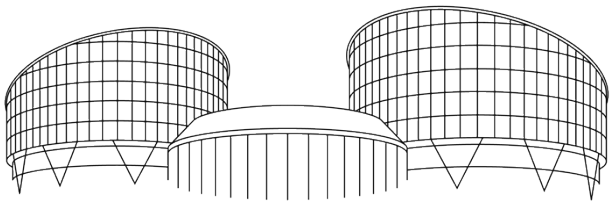

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SZAL v. POLAND

(Application no. 41285/02)

JUDGMENT

STRASBOURG

18 May 2010

FINAL

18/08/2010

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

In the case of Szal 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,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 27 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 41285/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Stefania Szal ("the applicant"), on 7 November 2002.

2. The applicant, who had been granted legal aid, was represented by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz 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 14 December 2006 the President of the Fourth Section decided to communicate the complaint concerning alleged lack of access to court 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

1.Proceedings before the Polish-German Reconciliation Foundation

5. The applicant was born in 1925 and lives in Przemyśl.

6. During the Second World War the applicant was subjected to forced labour on a farm owned by a German family B. in Leutz (currently Lucień in Poland).

7. On an unspecified date she submitted a request for compensation to the Polish-German Reconciliation Foundation.

8. On 17 April 2002 the Polish-German Reconciliation Foundation awarded the applicant financial assistance in the amount of EUR 1,124.84. It considered that the applicant's persecution fell under the 4th category. This category comprised persons who had been deported to Germany and subjected to forced labour. The amount was to be paid in two instalments, the first one in the sum of PLN 2,823 to be paid from 24 April to 8 May 2002.

9. On 29 July 2004 the Foundation gave a decision confirming payment of the second instalment, in the amount of PLN 1,247, to be paid from 6 August to 20 August 2004.

10. On 25 October 2004 the Director of Veterans' Office gave a decision by which he confirmed that the applicant complied with the conditions set out in the applicable domestic law for obtaining the status of a veteran on the strength of her imprisonment in the concentration camp Gross-Rosen in January and February 1945.

11. On 27 October 2005 the Przemyśl Regional Court gave a judgment by which it confirmed that the applicant satisfied the requirements which the applicable laws attached to the grant of war veteran status and that she was permanently and totally unable to work. It further stated that the applicant's health made it impossible for her to live independently. The court referred to medical reports prepared for the purposes of the proceedings and to a unanimous medical opinion given by a medical panel of the Social Insurance Authority which had also confirmed that the applicant's disability had been caused by her stay in the German concentration camp during the Second World War.

12. On 22 June 2006 the Foundation refused to award further payment to the applicant for her internment in the concentration camp, finding that the available evidence, in particular written statements submitted by witnesses, was insufficient proof that the applicant had been imprisoned there. The applicant appealed.

13. The Foundation, by a decision of 4 July 2006, refused to allow her appeal, reiterating the arguments on which it had relied in its first-instance decision.

2. Proceedings before civil courts

14. On 25 July 2002 the Oleśnica District Court rejected the applicant's statement of claim under Article 189 of the Code of Civil Procedure by which she had requested recognition (*ustalenie*) that she had been working as a forced labourer in Leutzen during the war, at a farm belonging to family B. The court had regard to a resolution of the Supreme Court of 5 October 2001 (III CZP 46/01), by which the latter court had held that civil courts lacked jurisdiction to examine any claims concerning forced labour during the Second World War and that it could not be accepted that such jurisdiction could be based on Article 189 of the Civil Code.

15. The applicant appealed. By a decision of 14 August 2002 the Wroclaw Regional Court upheld the contested decision, fully sharing the conclusions of the first-instance court. On an unspecified later date the Regional Court refused to grant her legal aid for the purposes of lodging a cassation appeal with the Supreme Court.

16. On 5 February 2008 the Warsaw District Court dismissed the applicant's action by which she claimed PLN 70,000 from the State Treasury as compensation for the State's failure to legislate in order to provide for social insurance entitlements to persons who during the Second World War had been subjected to forced labour and persecution in various factual contexts. The court observed that the applicant was entitled to various social insurance payments arising out of her bad health; in particular, she received a war veteran's benefit and a disability benefit granted to her under the universally applicable provisions of social insurance laws. Moreover, no national or international regulations obliged the Polish State to enact legislation addressing specifically the compensation rights of persons who had suffered during the Second World War and providing for special entitlements for them.

17. On 12 March 2009 the Warsaw Court of Appeal upheld this judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. The relevant law and practice concerning the Polish-German Reconciliation Foundation is set out in the Court's judgment in the case of *Kadłuczka v. Poland*, no. 31438/06, §§ 19-45, 2 February 2010.

THE LAW

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

19. Relying on Articles 1 and 6 of the Convention, the applicant complained that she had been deprived of a fair trial in the proceedings before the Foundation's bodies. The Court considers that her complaint concerns the lack of access to a court in respect of her 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. Applicability of Article 6 § 1

1. The parties' submissions

20. The Government argued that Article 6 § 1 of the Convention was not applicable to proceedings before the Polish Foundation in respect of the second compensation scheme. The applicant received payment from the Foundation on the basis of criteria which had been laid down in German law. They submitted that there had been no "dispute" over a "right" which had been recognised under the Polish or German law. Nevertheless, the Government claimed that 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.

21. The applicant contested the Government's argument and argued that the rights concerned were clearly of a civil character, within the autonomous meaning of that term which should be given to it under the established case-law of the Court.

2. The Court's assessment

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

22. 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, *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, § 28, ECHR 2004-IX). Lastly, the right must be a "civil" right.

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

23. 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.

24. 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.

25. In the *Woś* judgment, referred to above, 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).

26. 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'appreciation*) 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)).

27. 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 has 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).

28. In the context of the present case, the Court underlines that the substantive eligibility conditions under the second scheme were defined in the German Foundation Act and had to be applied as such by the partner organisations, including the Polish Foundation. It follows that when processing 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.

29. Turning to the circumstances of the present case, the Court notes that the applicant claimed payment from the Foundation referring to her imprisonment in a German concentration camp Gross-Rosen in January and February 1945. In order to substantiate her claim the applicant submitted written statements made by witnesses. However, the Foundation refused to award payment to her, considering that the available evidence was insufficient for a finding that she had indeed been imprisoned in that camp.

30. The essence of the applicant's claim is that the Polish Foundation wrongly considered that she had failed to show that she had been a prisoner of the concentration camp and, consequently, 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 her claim and the resultant flawed application of the eligibility conditions to her 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 relevant facts which had a direct bearing on the determination of her 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 a dispute arose between the applicant and the Foundation as regards the application of the eligibility conditions to her case.

31. 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.

32. 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 claiming to have been imprisoned by the German occupational authorities. In contrast, the *Associazione Nazionale Reduci* case dealt with claims of 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.

33. The Court notes that international public law does not establish individual claims for compensation for forced labour (see the *Associazione Nazionale Reduci* decision). 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).

34. 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 a 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 Polish Foundation's bodies had thus to determine a dispute concerning a right asserted by the applicant.

35. 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).

36. 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).

37. 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 her forced labour could be considered "civil" for the purposes of Article 6 § 1 of the Convention.

38. 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 remedies

1. The parties' submissions

39. The Government argued that the applicant had failed to exhaust relevant domestic remedies as she had never challenged the Foundation's decisions in a domestic court. She could have requested to have her claims determined in civil proceedings relying on Article 189 of the Code of Civil Procedure which provides that a plaintiff may demand a judicial declaration as to the existence or non-existence of a legal relationship or of a right if he or she has a legal interest therein. Her claims were related to property rights and the Polish Foundation operated under private law. Her claim was therefore of a civil character.

The Government invoked the decision of the Poznań Court of Appeal of 14 January 2005 (see paragraph 21 above) in order to refute the applicant's assertion that judicial review of the Foundation's decisions had been excluded. That court had 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.

40. 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 she filed her 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.

41. Secondly, the applicant could have availed herself of a constitutional complaint. In her 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.

42. The applicant argued that consistent case-law of the Polish courts indicated that no judicial review was available at the material time against decisions of the Foundation. In any event, the applicant had tried to have recourse to the civil law remedy referred to by the Government, but her claim based on Article 189 of the Civil Code was rejected by the courts. Moreover, the appellate court refused to grant her legal aid for the purposes of lodging a cassation appeal against a decision of the second-instance court, despite the fact that legal representation was mandatory and that the applicant could not afford to pay the legal fees. The applicant concluded that she had taken all possible steps in order to have the merits of her claim submitted to a judicial examination, but to no avail.

2. The Court's assessment

43. The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

44. Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 142, ECHR 2006-...).

45. In so far as the Government rely on the possibility of pursuing the applicant's claim before a civil court on the basis of Article 189 of the Code of Civil Procedure, the Court observed that she availed herself of that possibility. However, the courts refused to determine the merits of such claim, referring to the earlier case-law of the Supreme Court. In this connection, the Court notes that that court, in its Resolution of 27 June 2007, given by a panel of seven judges, stated firmly that, prior to its Resolution, interested persons had been deprived of the possibility of challenging the Foundation's decisions in a court. The Supreme Court found that the prevailing trend in the case-law of the civil courts was for exclusion of judicial review in respect of those decisions. The Court notes that it was only that authoritative decision of the Supreme Court 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.

46. The Government contended that, in any case, the applicant should have availed herself of a constitutional complaint. The Court notes that 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). In the applicant's case, no final decision of a judicial authority was given, as the applicant did not obtain legal aid for the purposes of pursuing her case further by way of a cassation appeal.

More importantly, the Court points out that it has held 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, among other authorities, *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 was ultimately 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.

47. 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.

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

C. Conclusion as to admissibility

49. 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.

D. Compliance with Article 6 § 1

1. The parties' submissions

50. The Government argued that the complaint under Article 6 § 1 of the Convention was manifestly ill-founded. 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. 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 provided for by the GFA and the Partnership Agreement.

51. The Government underlined that the decisions of the Foundation's Verification Commission and the Appeal Commission were subject to the 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 the 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 role of the Polish authorities was limited to assessing whether the Polish Foundation operated in conformity with the law.

52. The Government concluded that the Foundation's Appeal Commission could not be considered a judicial body, and in any event Article 6 § 1 was not applicable to the proceedings before the 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.

53. The applicant submitted that she had been deprived of access to a court which jurisdiction to review the decision given by the Polish Foundation in her case. She emphasised that a judicial declaration establishing facts which under the relevant provisions gave rise to

entitlement to payments provided for by the Polish and German statutes was the only possibility open to her, and to persons in similar situations, victims of various forms of persecution by the German authorities during the Second World War, to prove that they had satisfied the requirements to be granted compensation. However, the courts refused to make such a declaration.

Moreover, the Polish State, by participating in international agreements concluded within the framework of the so-called second compensation scheme, at issue in the present case, had taken upon itself the responsibility for the subsequent acts and failures of the Foundation. The fact that the Polish State had been acting through the Foundation, which was a private law institution, was insufficient to absolve it from its responsibility.

54. The applicant stressed that the Foundation, when making its decision, had disregarded the findings of fact made by the Przemyśl Regional Court as to the applicant's war veteran status and as to the causal link between the persecution to which she had been subjected during the Second World War and her disability. The outcome of the case had hinged exclusively on the assessment of the evidence submitted to the Foundation in support of her claim. The Foundation had made its own assessment of the evidence which was unreasonable, wholly arbitrary and ran counter to the findings of fact made in the decision of the Polish administration by which veteran status had been conferred on the applicant.

55. The applicant referred to the Court's judgment in the case of *Woś v. Poland*, no. 22860/02 and concluded that in view of the similarities between the shortcomings which the Court criticised in that case and the circumstances of the present case, it was obvious that the applicant's right of access to a court had also been breached.

2. The Court's assessment

56. 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.

57. 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 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*).

58. 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. 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.

59. Therefore, in order for the situation obtaining 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 19 – 23 above).

60. 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.

61. 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 her right of access to a court within the meaning of Article 6 § 1 of the Convention.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. The applicant complained that the courts had wrongly assessed the evidence and, as a result, had failed to establish correctly the facts of the civil cases in which she had been a plaintiff and had given erroneous judgments.

64. The Court reiterates that, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which like the establishment of facts are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140, and *García Ruiz v. Spain* [GC], no. 30544/96, ECHR 1999-I, § 28).

65. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed just satisfaction for both pecuniary and non-pecuniary damage in the amount of EUR 50,000.

68. The Government submitted that the amount claimed by the applicant was excessive.

69. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of her right of access to court. However, the Court accepts that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

70. The applicant, who received legal aid from the Council of Europe in connection with the presentation of her case, also claimed a total of EUR 3,842 to be paid to her lawyer who had prepared observations on the admissibility and merits of the case. She failed to produce documents or invoices to confirm that the amount claimed had been paid to the representative.

71. The Government indicated that the applicant had not shown that the expenses claimed for legal representation had actually been incurred.

72. The Court may make an award in respect of costs and expenses in so far as they were actually and necessarily incurred (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V). Given that the applicant failed to submit evidence to justify costs and expenses related to the legal representation, it makes no award under this head over and above the sum of EUR 850 paid by way of grant of legal aid.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the lack of judicial review of the decisions given by the Foundation admissible and the remainder of the application inadmissible;

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, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 18 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President