



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

FOURTH SECTION

CASE OF KOSTKA v. POLAND

(Application no. 29334/06)

JUDGMENT

STRASBOURG

16 February 2010

FINAL

16/05/2010

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

In the case of Kostka 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 Lawrence Early, *Section Registrar*,

Having deliberated in private on 26 January 2010,

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

PROCEDURE

1. The case originated in an application (no. 29334/06) 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 Stanisław Kostka (“the applicant”), on 3 July 2006.

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 2008 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 1934 and lives in Chmielno.

6. On an unspecified date the applicant applied to the Polish-German Reconciliation Foundation (“the Foundation”) for compensation on the ground that he and his parents had been deported to Germany with a view to performing forced labour in agriculture. 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”; “the GFA”) and the subsequent Agreement of 16 February 2001 between the Remembrance, Responsibility and Future Foundation (“the German Foundation”) and the Polish-German Reconciliation Foundation.

7. On 3 September 2003 the Foundation's Verification Commission decided that the applicant was not eligible for compensation. It informed him that under section 11 of the GFA only those forced labourers who had been deported to Germany or to an area occupied by it had been eligible for compensation. In the case of citizens of the Third *Reich* or persons placed on the List of German Nationals (*Deutsche Volksliste*; *niemiecka grupa narodowościowa*) their assignment to work by the German authorities was not considered compulsory. The Verification Commission established on the basis of documentary evidence that the applicant's parents had been placed on the List of German Nationals and that accordingly their assignment to work in Germany had not been compulsory.

8. On 27 October 2003 the applicant appealed against that decision. He strongly contested the Verification Commission's finding that the assignment to work of the persons who had belonged to the German Nationals' List had not been compulsory. He submitted that the farm of his parents had been sequestered by the German authorities without compensation. Subsequently, the applicant and his parents had been placed in the Jabłonów germanization camp. On account of his internment in the camp as a child the applicant was granted a veteran status by the Polish authorities. The applicant further argued that the seizure of his parents' prosperous farm without payment of compensation had been certainly effected against their will, as had been their transfer to work on a farm in Germany. He submitted that the placement on the German Nationals' List had resulted in most cases from various forms of coercion, in particular in Silesia and Pomerania where his family had been from. He concluded that his and his parents' deportation to perform forced labour in Germany had been compulsory.

9. On 20 August 2004 the Foundation's Appeal Commission dismissed the applicant's appeal. It reiterated that the applicant had not met the conditions specified in section 11 of the GFA. The Appeal Commission did not reason its decision.

10. On 29 November 2004 the applicant filed an appeal against that decision with the Appeal Commission for transmission to the Warsaw Regional Administrative Court. Since the appeal had not been transmitted, on 3 October 2005 the applicant made an application to the administrative court to impose a fine on the Appeal Commission.

11. On 19 October 2005 the Warsaw Regional Administrative Court rejected his application, finding that it did not have jurisdiction to examine appeals against decisions or inactivity of the Foundation. The court relied on the Supreme Administrative Court's Resolution of 3 December 2001 (no. OPS 3/01; see paragraph 37 below).

12. On 6 January 2006 the Supreme Administrative Court dismissed the applicant's appeal against the Regional Administrative Court's decision.

13. On 18 April 2006 the applicant lodged a constitutional complaint, alleging that the exclusion of the administrative court's jurisdiction in respect of the Foundation's decision had violated Article 45 § 1 of the Constitution, that provision guaranteeing access to court.

14. On 14 November 2007 the Constitutional Court discontinued the proceedings on procedural grounds (case no. SK 53/06). 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 (see paragraph 38 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional provisions

15. 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)

16. 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.

17. Subsequently, on 27 November 1991, the Minister–Head of the Cabinet Office (*Minister – Szef Urzędu Rady Ministrów*) acting as a Founder, 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.

18. 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 (*Odwoławcza Komisja Weryfikacyjna*).

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

19. 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 Poland.

20. 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.

21. 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.

22. 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.

23. 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

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

25. 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.

26. 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

27. 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.

28. 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.

29. 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).

30. 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.”

31. 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.

32. 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).

33. 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).

34. 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).

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

F. Case-law of the Polish courts

36. 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.

37. 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 Supreme Court's Resolution of 27 June 2007, no. III CZP 152/06

38. 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 Foundation. 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*, 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.”

THE LAW

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

39. The applicant complained under Article 6 § 1 of the Convention that there had been a breach of his right of access to a court on account of the administrative courts' refusal to examine his appeal against the Foundation's decisions. The relevant parts of Article 6 § 1 of the Convention 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. Applicability of Article 6 § 1

40. The Government submitted no observations.

41. The applicant argued that the Court's findings in the *Woś* judgment were applicable to the present case, having regard to the similarities between the first and the second compensation scheme.

42. 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.

43. 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).

44. 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).

45. 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)).

46. 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).

47. 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.

48. Turning to the circumstances of the present case, the Court notes that the applicant claimed before the Foundation that he and his parents had been deported to Germany and subjected to forced labour. However, the Foundation, relying on section 11 of the GFA, dismissed his claims, having found that their deportation and work had not been compulsory since the applicant's parents had been placed on the German Nationals' List. The applicant strongly objected to that decision. He argued, among others, that the placement on the German Nationals' List had resulted from various forms of coercion and that his family had been interned in the germanization camp (see, paragraph 8 above).

49. The essence of the applicant's claim is that the Foundation wrongly considered that his and his parents' deportation to perform forced labour in Germany had not been compulsory and that consequently he 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 claims 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 Foundation refused the applicant's claims while exercising its discretion as to the assessment of the relevant facts which had direct bearing on the determination of the applicant's eligibility status. In this respect the Court notes that section 11 of the GFA which was invoked by the Foundation does not explicitly exclude persons who had been placed on the List of German Nationals. Nor was the Court apprised of by the Government of any binding instructions issued to that effect by the German Foundation. Thus, the present case can be distinguished from the *Jakowicz* case on the ground that it concerned the 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 Foundation as regards the application of the eligibility conditions to his case.

50. 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.

51. 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 deported to Germany with his parents with a view to performing forced labour and whose request was dismissed for failure to establish that the deportation and forced labour were compulsory. 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.

52. 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 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 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 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 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).

53. 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 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.

54. 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).

55. 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).

56. 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 deportation and 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.

B. Exhaustion of domestic remedies

57. The Government submitted no observations.

58. Having regard to the Supreme Court's Resolution of 27 June 2007, the applicant argued that the Government did not comment on this point and thus admitted that the said Resolution could not lead to the conclusion that he had not exhausted domestic remedies.

59. The Court finds, in the absence of any submissions from the Government, that the applicant exhausted available domestic remedies.

C. Conclusion as to admissibility

60. The Court notes that the application 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.

D. Compliance with Article 6 § 1

61. 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.

62. 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 18 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 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.

63. 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 36-38 above). At this juncture, the Court observes that the Government put forward no arguments to the effect that the Supreme Court's Resolution could have been relied on by the applicant to assert his claims in civil proceedings, in particular having regard to the fact that the Foundation determined his claims long prior to the adoption of the said Resolution. Accordingly, the Court considers that it has not been established that the applicant was required to institute civil proceedings in order to review the Foundation's decisions. In addition, such a possibility arose only after he had lodged his application with the Court.

64. 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 it has not been demonstrated that the applicant was obliged to pursue his claims before civil courts.

65. 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.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage. He argued that the award in his case should have been higher than in the case of *Woś* because, by contrast to that case, his claims had been entirely dismissed by the Foundation. Furthermore, he claimed that the grounds invoked for the dismissal of his claims were derogatory.

69. The Government did not comment.

70. The Court considers that the applicant undoubtedly sustained non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Making an assessment on an equitable basis, it awards the sum of EUR 5,000 to the applicant under this head.

B. Costs and expenses

71. The applicant also claimed PLN 100 (25 EUR) for the costs incurred before the Warsaw Regional Administrative Court to prevent the violation found.

72. The Government did not comment.

73. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court awards the sum claimed by the applicant in full.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zloty at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 25 (twenty five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President