



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

FOURTH SECTION

CASE OF BELKA v. POLAND

(Application no. 20870/04)

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 Belka 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. 20870/04) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms Walentyna Belka (“the applicant”), on 11 May 2004.

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

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

4. On 26 September 2005 the President of the Fourth Section decided to give notice of the application. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Third-party comments were received from the Government of Germany which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1934 and lives in Kościan.

7. During the Second World War, in 1940, the applicant's entire family – her parents and their children – were expelled from their house and farm in

the vicinity of Poznań by German occupying forces. Subsequently, they were for some time placed in a camp for expelled persons in Poznań and then shipped off to eastern Poland, referred to at that time as General Government (“*Generalna Gubernia*”), which was occupied by the German authorities. The applicant and her family were assigned to live on a farm of local farmers in Szaniawy. At the time of the expulsion, imprisonment and resettlement the applicant was six years old.

8. On 16 June 2001 the applicant submitted a request for financial assistance from the Polish-German Reconciliation Foundation under the so-called second compensation scheme (see paragraph 16 below). She declared that she had been a victim of persecution by the German occupying authorities during the Second World War. In support of her claims the applicant submitted the following documents: a form certifying registration of her stay in Szaniawy during the war, a certificate of her first communion issued by the rector of the parish of Trzebieszów, a certificate of her mother's death in Szaniawy, statements by three witnesses certifying that the applicant had been expelled from the Poznań Province to Szaniawy during the war, the workbook (“*Arbeitsbuch*”) of her father's sister, issued by the German authorities, and a number of documents from various Polish archives informing the applicant about difficulties in obtaining documents confirming the persecution to which she had been subjected.

9. In 2002 the Verification Commission of the Polish-German Reconciliation Foundation, established under the Agreement of 16 October 1991 between the Polish and German Governments and operating on the basis of its statute, refused to pay financial assistance to the applicant, considering that persons expelled from their homes and properties by the German forces of occupation during the war were not entitled to compensation.

10. It further stated that the evidence submitted by the applicant, in particular the witness statements, was insufficient to confirm that the applicant and her family had been imprisoned in the camp for expelled persons.

11. The Foundation in its letter referred to the requirements of eligibility which were laid down by regulations governing the functioning of the second compensation scheme operated by the Foundation (on the basis of a Law of 2000 on the Creation of the “Remembrance, Responsibility and Future” Foundation enacted by the German Parliament and the subsequent agreement between that Foundation and the Polish-German Reconciliation Foundation, see paragraph 16 below).

12. The applicant appealed. On 21 November 2003 the Appeals Commission of the Foundation upheld the contested decision. It informed the applicant that she was not eligible for financial assistance under the scheme in respect of her deportation. Neither she nor her family had been

deported for the purposes of forced labour to the territory of the German Reich within its borders of 1937.

Moreover, the evidence which she had submitted did not allow it to be established that the applicant and her family had indeed been imprisoned in the camp in Poznań. It further informed the applicant that no appeal lay against this decision.

13. On 12 January 2007 the public prosecution services lodged an action on the applicant's behalf with the Warsaw District Court, referring to Article 189 of the Civil Code and to the Court's judgment in the case of *Woś v. Poland* (no. 22860/02, ECHR 2006-VII) and seeking to confirm that judicial review of the Foundation's decisions had been available to the applicant at the relevant time.

14. These proceedings were stayed on an unspecified later date, when the court referred to an individual constitutional complaint pending before the Constitutional Court at that time and brought by a certain Mr K. Subsequently, in June 2007 the Supreme Court, by way of a resolution, held that decisions of the Foundation could be challenged before the ordinary courts (see paragraph 20 below). This approach was indirectly confirmed by a decision given by the Constitutional Court in the case referred to above (see paragraph 21 below). The prosecuting authorities did not request that the civil proceedings brought on the applicant's behalf be resumed.

15. In February 2007 the Foundation officially notified the public that it had ceased, as from 31 December 2006, to make any further payments to the victims, having allocated all financial resources which had been earmarked for that purpose.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. 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. THE CONTINUED EXAMINATION OF THE APPLICATION

17. In her letters dated 7 and 21 May 2006 the applicant stated that she had experienced insurmountable difficulties in finding a lawyer willing to represent her and in obtaining the translation of the documents served on her in connection with the proceedings before the Court. She stated that she did not wish to pursue the application. However, in a subsequent letter of

29 May 2006 she expressed the wish that the examination of the case be continued.

18. The Court notes that the applicant's statements were contradictory and that it was difficult to determine her final position as to whether she wished to pursue her application. However, the Court takes note of the complex nature of the complaints made in the present case. It is further of the view that the case raises important issues of general interest in connection with the legal review of decisions which were, until December 2006, given by the Polish-German Reconciliation Foundation. The importance and complexity of the issues are evidenced also by the fact that the Court has given a number of decisions and judgments relating to similar cases (see *Woś v. Poland*, no. 22860/02, ECHR 2006-VII; *Jakowicz v. Poland*, (dec.), no. 16778/02, 13 October 2009; *Kadłuczka v. Poland*, no. 31438/06, 2 February 2010; *Kostka v. Poland*, no. 29334/06, 16 February 2010; and *Krosta v. Poland*, no. 36137/04, 2 February 2010).

19. Accordingly, the Court does not find it appropriate to strike the application out of its list of cases. It considers that there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the further examination of the application on its merits (Articles 37 § 1 *in fine* and 38 § 1(b) of the Convention; see also *Wieczorek v. Poland*, no. 18176/05, § 34, 8 December 2009, *mutatis mutandis*).

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

20. 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 in so far as they related to her claim concerning compensation for her imprisonment in the camp for expelled persons.

The Court considers that her complaint concerns the lack of access to a court in respect of that part of her claim raised before the Polish Foundation. The complaint falls to be examined under Article 6 § 1 of the Convention, the relevant parts of which provide:

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

A. Applicability of Article 6 § 1

1. The parties' submissions

21. 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 payments made by the Foundation were made *ex gratia* and could not therefore be assimilated to payments made under the provisions of civil law. The applicant's right to obtain such payment had never been recognised under either Polish law or German law. The substantive criteria of entitlement to compensation had been laid down in German law. They submitted that there had been no “dispute” over a “right” which had been recognised under Polish law.

As there had been no legal basis for her claim in Polish law, the applicant could not avail herself of a declaratory action under Article 189 of the Civil Code and seek thereby a judicial declaration that judicial review against the Foundation's decision had been available in her case. Thus, as she had no substantive right, even on arguable grounds, she could not claim to be a victim of a breach of the Convention. Moreover, the applicant had never used any other judicial remedies in order to assert her rights. She had therefore not complied with the requirement of exhaustion of domestic remedies.

22. The applicant contested the Government's argument.

2. *The Court's assessment*

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

23. The Court reiterates that, according to the principles laid down in its case-law, it must first ascertain whether there was a “dispute” (“*contestatio*”) 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

24. The Court recalls that in the *Woś v. Poland* judgment, referred to above, 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.

25. 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.

26. 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; *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 77, ECHR 2005-V).

27. 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)).

28. 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 of the exactions and persecution committed by the German occupying authorities and not perpetrators (see *Woś v. Poland* (dec.), cited above, § 85).

29. 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.

30. Turning to the circumstances of the present case, the Court notes that the applicant claimed payment from the Foundation referring to the fact that she and her family had been imprisoned in a camp for expelled persons in Poznań immediately after their expulsion from their farm. In order to substantiate her claim the applicant submitted three written witness statements. However, the Foundation refused to award payment to her in respect of that part of her claim, considering that the available evidence was insufficient for a finding that she had indeed been imprisoned in that camp.

31. The essence of this part of the applicant's case is that the Polish Foundation wrongly considered that she had failed to show that she had been a prisoner of the camp for persons expelled by the German occupying authorities from their houses and properties and, consequently, that she was not eligible for benefits. Hence, the thrust of this part of the application 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, this part of the application 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 mere 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.

32. The Court has next to determine whether the right to receive payment from the Polish Foundation on account 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.

33. The Court considers that this part of the applicant's case is 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 occupying 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.

34. 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).

35. 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; *Wieczorek v. Poland*, no. 18176/05, § 65, 8 December 2009). In conclusion, the Court finds that the Polish Foundation's bodies had thus to determine a dispute concerning a right asserted by the applicant.

36. 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).

37. 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).

38. 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 imprisonment in the camp for expelled persons could be considered “civil” for the purposes of Article 6 § 1 of the Convention.

39. 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

40. 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. After the Supreme Court confirmed, by its Resolution of 2007 (see paragraph 20 above), that a judicial remedy was available against the decisions of the Polish Foundation, the applicant should have availed herself of such remedy.

41. The applicant made no comment in that connection.

2. The Court's assessment

42. 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).

43. 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-...).

44. The Court notes that the Supreme 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 established.

45. After that date, it would not have served any practical purpose to claim payment against the Foundation before a civil court, given that the Foundation had ceased to make payments as from 31 December 2006 (see paragraph 15 above).

46. 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

47. The Court notes that this part of 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

1. The parties' submissions

48. The Government reiterated that the case did not concern the determination of the applicant's civil rights or obligations within the meaning of Article 6 of the Convention. Hence, she could not derive a right of access to a court from this provision. The Polish authorities had never accepted the obligation to redress the wrongs done to Polish citizens by Nazi Germany. The Polish Foundation had been acting merely as an intermediary between the claimants and the founder, the German "Remembrance, Responsibility and Future" Foundation. It had been playing only a supporting role, collecting documents, processing applications and establishing the eligibility of claimants. Furthermore, the charitable nature of the payments made by the Polish Foundation did not allow them to be regarded as civil in character. This was confirmed also by the size of the Polish Foundation's assets which, given the magnitude of wrongs committed by the German occupying regime to the Polish citizens during the Second World War, would clearly be insufficient to compensate the victims for damage which they had suffered.

49. In any event, the right of access to a court was not an absolute one. Various restrictions could be imposed on it as that right, by its very nature, called for regulation by the State. In imposing such restrictions, the States were allowed a certain margin of appreciation, provided that the restrictions did not threaten the very essence of that right. In the present case, the restrictions placed on access to a court by the German Law of 2000 and the agreement between the Polish and German Foundations could not be deemed to infringe Article 6 of the Convention since they had been imposed with the aim of ensuring equitable payments to the relatively small group of persons meeting the eligibility criteria. Had these criteria allowed for disbursing payments to a broader group of victims, they would have been entitled to smaller payments.

50. The applicant generally disagreed with the Government's submissions. She submitted that she had been deprived of access to a court which had jurisdiction to review the decision given by the Polish Foundation in her case. As a result, the manifestly erroneous and arbitrary decisions given in her case had not been subjected to any kind of fair or thorough review.

2. The third party's submissions

51. The German Government submitted that the Federal Republic of Germany considered it a particular obligation to attempt to make certain reparations for the injustice committed by the Nazi regime and to that end it had adopted various regulations to provide reparations to the victims.

Compensation to foreign individuals for forced labour was in principle not provided until the establishment of the “Remembrance, Responsibility, Future” Foundation. The German Government submitted that it had been important that the payments should benefit those who, due to their advanced age, their failing health or other trauma arising from forced labour had been prevented from pursuing costly and time-consuming court actions. In order to provide as many of them as possible with compensation, this had to be done as quickly as possible.

52. The German Foundation had primarily used already-existing institutions (“partner organisations”) which had the relevant experience in order to implement the application procedure and the payment of compensation. Its financial resources had been allocated in specified amounts (so-called “ceilings”) to the seven partner organisations. The Foundation Act defined those eligible for compensation and determined the maximum amount of compensation for certain categories. The partner organisation, in concert with the Board of Trustees, could establish additional subcategories and set corresponding amounts.

53. The German Government claimed that it was not the German Foundation which decided on applications. Rather, decisions were made by the respective partner organisation and its appeal board, based upon the submitted evidence or substantiation. The procedure for processing applications had been determined by the German Foundation with the partner organisations through so-called partnership agreements.

54. Distribution of funds to those eligible for compensation had also been undertaken by the partner organisation. When a number of applications were granted by a partner organisation, they were forwarded to the German Foundation in the form of a so-called tranche list. An evaluation team from the German Foundation made spot checks of the list, assessing the compliance of the decisions with the provisions of the Foundation Act. The same procedure applied to the applications which were refused. If the evaluation by the German Foundation showed that the partner organisation had made an erroneous decision, it was called upon to review its decision and the funds remained frozen until the case was clarified.

55. As regards the review of decisions, the German Government submitted that each partner organisation was to establish an independent appeal organ that was not subject to any outside instruction. As a general rule, the decisions of the appeal organs were final. The German Foundation was not an additional or higher appeal instance to which claimants could turn if the independent appeal organ did not accept their objection. If other grossly erroneous decisions were determined in the spot-check assessment, the partner organisation would reopen the application process and remedy the error by issuing a new decision.

56. The German Government maintained that legal actions against decisions taken on appeal were not permissible under German or Polish law.

Payment of compensation to individuals under the Foundation Act was not made pursuant to an individual legal entitlement. Rather, such payments were voluntary payments by the German State and German industry which had been based upon previous international negotiations, and whose contractual terms had been accepted by the Polish Government.

57. Lastly, the German Government referred to the decision of the Federal Constitutional Court of 7 December 2004 which examined the constitutionality of section 16 of the Foundation Act¹. According to that provision, claims arising out of forced labour could only be asserted within the scope of the Foundation Act and further-reaching claims were excluded. The claimants in that case had been prisoners in the Auschwitz concentration camp and had been subjected to forced labour for a company. Their pending civil suit for compensation against the company was dismissed pursuant to section 16 of the Foundation Act, which had entered into force in the meantime. The Federal Constitutional Court refused to admit the constitutional complaint. It recognised that there had been interference with the claimants' property rights, but considered that the provision as a whole was constitutionally permissible. In taking that view, the Federal Constitutional Court took into account the purpose of the Act, which was to provide rapid compensation to as many forced labourers as possible and, at the same time, to establish legal security for German companies. It held that the interference with the property rights of the forced labourers could be justified, having regard to the overall scope of the provision in question. The Act spared the claimants protracted legal disputes and ensured that the payments were not dependent upon coincidences, such as, for example, whether the companies from that era still existed or remained solvent.

58. In conclusion, the German Government argued that without the establishment of the Foundation only an extremely small number of the former forced labourers would have had the opportunity to receive compensation. As such, the establishment of the Foundation strengthened the legal position of the forced labourers as a group.

3. The Court's assessment

59. 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

1. The Federal Constitutional Court's decision is extensively reported in the Court's decision in the case of *Poznanski and Others v. Germany*, no. 25101/05, 3 July 2007.

adjudicating bodies – the Verification Commission and the Appeal Commission – could be considered as tribunals conforming to the requirements of Article 6 § 1.

60. In this connection, 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*).

61. 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.

62. 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 17-21 above). The Government, in their submissions, actually confirmed that the applicant could not submit any appeal against the Appeal Commission's decision to any Polish court.

63. 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.

64. Having regard to the above considerations, the Court considers that the exclusion of judicial review in respect of the decisions given by the Foundation and concerning the applicant's claim arising in respect of her imprisonment in the camp for expelled persons impaired the very essence of her right of access to a court within the meaning of Article 6 § 1 of the Convention.

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

III. OTHER ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

66. The applicant further complained that she had not received compensation from the Foundation under the second compensation scheme in respect of the fact that she had been expelled from her parents' house by the German occupying administration. As a result of the expulsion she and her family had suffered serious hardship, lost their home and property and had been exposed to physical and psychological suffering. They had experienced difficulties in finding accommodation afterwards and had been exposed to a long period of uncertainty and poverty. The expulsion had lacked any legal basis and had been carried out for the purposes of settling German nationals in the farms of their lawful Polish owners. She should have received compensation for that, but the Foundation had refused. Moreover, the Foundation's decision could not be reviewed by any other body.

67. The Court reiterates that the responsibility of the Polish State may be engaged exclusively as regards those situations 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 (see paragraphs 30 – 34 above). It has already examined the applicant's complaint in so far as it related to the establishing of the facts relevant for the legal characterisation of the particulars of her claim and to the assessment of the evidence which the applicant had submitted to the Foundation to prove her claim in respect of imprisonment in the camp for expelled persons.

However, the other part of her claim was of a different character. In fact, both in the proceedings before the Foundation organs and before the Court, the applicant challenged the substantive criteria on the basis of which an entitlement to compensation arose under the 2000 Law. The thrust of the applicant's grievance was directed against the fact that no compensation was foreseen in the second compensation scheme for persons expelled from their properties during the Second World War by the German occupying administration or for persons who had been otherwise deprived of their property during that time. In other words, she attempted to challenge the substantive regulations which defined the scope of the beneficiaries of the second compensation scheme. As such, her claim was not satisfied by the Polish Foundation, and could not have been, since the Foundation had no discretion as to the substantive aspects of that scheme. In conclusion, the Court considers that the applicant could not claim to be entitled to receive wider-reaching benefits from the Foundation.

68. It follows that Article 6 § 1 of the Convention does not apply to that part of the facts of the present case which concern the applicant's compensation claim for the expulsion of her family from their farm. This part of the application is thus incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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.”

70. The applicant claimed just satisfaction for both pecuniary and non-pecuniary damage, without specifying its amount.

71. The Government submitted that any just satisfaction to be awarded in the case should be compatible with amounts awarded in similar cases.

72. 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.

73. The applicant did not submit any claim in respect of costs.

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* admissible the complaint regarding the lack of access to a court in respect of the proceedings before the Polish-German Reconciliation Foundation concerning the applicant's entitlement to payments in respect of her imprisonment in the camp for expelled persons, 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.

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