Administrative Courts and of the Law of 30 August 2002 on Procedure before Administrative Courts, which delineated the jurisdiction of the administrative courts. On 14 November 2007 the Constitutional Court discontinued the proceedings on procedural grounds. It found that the claimant had not obtained a “final decision” within the meaning of Article 79 of the Constitution, since he had mistakenly seized the administrative courts and not the civil courts to pursue

his appeal against the Foundation's decision. The Constitutional Court relied on the constitutional presumption in favour of jurisdiction of the civil courts and the Supreme Court's Resolution of 27 June 2007.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

36. The applicant complained under Article 4 of the Convention about his forced labour during the Second World War.

37. The Court notes that the applicant's deportation to the German *Reich* and his forced labour there are not attributable to the Polish State. Accordingly, this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE PROCEEDINGS CONCERNING THE APPLICANT

38. The applicant contested the amount awarded by the Polish Foundation on account of his forced labour during the war. He did not rely on any provision of the Convention. The Court considers that the applicant's complaint falls to be examined under Article 6 § 1 of the Convention, the relevant parts of which provide:

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

39. The Government argued that Article 6 § 1 was not applicable to the proceedings at issue and that the applicant had not exhausted the relevant domestic remedies.

40. In so far as the applicant complained about the unsatisfactory amount of compensation awarded by the Polish Foundation on account of his forced agricultural labour, the Court observes that the applicant did not claim to come under another, more favourable, category of eligibility. He limited himself to contesting the amount awarded by the Polish Foundation as not commensurate with his hardship. However, the Court observes that the Foundation acknowledged his deportation and forced labour in agriculture and awarded him the amount of EUR 1,124.84, which was applicable to that category of eligibility. The applicant did not submit any arguments which would cast doubt on the classification of his persecution under the eligibility conditions as set out in the GFA. The Court

considers that the applicant did not indicate any legal basis for his claim to have a right to receive further compensation from the Foundation (see *Jakowicz v. Poland* (dec.), no. 16778/02, § 83, 13 October 2009). Consequently, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be declared inadmissible pursuant to Article 35 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE PROCEEDINGS CONCERNING THE APPLICANT'S DAUGHTER

41. The applicant complained that his daughter had been refused compensation, following a flawed assessment of the relevant facts by the Foundation. He claimed that there had been no authority which could have reviewed the Foundation's decisions. He did not invoke any provision of the Convention. The Court considers that the applicant's complaint concerns the lack of access to a court in respect of the claims raised before the Polish Foundation and falls to be examined under Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...”

A. Preliminary issue

42. The Government submitted that the applicant had originally lodged his application against the Federal Republic of Germany. They were of the opinion that the application should have been communicated to the German Government with a view to enabling the Court to examine it in a comprehensive manner. The present case concerned the second compensation scheme in which the Polish Foundation had acted in conformity with the GFA. The Government maintained that the communication of the present application to the Polish Government was contrary to the applicant's will and in contravention of Article 34 of the Convention.

43. The applicant did not comment.

44. The Court observes that a similar argument submitted by the Government in the case of *Jakowicz* was dismissed (see, *Jakowicz v. Poland*, cited above, § 54). In particular, the Court recalled its finding made in the *Woś* judgment that the responsibility of the Polish State was engaged in respect of both the first and the second compensation schemes (see, *Woś v. Poland*, no. 22860/02, § 54, ECHR 2006-VII). In addition, the Court notes that in his initial correspondence with the Court the applicant indicated both Poland and Germany as the respondent States.

Furthermore, the Court considers that the principal issue in the case concerns the assessment of the applicant's claims by the Polish Foundation and the lack of judicial review of the Polish Foundation's decisions. Having regard to the foregoing, the Court finds that it was not required to communicate the case to the German Government.

B. Compatibility *ratione personae*

45. The Government argued that the complaint was incompatible *ratione personae* with the Convention since the applicant had no legitimate interest in pursuing the application on behalf of his late daughter. Relying on section 13 of the GFA, they indicated that the benefits granted by the Foundation were of a personal character and that parents were not entitled to receive benefits from the Foundation on account of the persecution of their late children. They underlined that the only person entitled to pursue the claim of the applicant's late daughter was her husband. The Government maintained that the applicant had failed to show that he had been directly affected by the Foundation's decisions in respect of his daughter.

46. The applicant did not comment.

47. The Court observes that the husband of the applicant's daughter applied to the Foundation for benefits on account of her birth during the period when her parents had been subjected to forced labour in Germany. The Foundation's Verification Commission dismissed that claim on 28 August 2003 and the applicant subsequently filed an appeal against the unfavourable decision. On 23 July 2004 the Foundation's Appeal Commission examined the applicant's appeal and upheld the original decision. The Court considers that it does not need to pronounce on the applicant's standing in the proceedings before the Foundation in the light of section 13 of the GFA. It notes that the Foundation examined his appeal on the merits and thus implicitly recognised that the applicant was entitled to pursue the claim lodged on behalf of his daughter. Accordingly, the Court finds that the applicant is entitled to pursue the present application and dismisses the Government's plea of inadmissibility on the ground of incompatibility *ratione personae*.

C. Applicability of Article 6 § 1

1. The parties' submissions

48. The Government argued that Article 6 § 1 of the Convention was not applicable to the proceedings before the Polish Foundation in respect of the second compensation scheme as they did not concern the determination of his civil rights and obligations. They restated that the applicant had not

been entitled to receive benefits on behalf of his late daughter and thus the dispute over those benefits between the applicant and the Foundation could not have arisen. Nevertheless, the Government claimed that the civil disputes which might have arisen between the Foundation and its beneficiaries fell within the scope of “civil rights” since the civil courts had jurisdiction to examine such disputes.

49. The applicant did not comment.

2. *The Court’s assessment*

(a) Principles deriving from the Court’s case-law

50. The Court reiterates that, according to the principles laid down in its case-law, it must first ascertain whether there was a “dispute” (“*contestation*”) over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether this “right” is also protected under the Convention (see, *inter alia*, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-A). The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question (see, among other authorities, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X, and *Markovic and Others v. Italy* [GC], no. 1398/03, § 93, ECHR 2006-...). Lastly, the right must be a “civil” right.

(b) Application of the above principles to the present case

51. The Court recalls that in the *Woś* judgment (see, *Woś v. Poland*, no. 22860/02, ECHR 2006-VII) it examined a similar complaint in respect of the first compensation scheme, set up on the basis of the bilateral Polish-German agreement of 16 October 1991 and found Article 6 § 1 applicable to the proceedings before the Polish-German Reconciliation Foundation.

52. In contrast, the present case concerns the second compensation scheme, which was established following multilateral negotiations with a view to providing compensation to slave and forced labourers and other victims of the National Socialist period, primarily from central and eastern Europe. The agreement reached in the negotiations, in particular in respect of the categories of persons who were eligible and the establishment of the German Foundation as a means of providing funds to victims, was subsequently incorporated in the German Foundation Act of 2 August 2000. Section 10 of the Act stipulated that partner organisations, including the Polish Foundation, were entrusted with evaluation of claims and disbursement of payment to eligible claimants. The same provision

stipulated that the German Foundation was neither authorised nor obligated in respect of the approval and disbursement of payments by the partner organisations. The particular feature of the second compensation scheme was that the eligibility conditions had been specified in the GFA, while at the same time the examination of the relevant applications was to be carried out by the partner organisations, including the Polish Foundation. The Court considers that for all practical purposes, decisions to qualify applicants as coming under a particular eligibility category and to grant payments in respect of the claimants who resided in Poland were taken by the Polish Foundation (see *Woś v. Poland* (dec.), no. 22860/02, § 66, ECHR 2005-IV; *Jakowicz v. Poland* (dec.), no. 16778/02, § 76 *in fine*, 13 October 2009). The Court notes that the German Foundation carried out random checks of the decisions taken by the Polish Foundation, but in its view this does not alter the conclusion that the Polish Foundation played the main role in the process. In any event, there is no evidence that the decisions in respect of the applicant's claims were reviewed or altered by the German Foundation.

53. In the *Woś* judgment the Court held that the Convention imposes no general obligation on the Contracting States to provide redress for wrongs inflicted in the past under the general cover of State authority (see also, *mutatis mutandis*, *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). This principle applies to the Federal Republic of Germany in respect of wrongs or damage caused by the German *Reich* (see *Associazione Nazionale Reduci Dalla Prigionia dall'Internamento e dalla Guerra di Liberazione (A.N.R.P.) v. Germany* (dec.), no. 45563/04, 4 September 2007; and *Ernewein and Others v. Germany* (dec.), no. 14849/08, 2 May 2009) but it is even more relevant for third States, like Poland, who bear no responsibility in connection with wrongs inflicted by a foreign occupying force or another State (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 124, ECHR 2004-V; *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 77, ECHR 2005-V).

54. However, the Court recalls that if a compensation scheme were to be established, the substantive regulations which determined the eligibility conditions for any compensation would in principle fall outside the Court's jurisdiction, unless the relevant conditions were manifestly arbitrary or blatantly inconsistent with the fundamental principles of the Convention (see *Woś v. Poland*, cited above, § 72). In other words, when a State decides to compensate the past wrongs for which it bore no responsibility, it enjoys a significant discretion (*grand pouvoir d'appréciation*) in determining the beneficiaries and the modalities of any compensation scheme and, in principle, no challenge to the eligibility conditions as such may be allowed (see *Maltzan and Others*, cited above,

§ 77; *Epstein and Others v. Belgium* (dec.), no. 9717/05, ECHR 2008-... (extracts)).

55. The Court observes that the compensation scheme established under the GFA concerned claims of forced labourers and other victims of Nazi Germany (see section 2 of the GFA on the purpose of the German Foundation). As those claims date back essentially to the Second World War there could be no question of the Polish State's responsibility for the wrongs committed during that period. It is clear that the Polish State have no obligations of any kind to redress the wrongs inflicted by another State as its citizens were victims and not perpetrators (see *Woś v. Poland* (dec.), cited above, § 85).

56. In the context of the present case, the Court underlines that the substantive eligibility conditions under the second scheme were defined in the GFA and had to be applied as such by the partner organisations, including the Polish Foundation. It follows that while processing the applications the Polish Foundation was bound to follow the substantive criteria as specified in the GFA and had no power either to review its reasonableness or to unilaterally modify or extend them. Thus, the Polish Foundation and, *a fortiori*, the Polish State cannot bear responsibility in cases where an applicant, due to the scope of the substantive eligibility conditions as such, was not included in the group of persons entitled to certain benefits. The Court emphasises that the Polish Foundation exercised only a certain measure of discretion when assessing the facts of individual cases and the evidence submitted by the claimants. Its assessment of those elements was decisive for the outcome of the proceedings before the Foundation. The Court considers that the responsibility of the Polish State may be engaged exclusively as regards those cases where the dispute concerns the application of the eligibility conditions to the facts of individual cases in the area falling within the Foundation's margin of discretion. Accordingly, in each case it is necessary to determine whether a claimant challenges the eligibility conditions or the assessment of facts and evidence by the Polish Foundation and whether that assessment remained within the Polish Foundation's margin of discretion.

57. Turning to the circumstances of the present case, the Court recalls that the applicant is entitled to pursue the present application in respect of the claims asserted on behalf of his daughter since the Polish Foundation regarded him as an entitled person (see paragraph 47 above). The Court notes that the applicant claimed that his daughter had been born on 30 April 1945 and thus was entitled to receive benefits under the so-called openness clause on account of her birth during the period in which her parents were subjected to forced labour in Germany. The applicant submitted that upon his return he had registered his daughter as being born in Poland on 13 May 1945 for fear of possible negative consequences of disclosing the true date. In order to substantiate the claim the applicant relied on two

written statements provided by his fellow forced labourers. However, the Polish Foundation held that the documents in the file (the daughter's identity card) confirmed that she had been born on 13 May 1945 in Poland. It found that there were no documents in support of the applicant's assertion that his daughter had been born on 30 April 1945 in Germany and accordingly dismissed the claim.

58. The essence of the applicant's claim is that the Polish Foundation wrongly considered that his daughter had not been born on 30 April 1945, i.e. during the period of his forced labour, and consequently she was not eligible for benefits. In the present case the thrust of the applicant's complaint is directed against the Polish Foundation's erroneous assessment of the facts underlying his daughter's claim and the resultant flawed application of the eligibility conditions to the case (compare and contrast *Jakowicz v. Poland* (dec.), cited above, § 80). In the case of *Jakowicz* the Foundation dismissed the applicant's claims, which went beyond the scope of the substantive eligibility conditions and as such were outside the Foundation's remit. By contrast, in the present case the Polish Foundation refused the applicant's claims while exercising its discretion as to the assessment of the relevant facts which had a direct bearing on the determination of the applicant's eligibility status. Thus, the present case can be distinguished from the *Jakowicz* case on the ground that it concerned a dispute as to the assessment of relevant facts and not a challenge to the substantive eligibility conditions. Accordingly, the Court finds that the dispute arose between the applicant and the Polish Foundation as regards the application of the eligibility conditions to his case.

59. The Court has next to determine whether the right to receive payment from the Polish Foundation on account of forced labour or other form of persecution was recognised, at least on arguable grounds, under domestic law. The Court recalls that in the case of *Associazione Nazionale Reduci Dalla Prigionia dall'Internamento e dalla Guerra di Liberazione* (cited above), concerning the second compensation scheme, it examined the complaints of former Italian POWs about the exclusion of judicial review in respect of decisions rendered by the International Organization for Migration (one of the partner organisations). The Court found that as the applicants (former POWs) had been clearly excluded from benefits under the German Foundation Act they could not claim to have had a right to compensation. On that ground, it distinguished the case from *Woś* and held that Article 6 was not applicable to the facts of that case.

60. The Court considers that the present case is, in turn, distinguishable from the *Associazione Nazionale Reduci* decision, in that it concerns the arguable claim of a person born during the period of her parents' deportation and forced labour in Germany whose request was dismissed for failure to establish that she in fact had been born during the relevant period. In contrast, the *Associazione Nazionale Reduci* case dealt with persons who

had been expressly excluded from the ambit of the second compensation scheme on account of their undisputed POW status, and thus no question of a right to compensation could arise.

61. The Court notes that international public law does not establish individual claims for compensation for forced labour (see *Associazione Nazionale Reduci* decision which referred to the judgment of the Federal Constitutional Court of 28 June 2004). Such claims could be established exclusively through domestic law, and in such a case the legislator enjoys a wide margin of discretion, as noted above. In this respect the Court observes that the conditions and procedures with which a claimant had to comply before a payment could be awarded by the Polish Foundation were first agreed in the course of multilateral negotiations, then laid out in the GFA and subsequently transposed into the regulations binding on the Foundation via the Partnership Agreement of 16 February 2001 and any subsequent agreements concluded in the framework of the so-called openness clause. The Polish Foundation's statutes were subsequently amended with a view to implementing the provisions of the GFA and the Agreement of 16 February 2001. Thus, the Foundation's regulations stipulated the conditions which had to be fulfilled by a person seeking benefits. It is noteworthy that the Supreme Court in its Resolution of 27 June 2007 found that the basis of the rights of a person seeking payment from the Polish Foundation were the Foundation's statutes, the rules of the Verification Commission and the relevant provisions of the GFA. The Court is mindful of the particular character of the legal regime governing the second compensation scheme which defined the categories of eligible claimants. Nevertheless, it finds that the Polish Foundation's regulations could be considered to create a right for a claimant arguably fulfilling the relevant eligibility conditions to claim compensation from the Foundation (see, *mutatis mutandis*, *Woś v. Poland* (dec.), cited above, § 83).

62. The Court notes that the payments at issue were voluntary in the sense that the States were free to establish the scheme and to determine the scope of its beneficiaries. However, once such general scheme has been adopted and once a claimant could be reasonably considered to have complied with the eligibility conditions stipulated in the GFA and in the Foundation's regulations, he or she had a right to be awarded payment by the Foundation (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 40, Reports 1997-IV and *Woś v. Poland*, cited above, § 75). The Court points out that in the somewhat similar area of social security and welfare benefits, many domestic legal systems provide for those benefits to be paid - subject to the fulfilment of the conditions of eligibility - as of right (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X, § 51). In conclusion, the Court finds that the Foundation's bodies had thus to determine a dispute concerning a right asserted by the applicant.

63. As to the “civil” character of the right asserted by the applicant, the Court reiterates that the concept of “civil rights and obligations” is not to be interpreted solely by reference to the respondent State’s domestic law. Article 6 § 1 of the Convention applies irrespective of the status of the parties, the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter (see, among other authorities, *Georgiadis v. Greece*, 29 May 1997, § 34, *Reports* 1997-III).

64. The Court reiterates that in the *Woś* judgment, which concerned similar claims under the first compensation scheme, it held that those claims could be considered “civil” within the meaning of Article 6 § 1 (see *Woś v. Poland*, cited above, § 76). In reaching that conclusion, the Court had regard, *inter alia*, to the similarities between the compensation claims asserted before the Foundation and disputes over entitlement to social security and welfare benefits, which generally fall within the scope of Article 6 (see *Mennitto v. Italy* [GC], no. 33804/96, § 28, ECHR 2000-X; *Tsfayo v. the United Kingdom*, no. 60860/00, § 39, 14 November 2006).

65. Further, the Court notes that the Supreme Court in its resolution of 27 June 2007, referring extensively to the *Woś* judgment, found that a claim against the Foundation was to be considered a “civil” claim in a formal sense for the purposes of establishing court jurisdiction. The Court consequently finds that the applicant’s right to claim compensation from the Foundation on account of his forced labour could be considered “civil” for the purposes of Article 6 § 1 of the Convention. For the above reasons the Court finds that the right to compensation asserted by the applicant under the second compensation scheme is a civil right within the meaning of Article 6 § 1 of the Convention and that this provision is applicable to the proceedings before the Foundation in the applicant’s case.

D. Exhaustion of domestic remedies

1. The parties’ submissions

66. The Government argued that the applicant had failed to exhaust relevant domestic remedies as he had never challenged the Foundation’s decisions in a domestic court. The applicant could have requested to have the claims lodged on behalf of his daughter determined in the civil proceedings relying on Article 189 of the Code of Civil Procedure, having regard to the fact that the claims were related to the property rights and that the Polish Foundation operated under private law. The Government invoked the decision of the Poznań Court of Appeal of 14 January 2005, no. I ACz 3043/04 in order to refute the applicant’s assertion that judicial review of the Foundation’s decisions had been excluded. The Court

of Appeal held that a decision determining whether the Foundation had been obligated to pay benefits to a claimant was a decision on the merits of a claim and should be examined by the court as such. Accordingly, in the Government's view, the Court of Appeal's decision confirmed that the determination of the right to receive payment from the Foundation could have been pursued under Article 189 of the Code of Civil Procedure.

67. The Government further underlined that the Supreme Court's Resolution of 27 June 2007 confirmed their earlier submission that judicial review of the Foundation's decisions had been available to claimants. Accordingly, all persons seeking benefits from the Foundation could have contested its decisions before the civil courts. The applicant should have resorted to that remedy before he filed his case in Strasbourg. In the Government's view, the said Resolution confirmed that the right to appeal against the Foundation's decisions stemmed directly from the Constitution and the Code of Civil Procedure.

68. Secondly, even assuming that his civil suit had been rejected, the applicant could have availed himself of a constitutional complaint. In his constitutional complaint the applicant, who maintained that the right to receive payment from the Foundation was of a civil character, could have raised the question of compatibility of Articles 1 and 2 of the Code of Civil Procedure with Article 45 of the Constitution. The Government drew an analogy between the present case and the situation which obtained in the Constitutional Court's judgment of 10 July 2000 (case no. SK 12/99). In that case, a student whose claims against a university had been rejected by civil courts for lack of jurisdiction lodged a constitutional complaint, raising the question of the compatibility of Articles 1 and 2 of the Code of Civil Procedure with Article 45 of the Constitution. The Constitutional Court ruled that Article 1 of the Code of Civil Procedure, interpreted as not including in the notion of "civil case" certain pecuniary claims stemming from an administrative decision, was incompatible with Article 45 of the Constitution. Furthermore, the Government argued that the decision of the Constitutional Court of 14 November 2007 in case no. SK 53/06 confirmed that the applicant should have instituted proceedings against the Foundation before the civil courts.

69. The applicant did not comment.

2. The Court's assessment

70. The Court has first to determine whether the applicant was required to pursue the claims against the Foundation in a civil court. The Government, relying on the Poznań Court of Appeal's decision of 14 January 2005, contended that such possibility had been open to the applicant. In their view, this assertion was further confirmed by the Supreme Court's Resolution of 27 June 2007. The Court observes, however, that the Supreme Court in its authoritative decision given by a panel

of seven judges stated firmly that, prior to its Resolution, interested persons had been deprived of a possibility to challenge the Foundation's decisions in a court. The Supreme Court found that the prevailing trend in the case law of the civil courts was the exclusion of judicial review in respect of those decisions. It noted that the Poznań Court of Appeal's decision of 14 January 2005 and the Szczecin Court of Appeal's decision of 12 July 2006 took a different approach. However, those decisions did not affect the Supreme Court's conclusion as to the earlier lack of availability of judicial review. The Court notes that it was only the Supreme Court's Resolution which, having regard, among others, to the *Woś* judgment, reinterpreted the notion of a "civil case" and acknowledged that such claims could be heard by civil courts. Accordingly the Court finds that prior to 27 June 2007 the availability of judicial review in respect of the Foundation's decisions had not been sufficiently established and the applicant could not be reproached for failing to institute civil proceedings against the Foundation (see *Woś v. Poland*, cited above, § 106).

71. The Government lastly contended that, in any case, the applicant should have availed himself of a constitutional complaint. The Court has accepted that at the date of the lodging of his application in Strasbourg, i.e. on 27 August 2004 the applicant was not required to pursue his claims before the civil courts as – in view of the settled case-law – such a course of action was bound to fail. At the same time, in order to file a constitutional complaint a claimant is obliged to obtain a final decision from a court or an administrative authority (see Article 79 of the Constitution). More importantly, the Court points out that a constitutional complaint could be recognised as an effective remedy only where the individual decision which allegedly violated the Convention had been adopted in direct application of an unconstitutional provision of national legislation (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003, and *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005). However, at the heart of the present case lies the judicial interpretation of the relevant legislative provisions on court jurisdiction, which resulted in a finding that neither the civil nor the administrative courts could hear claims against the Foundation (see *Woś v. Poland*, cited above, § 95). As stated above, that problem of judicial interpretation was eventually resolved by the Supreme Court's Resolution of 27 June 2007. The Court notes that the issue of whether civil or administrative courts should hear such claims was also debated by legal writers.

72. The Court is aware that in exceptional cases the Constitutional Court may examine a constitutional complaint against a provision of law in the meaning attributed to it under consistent and long-standing judicial or administrative practice, provided that such interpretation has not been contested by legal writers (see, *inter alia*, the Constitutional Court's judgment of 31 March 2005, case no. SK 26/02, § 5.3, with further

references). However, it is not satisfied that the prerequisites for lodging such a constitutional complaint were met in the present case. Lastly, the Court notes that the Constitutional Court's decision of 14 November 2007 in case no. SK 53/06 was given after the present application had been lodged. For the above reasons the Court considers that a constitutional complaint cannot be regarded with a sufficient degree of certainty as an effective remedy in the applicant's case.

73. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

E. Conclusion as to admissibility

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

F. Compliance with Article 6 § 1

1. The parties' submissions

75. The Government argued that the complaint under Article 6 § 1 of the Convention was manifestly ill-founded. The question of access to a court had not arisen, since the applicant had never instituted judicial proceedings at the domestic level. They restated that Article 6 § 1 was not applicable to the proceedings at issue and thus the operation of the Foundation's bodies could not be examined under this provision. They further argued that the Foundation's organs which dealt with the applicant's case had been established in accordance with section 19 of the GFA and the Agreement of 16 February 2001 between the German and the Polish Foundation. Section 19 of the GFA stipulated that the partner organisations were to create appeals organs which were independent and subject to no outside instruction. The Partnership Agreement contained further detailed regulations in this respect. In so far as the appeal procedure was concerned the Polish Foundation operated within the legal framework set out in the GFA and the Partnership Agreement.

76. The Government underlined that the decisions of the Foundation's Verification Commission and the Appeal Commission were subject to scrutiny of the German Foundation. The latter could review decisions taken by the partner organisation after the appeal procedure had been concluded. To this end the Polish Foundation had to allow the German Foundation access to the relevant documents at any time. If grossly incorrect decisions were discovered during such inspection, the Polish

Foundation had to reopen the procedure and remedy the issue in a new decision. Furthermore, the German Foundation could quash decisions of the Polish Foundation and reopen a case. The Government stressed that the German Foundation could have ordered an audit of the Polish Foundation. Therefore, it was the German Foundation which exercised real control over the Polish Foundation. The Foundation's bodies operated under the accessible provisions of law determined in the Partnership Agreement and the rules of procedure of the Appeal Commission were approved by the German Foundation. The role of the Polish authorities was limited to assessing whether the Polish Foundation operated in conformity with the law.

77. The applicant maintained his application but did not submit specific comments.

2. The Court's assessment

78. Article 6 § 1 requires that in the determination of civil rights and obligations, decisions taken by administrative or other authorities which do not themselves satisfy the requirements of that Article be subject to subsequent control by a judicial body that has full jurisdiction (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 51, Series A no. 43; *Woś v. Poland*, no. 22860/02, § 92, ECHR 2006-VII). The Court must therefore first ascertain whether the Foundation's adjudicating bodies – the Verification Commission and the Appeal Commission – could be considered as tribunals conforming to the requirements of Article 6 § 1.

79. The Court notes that the Government stressed the significant role of the German Foundation in the decision-making process concerning the claims raised before the Polish Foundation. Even assuming that the German Foundation could to some extent verify the correctness of the decisions taken by the Polish Foundation, there is no evidence that it had been involved in reviewing decisions taken in the applicant's case. Thus, the Court, having regard to Article 10 of the GFA, reaffirms that for all practical purposes, decisions to grant payments in respect of the claimants who resided in Poland were taken by the Polish Foundation (see *Woś v. Poland* (dec.), cited above, § 66; *Jakowicz* (dec.), cited above, § 76 *in fine*).

80. According to the Court's settled case-law, a tribunal within the meaning of that provision must satisfy a series of requirements – independence, in particular of the executive, impartiality, duration of its members' terms of office, and guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (see *Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132; *Demicoli v. Malta*, 27 August 1991, § 39, Series A no. 210; and *Cyprus v. Turkey* [GC], no. 25781/94, § 233, ECHR 2001-IV). In the present case, as regards

structural guarantees, the Court notes that the members of the Verification Commission and the Appeal Commission were appointed and dismissed by the Foundation's management board and, in respect of the latter, in consultation with the Foundation's supervisory board. The Foundation's statutes also specified that the rules governing the operation of the Foundation's adjudicating bodies were to be set out in the regulations drafted by the management board and adopted by the supervisory board. The Foundation's governing bodies were in turn appointed and dismissed by the Government Minister at his or her full discretion (see paragraph 13 above). Furthermore, a degree of control and supervision over the Foundation was exercised by the Government Minister. Furthermore, it appears that the members of the Verification Commission and the Appeal Commission did not have tenure. Thus, the Court considers that the independence of the Foundation's adjudicating bodies, despite the Government's arguments to the contrary in respect of the Appeal Commission, was open to serious doubt. As regards procedural guarantees, it appears that the adjudicating commissions had no clear and publicly-available rules of procedure (see *H v. Belgium*, 30 November 1987, § 53, Series A no. 127-B) and did not hold public hearings. For these reasons, they cannot be regarded as tribunals within the meaning of Article 6 § 1.

81. Therefore, in order for the obtaining situation to be in compliance with Article 6 § 1, the decisions of the Foundation's adjudicating bodies should have been subject to review by a judicial body having full jurisdiction. However, the Court notes that until June 2007 the domestic courts' prevailing position, as confirmed in the Supreme Court's Resolution of 27 June 2007, was that judicial review by either administrative or civil courts in respect of the Foundation's decisions was excluded (see paragraphs 31-32 and 34 above). At this juncture, the Court observes that the Government also criticised the applicant for having failed to institute judicial proceedings against the Foundation in the civil courts prior to the adoption of the Supreme Court's Resolution. It notes, however, that the applicant was not obliged to pursue his claims before the courts, as such action would obviously have been futile, having regard to the settled case-law of the domestic courts at the relevant period.

82. The Court observes that the major change in respect of the availability of judicial review in civil proceedings came with the Supreme Court's Resolution of 27 June 2007. The Supreme Court revisited the existing practice and held that claims against the Polish Foundation in respect of Nazi persecution were civil claims in the formal sense. Accordingly, the civil courts had jurisdiction to examine such claims. The Court very much welcomes such a positive development in the Supreme Court's case-law which, at least in part, was prompted by its judgment in the *Woś* case. However, as noted above (see paragraph 70 above), the

applicant in this case was not required to attempt to seek judicial review of the Foundation's decisions since such a possibility arose only near three years after he had lodged his application.

83. Having regard to the above considerations, the Court considers that the exclusion of judicial review in respect of the decisions given by the Foundation in the applicant's case impaired the very essence of the right of access to a court within the meaning of Article 6 § 1 of the Convention.

84. It follows that there has been a breach of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. 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

86. The applicant claimed 150,000 Polish zlotys (PLN) in respect of non-pecuniary damage on account of his forced labour in Germany and related suffering.

87. The Government argued that they were not responsible for the wrongs suffered by the applicant during the Second World War. Furthermore, in their view the applicant's claims were exorbitant.

88. The Court recalls that it found a violation of Article 6 § 1 as regards the exclusion of judicial review of the Foundation's decisions in respect of the claims asserted on behalf of the applicant's daughter. The part of the application concerning the applicant's forced labour and the unsatisfactory amount of compensation granted by the Foundation in that respect was declared inadmissible. Accordingly, the Court finds that there are no grounds to make any award in respect of the applicant's claims.

B. Costs and expenses

89. The applicant did not submit claim for costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the lack of access to a court in respect of the proceedings before the Polish-German Reconciliation Foundation admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 2 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President