

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

FOURTH SECTION

DECISION

Application no. 3524/05
Henryk PIKIELNY and Others
against Poland

The European Court of Human Rights (Fourth Section), sitting on 18 September 2012 as a Chamber composed of:
David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 12 January 2005,

Having regard to the decision to examine the case simultaneously with the case of *Ogórek v. Poland* (no. 28490/03), pursuant to Rule 42 § 2 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The application was lodged by five applicants – Henryk Pikielny ("the first applicant"), Simon Pikielny ("the second applicant"), Yael Star ("the third applicant"), Irit Fenton ("the fourth applicant") and Ruth Leshem ("the fifth applicant"). The first applicant is a Brazilian national, the second,

third and fifth applicant are Israeli nationals. The fourth applicant has dual Israeli and British nationality. They were born in 1928, 1923, 1932, 1937 and 1936 respectively. The first applicant lived in Paris, the second in Hertzila, the third in Ashdod, the fourth in Haifa, and the fifth in Tel Aviv.

The first applicant died on 12 June 2010. On 20 October 2010 the applicant's wife, Ms Helena Pikielny, expressed the wish to pursue the application in his stead.

The applicants were represented before the Court by Ms A. Suchecka-Tarnacka and Mr B. Kordasewicz, lawyers practising in Warszawa, Poland. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background

3. The applicants' ancestors owned a textile manufacturing factory in Łódź, Poland, consisting of some 15 various buildings, including wool weaving mills, a plot of land of 6,437 sq. m. and a garden. The factory, which was originally intended for the manufacture of silk scarves, was founded by the first, the second and the fourth applicants' grandfather, Mojżesz Pikielny, in 1889.

4. Shortly before the Second World War the factory operated under the name "Factory of Wool and Cotton Manufactures M. i. T. Pikielni Joint Stock Company" ("*Fabryka Wyrobów Wełnianych i Bawełnianych M. I T. Pikielni Spółka Akcyjna*") and, following various acquisitions and transactions, was eventually co-owned by Mojżesz Pikielny and his sons – Maks Pikielny (the first and second applicants' father) and William Pikielny (the fourth applicant's father).

5. Following the outbreak of the Second World War, the factory owners and the applicants' other relatives were taken by the Nazis to concentration camps or ghettos. The factory was taken over by Germans and throughout the war operated under the Nazi-appointed trustee (*"Treuhender"*).

6. William Pikielny was killed during a bombing of Łódź in 1939. Mojżesz Pikielny perished in the Warsaw ghetto in 1943. Maks Pikielny and the first and second applicants survived the concentration camps and returned to Łódź at the end of the war. They found the factory functioning largely as it had been during the Nazi occupation. It was then taken over and managed by the communist authorities. In recognition of his former role as owner and chief executive of the factory Maks Pikielny

was designated by the Workers' Committee as manager of operations. In fact, he actively managed the business until he and the first and second applicants left Poland for Brazil in June 1946.

2. Facts before 10 October 1994

7. On 12 February 1948 the factory was nationalised by virtue of the Minister of Light Industry's (*Minister Przemysłu Lekkiego*) decision no. 22 ("the 1948 decision"), issued pursuant to section 3(16) of the Law of 3 January 1946 on the nationalisation of basic branches of the State economy (*Ustawa o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej*) ("the 1946 Act"). The decision was published in the Cabinet's Official Gazette (*Monitor Polski*) no. 44 of 30 April 1948.

8. The former owners were neither notified about the take-over of their property nor were they compensated for it. Throughout the years of the communist regime the factory remained operating, having been transferred by the State Treasury from one State-owned enterprise to another. Finally, in 1963 it was assigned to "*Lodex*", a State-owned Wool Trade Plant (*Zakłady Przemysłu Wełnianego "Lodex"*). However, the relevant entry recording the owner in the Łódź District Court Land and Mortgage Register had not been amended and the company "M. i T. Pikielny Joint Stock Co." remained listed as the factory's owner until the beginning of the 1990s.

At around the same time the applicants started to make first attempts to have the land and factory restored to them or, alternatively, to obtain compensation for its nationalisation.

9. On 31 May 1991 winding-up proceedings were instituted in respect of the *"Lodex"* Wool Trade Plant. In the course of the proceedings, *"Lodex"* lodged an application with the Łódź District Court for acquisition of the property in question by prescription. The claim was dismissed on 3 March 1992.

10. Subsequently, the plant's representatives asked the Łódź District Court to open a new book (*księga wieczysta*) for the property and to make an entry recording the State Treasury as its owner.

11. On 17 April 1992 the Łódź District Court ordered that the old books and records kept for the property and listing the applicants' family as the owners be closed, that a new book no. 87708 be opened and that the State Treasury be entered in the Land and Mortgage Register as the owner of the property. The applicants appealed against that order.

12. On 10 December 1993 the Łódź Regional Court dismissed their appeal (*rewizja*). Subsequently, on 30 April 1994, the applicants asked the Minister of Justice to lodge an extraordinary appeal (*rewizja nadzwyczajna*) against the contested order but their request was to no avail.

13. In the meantime, on 17 December 1992, the Governor of Łódź (*Wojewoda*) had given a decision declaring that the "*Lodex*" Wool Trade Plant had acquired perpetual use (*użytkowanie wieczyste*) of the land

in question "with ownership of the buildings and machines having been acquired by '*Lodex*' through payment". The applicants sought to have the administrative proceedings reopened. On 23 March 1993 the Governor of Łódź refused their application.

3. Facts after 10 October 1994[1]

14. On 14 December 2004, following the applicants' inquiry into the possibility of obtaining pecuniary compensation for the nationalised property, the Minister for Economy and Labour (*Minister Gospodarki i Pracy*) informed them by letter that until that time no laws regulating this matter had been enacted. Admittedly, the 1946 Act in sections 3 and 7 stated that an appropriate body would be set up to deal with such compensation claims and that the relevant rules governing the principles for payment of compensation would be established. However, the Cabinet had not yet fulfilled that statutory obligation. Accordingly, there was no body that could be authorised to act in respect of compensation or related matters. The Minister added that it should be assumed that this lacuna would be removed once Parliament had adopted a law on restitution and compensation. Currently, the Minister for the State Treasury was working on the relevant bill and it was likely that that bill would soon become a formal proposal by the Government.

Since then, the applicants have not made any further attempts to claim compensation for the nationalised factory before the domestic authorities.

B. Relevant domestic law and practice

1. The 1946 Act

15. Following the establishment of the communist regime in Poland nearly all branches of industry, as well as banking, insurance, transport and commercial companies were taken over by the State under the 1946 Act which, in its section 1, stated the purposes of nationalisation as follows:

> " In order to ensure the planned rebuilding of the state economy, the economic sovereignty of the State and to foster the general well-being, the State shall take over ownership of enterprises on the conditions laid down in this law."

Pursuant to section 2(1), only those industrial, mining, transport, banking, insurance and commercial enterprises that belonged to the Third Reich and the former Free City of Gdańsk, their citizens (except for those of Polish or other nationality who had been persecuted by the Germans), German and Gdańsk legal persons (except for those set up under

1. The date on which Protocol No. 1 to the Convention entered into force in respect of Poland.

public law), companies controlled by German or Gdańsk citizens or administration or those owned by persons who had defected to the enemy were to be taken over by the State without payment of compensation.

16. Section 3(1) of the 1946 Act (as amended) states that the owners of the remaining enterprises were to be compensated for their nationalised property. That provision reads, in so far as relevant, as follows:

> "1. The State shall compensate [the owners] for taking over ownership of the following:
>
> A. Mining and industrial enterprises in the following sectors of State economy:
>
> 1) mines and mining leases subject to mining law;
>
> 2) oil and gas industry, including mines, refineries, gasoline production and other processing plants, gas pipes and synthetic fuel industry;
>
> 3) companies that generate, process, transmit or distribute electricity ...;
>
> 4) companies that generate, process, transmit or distribute gas ...;
>
> 5) water supply companies serving more than one municipality ...;
>
> 6) steelworks and non-ferrous metals smelting plants;
>
> 7) armaments, aviation and explosives industry;
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> 8) coking plants;
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> 9) sugar factories and refineries;
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> 10) industrial distilleries, spirit refineries and vodka production plants;
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> 11) breweries with an annual output exceeding 15,000 hectolitres;
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> 12) yeast production plants;
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> 13) grain plants with a daily output exceeding 15 tons of grain ...;
>
> 14) oil plants with an annual output exceeding 500 tons and all refineries of edible fats;
>
> 15) cold stores;
>
> 16) large and medium textile industry;
>
> 17) printing industry and printing houses;
>
> ...

B. Industrial enterprises not listed in subsection "A" if they are capable of employing in the production more than 50 persons on one shift.

...

C.

1) Transport enterprises (standard gauge and narrow-gauge railways, electric railways and aviation transport enterprises);

2) communication enterprises (telephone, telegraph and radio enterprises).

17. Section 7 lays down general principles for compensation to be paid for nationalised property. It states, in so far as relevant, as follows:

"1. The owner of an enterprise whose ownership has been taken over by the State (section 3) shall receive compensation from the State Treasury within one year from the date on which a notice of final determination of the amount of compensation due has been served on him.

2. Such compensation shall in principle be paid in securities; however, in exceptional and economically justified cases it may also be paid in cash or other values.

3. The amount of compensation due shall be determined by special commissions. The persons concerned shall have the right to participate in proceedings before those commissions. If need be and in any case if so requested by the persons concerned, the commission shall appoint appropriate experts.

4. The composition of the commissions, the rules for the appointment of their members, the quorum, the rules of procedure before the commissions and rules for appeals against their decisions shall be determined by an ordinance issued by the Cabinet.

5. The following factors shall be taken into account in determining compensation:

a) general deterioration of the value of State property;

b) net value of the corporate property on the date of nationalisation;

c) deterioration of the value of the enterprise cause by war losses or losses incurred by the enterprise in connection with the war, occupation in the period from 1 September 1939 to the date of nationalisation;

d) value of expenditures made after 1 September 1939;

e) special circumstances affecting the value of the enterprise (concession terms, licenses etc.).

6. A Cabinet's ordinance shall determine detailed rules governing the calculation of compensation, assessment of the circumstances listed in subsection 5 and means of payment of compensation (subsection 2) and depreciation of securities."

18. Pursuant to section 10, the Cabinet and the relevant Ministers shall be entrusted with the implementation of the 1946 Act. However, since 5 February 1946, the date of entry into force of the 1946 Act, until the present day the Cabinet has not yet issued an ordinance on the organisation of the compensation commissions and determination of compensation referred to in section 7(4) and (6).

2. The State's liability in tort

(a) Provisions of the Civil Code applicable from 10 October 1994 to 1 September 2004

19. Articles 417 et seq. of the Civil Code (*Kodeks cywilny*) provide for the State's liability in tort.

In the version applicable until 1 September 2004, Article 417 § 1, which lays down a general rule, read as follows:

> "1. The State Treasury shall be liable for damage caused by a State official in the performance of the duties entrusted to him."

(b) Provisions of the Civil Code applicable from 1 September 2004

20. On 1 September 2004 the Law of 17 June 2004 on amendments to the Civil Code and other statutes (*Ustawa o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw*) ("the 2004 Amendment") entered into force. The relevant amendments were in essence aimed at enlarging the scope of the State Treasury's liability in tort under Article 417 of the Civil Code – including the addition of a new Article 417^1 and provision being made for the State's tortious liability for failure to enact legislation, a concept known as "legislative omission" (*zaniechanie legislacyjne*).

21. Following the 2004 Amendment, Article 417^1, in so far as relevant, reads as follows:

> "4. If damage has been caused by failure to enact a law [*akt normatywny*] where there is a statutory duty to do so, the incompatibility of the failure to enact that law shall be established by the court dealing with the claim for damages."

However, under the transitional provisions of section 5 of the 2004 Amendment, Article 417 as applicable before 1 September 2004 applies to all events and legal situations that subsisted before that date.

(c) Constitutional tort

22. The concept of the State's civil liability for a constitutional tort was introduced into the Polish legal order on 17 October 1997, the date of entry into force of the 1997 Polish Constitution.

Article 77 § 1 of the Constitution states, in so far as relevant, as follows:

> "Everyone shall have the right to compensation for any harm done to him by any act of a public authority in breach of the law."

(d) The Supreme Court's case-law on compensation for legislative omission in nationalisation cases

(i) The 2005 Resolution (no. III CZP 82/05)

23. In its resolution of 24 November 2005 ("the 2005 Resolution"), the Supreme Court (*Sąd Najwyższy*), sitting as a bench of three judges, dealt with the following legal questions submitted to it by the Warsaw Court of Appeal (*Sąd Apelacyjny*):

> " Is the State Treasury liable for damage caused by failure to enact a law [*akt normatywny*] if the duty to enact that law, laid down in section 7(4) and (6) of [the 1946 Act] was not fulfilled until the date of entry into force of [the 2004 Amendment],
>
> and, if so,
>
> When this duty should have been performed and whether damages for failure to enact the above law corresponds to unreceived compensation for the enterprise nationalised by the State, determined in accordance with the principles laid down in section 7(2) and (5) of [the 1946 Act]?".

The question arose in the context of a case brought by a certain E.K., who sought damages for the nationalisation of her family's printing house and, as one of the basis for her claim, invoked Article 417^1 of the Civil Code, relying on the State's legislative omission consisting in its failure to issue the relevant ordinance.

24. The Supreme Court's answer in the operative part of the resolution reads:

> "Until the date of entry into force of [the 2004 Amendment] the Cabinet's failure to issue an ordinance foreseen in section 7(4) and (6) of [the 1946 Act] did not constitute a basis for a claim by an owner of the nationalised enterprise for damages arising from [nationalisation]."

25. The resolution contains extensive reasoning, the main thrust of which reads as follows:

> "[As regards the time-frame for the issue of the ordinance]. The determination of the beginning of that situation carries with it a certain element of arbitrariness since [the 1946 Act] does not lay down any term within which the ordinance referred to in section [7] (4) and (6) should be issued. Assuming that in general the absence of a term is tantamount to a duty to enact a law without undue delay, it can be considered that the discharge of the statutory authorisation, assuming the existence of willingness of the authorised body (the Cabinet) should have taken place in 1946 or in 1947 at the latest. This is supported by the fact that the Cabinet issued

ordinances implementing other provisions (including section 2(7) of the Act, a fundamental provision for the interest of the State).

[As regards the State's civil liability for legislative omission], ... it should be concluded that before the entry into force of the 1997 Constitution the State had not been liable under civil law for the consequences of its legislative inactivity. ...

17 October 1997, marking the entry into force of the Constitution is the relevant date as its constitutes the beginning of the existence in the legal order of, *inter alia*, Article 77 § 1 of the Constitution, proclaiming the right of "everyone" to compensation for any harm done to him by any act of a public authority in breach of the law ....

Assuming that Article 77 § 1 does not contain a provision making it possible to draw from it a direct basis for a claim for damages for the legislature's inactivity, it must be said that the rules for the State's liability in the sphere of law-making should be established by means of an ordinary statute, determining in a more detailed manner than Article 77 §1 premises for an effective claim. ...

Article 417^1 § 4 of the Civil Code, as introduced by [the 2004 Amendment] satisfies the requirement of detailed premises. The relevant temporal consequences have been clearly set out in its section 5, evidently indicating the prospective operation of Article 417^1 § 4 of the Civil Code. A formulation laying down a non-retroactive character of the provision is telling in that it refers to "events and legal situation that subsisted before its entry into force" ... In consequence, the assessment of the effects of legislative omission subsisting before 1 September 2004 was governed by [earlier provisions]. The relevant Article 417, in its version before the amendment, did not include legislative omission as it was based on a completely different premise, namely, the absence of the State's civil liability for the legislature's acts. ... "

(ii) The 2007 Judgment (no. I CSK 273/07)

26. On 5 December 2007 the Supreme Court, sitting as a bench of three judges, dealt with a cassation appeal (*kasacja*) lodged by Lubelska Fabryka Maszyn i Narzędzi Rolniczych *"Plon"*,[2] a limited liability company which was at that time subject to a winding-up procedure. The appellant contested the judgment of the Warsaw Court of Appeal of 2 February 2007, rejecting its appeal (*apelacja*) against the judgment of the Warsaw Regional Court of 30 May 2006 whereby its claim for damages arising from the State's failure to issue the relevant ordinance, pursuant to section 7(2) and (5) of the 1946 Act, had been dismissed. The claim was based on Article 77 of the Constitution and Articles 417 and 417^1 § 4 of the Civil Code.

In dismissing the cassation appeal, the Supreme Court essentially reiterated the grounds stated in the 2005 Resolution (see paragraph 25 above), stressing that the impugned legislative omission occurred in 1946 or, at the latest in 1947 and since then had continued. However,

2. The company lodged a similar application (no. 1680/08) with the Court on 7 December 2007.

Article 77 § 1 of the Constitution could not be considered a legal basis for a claim deriving from an "omission" by public authorities since that provision clearly covered only their "acts". The provision of Article 417^1, enabling a plaintiff to seek damages for legislative omission, had been introduced only on 1 September 2004 by virtue of the 2004 Amendment. The terms of section 5 of the Amendment 2004 were unambiguous: Article 417^1 of the Civil Code did not apply to events and situations that had subsisted before its entry into force. Consequently, its operation was excluded in respect of legislative omissions that originated in facts that had occurred earlier, even if this state of affairs continually existed until the present day.

(e) The Constitutional Court's case-law on compensation for legislative omission in nationalisation cases

27. On 13 June 2011 the Constitutional Court (*Trybunał Konstytucyjny*) heard a constitutional complaint lodged by a company *Elektrownia w Kielcach spółka akcyjna*, challenging the constitutionality of section 5 of the 2004 Amendment in so far as it excluded the application of Article 417^1 of the Civil Code to situations that had subsisted before the entry into force of that Amendment, i.e. 1 September 2004 (see also paragraphs 20-26 above). The claimant invoked, in particular, Article 77 § 1 of (right to compensation for unlawful action of public authority) read in conjunction with Article 2 (rule of law), Article 64 §§ 1 and 2 (right of ownership) read in conjunction with Article 21 §§ 1 and 2 (protection of ownership) and Article 32 § 1 (equality before the law) and Article 45 § 1 (right of fair trial) of the Constitution.

Before lodging the complaint, the company, which had been nationalised under the 1946 Act, unsuccessfully sought compensation for the Prime Minister's legislative inactivity in that he had failed to enact an ordinance on rules for compensation as required by the 1946 Act. On 4 April 2008 the claim was finally rejected by the Warsaw Court of Appeal on the grounds stated in the 2005 Resolution (see paragraphs 23-25 above).

The Constitutional Court's decision (no. SK 26/09), in its relevant part, reads as follows:

> "4.7. ... Consequently, in the light of the provisions of the Constitution it is difficult to assume that non-fulfilment of the duty to enact an ordinance on compensation for nationalised property derived from [the 1946 Act] amounted to "[an] act of a public authority in breach of the law" linked with the State's liability for [constitutional] tort under the Constitution. Even assuming that the state of legislative omission still persists, it should at the same time be concluded that the duty is non-enforceable. Thus, it is evident that on the basis of the applicable laws only a statute could regulate compensation for the claimant's nationalised property. ... Accordingly, the Constitutional Court considers that the assumption that a legislative omission "in breach of the law" still continues is unwarranted, in particular after the entry into force of the Constitution, in the light of its standards. ... In the light of the constitutional standards as applicable at present it is difficult to accept that there

is any legal force attached to the duty imposed on the Cabinet by section 7 of the 1946 Act."

3. Code of Administrative Procedure

(a) Annulment of final administrative decision

28. Article 156 § 1 of the Code of Administrative Procedure ("the CAP") (*Kodeks postępowania administracyjnego*), which sets out grounds on which a final administrative decision is subject to annulment, states:

"1. A public administration authority shall declare a decision null and void if:

1) it has been issued in breach of the rules governing competence;

2) it has been issued without a legal basis or in flagrant breach of the law;

3) concerns a case already decided by means of another final decision;

4) it has been addressed to a person who is not a party to the case;

5) it was unenforceable on the date of its issuance and its unenforceability is of a permanent nature;

6) it would give rise to a punishable offence in the event that it has been enforced;

7) it has a flaw making it null and void by the force of law.

There is no time-limit for a party's request to have an administrative decision declared null and void under Article 156 § 1.

However, there are situations where, even if certain grounds listed in Article 156 § 1 exist, the lapse of time or irreversible effects of the contested decision have consequences for the formula used in a decision given in the annulment procedure. Article 156 § 2 provides for the following exceptions:

" A decision shall not be declared null and void on the grounds listed in paragraph 1 (1), (3), (4) and (7) if 10 years have expired from the date of its service or promulgation, as well as if the decision has produced irreversible legal effects."

Article 158 reads as follows:

"1. A ruling on annulment of a decision shall be given by means of a decision.

2. If it is impossible to declare a decision null and void because of the circumstances referred to in Article 156 § 2, a public administration authority shall only declare that the contested decision has been issued contrary to the law and indicate circumstances because of which it has not declared the decision null and void."

For the purposes of compensation, the effects of declaring the original administrative decision "null and void" or "issued contrary to the law" are the same.

29. Article 160 set out principles for compensation for loss caused by the issuance of an administrative decision subsequently annulled on the grounds listed in Article 156 § 1.

This provision was repealed by the 2004 Amendment with effect from 1 September 2004 (see also paragraphs 20-21 above) and replaced by new Article 417^1 § 2 of the Civil Code. However, under section 5 of the 2004 Amendment, which sets out transitional rules, Article 160, in the version applicable on the repeal date, still applies to "events and legal situations" that subsisted before the entry into force of the 2004 Amendment.

Article 160, in the version applicable on the relevant date, read as follows:

> "1. A party who has suffered a loss on account of the issuance of a decision in breach of Article 156 § 1 or on account of annulment of such a decision shall have a claim for compensation for actual damage, unless he has culpably caused the circumstances mentioned in this provision.
>
> 2. The provisions of the Civil Code, except for Article 418 [provision repealed], shall apply to [such] compensation.
>
> 3. Compensation is due from an authority that issued a decision in breach of Article 156 § 1, unless the other party to the proceedings concerning the decision culpably caused the circumstances mentioned in this provision; in the latter case a claim for compensation shall be directed against the culpable party.
>
> 4. A public administration authority that has declared a decision null and void or declared, pursuant to Article 158 § 2, that it has been issued contrary to the law shall rule on compensation due from the authority referred to in § 1. The vindication of compensation from a person who has culpably caused the circumstances mentioned in Article 156 §1, shall be effected before a court of law.
>
> 5. A party who is not satisfied with compensation granted by a public administration authority referred to in § 4, may lodge a claim with a court of law within 30 days from the date of service of a decision given on that matter.
>
> 6. A claim for compensation shall be time-barred after 3 years from the date on which has become final the decision declaring null and void the decision issued in breach of Article 156 § 1 or decision whereby an authority has declared, pursuant to Article 158 § 2, that the contested decision has been issued in breach of Article 156 § 1."

(b) Supreme Court's resolution on the application of Article 160 of the CAP to compensation claims for issuance of defective administrative decision

30. On 30 March 2011 the Civil Chamber of the Supreme Court, sitting in plenary, gave a resolution (no. III CZP 112/10) on the application of Article 160 of the CAP and rules regarding compensation. The resolution

was given in response to legal questions submitted by the First President of the Supreme Court in connection with certain problems and divergences arising in judicial practice, in particular in respect of the temporal effects of Article 160 as determined in section 5 of the 2004 Amendment, the application of Article 417^1 § 2 of the Civil Code which replaced Article 160 (see paragraphs 20-21 and 29 above) and rules for adjudicating compensation.

The resolution contains an extensive reasoning which, in so far as relevant, may be summarised as follows:

1) Article 160 §§ 1,2,3 and 6 of the CAP applies to all claims for damages arising from an issuance of a final administrative decision given before 1 September 2004, which has been declared null and void or has been declared as being issued in breach of Article 156 § 1 of the CAP. In contrast, paragraphs 4 and 5 of Article 160, setting out the procedure for vindicating such claims, should be considered as no longer applicable. Consequently, a party seeking compensation under this provision should file an action directly with a civil court.

2) Where an annulled administrative decision has been given before the entry into force of the Constitution (17 October 1997), compensation defined in Article 160 of the CAP shall not include loss of profits sustained in consequence of its issuance, even if such loss has occurred after this date.

(c) Information on cases involving the annulment procedure under Article 156 § 1 and claims for compensation for nationalised property under Article 160 of the CAP produced by the Government

31. The Government, in their observations, supplied data concerning the annulment procedure and claims for compensation for nationalisation asserted by former owners or their heirs under the provisions of the CAP. Their submissions may be summarised as follows. From 1989 to 30 September 2006 the Ministry for Economy registered 3,167 cases where applicants asked for the annulment of nationalisation decisions issued under the 1946 Act and other nationalisation laws adopted under the communist regime. Many other cases were registered in other Ministries. The Government assumed that one half of those cases concerned the 1946 Act. By 30 September 2006 the relevant Minister annulled 1,394 nationalisation decisions, declaring them either null and void or being issued in breach of the law. A further 1,100 similar cases were at that time pending. In 625 cases the applicants initiated the compensatory procedure under Article 160 of the CAP. In 374 cases compensation was granted, 151 cases were dismissed as time-barred since the applicants had not complied with the statutory time-limit of 3 years for lodging a compensation claim. _

Between 1995 and 2006 the Minister for Economy paid to claimants 227,000,000 Polish zlotys (PLN)[3] by way of compensation for nationalised property.

4. Legislative initiatives concerning restitution and compensation for property taken under the communist regime

(a) From 1990 to 2005

32. In the years 1990-2005 Parliament dealt with 11 bills on reprivatisation, restitution and compensation for property taken over by the communist authorities under nationalisation laws passed in 1944-1962. None of them was successfully enacted mostly because fresh elections were called and the work on them had to be discontinued. In the case of the 1999 bill on the restitution of immovable property and certain kinds of movable property taken from natural persons by the State or by the Warsaw Municipality, and on compensation (*Projekt ustawy o reprywatyzacji nieruchomości i niektórych ruchomości osób fizycznych przejętych przez Państwo lub gminę miasta stołecznego Warszawy oraz o rekompensatach* – "the Restitution Bill 1999") the relevant Act of Parliament never entered into force because it had been vetoed by the President of Poland.

Each of those bills, although they differed in specific modalities, contained provisions for compensation for nationalisation of property under the 1946 Act.

(b) From 2006 until the present

33. In 2007 the Polish Parliament started the first reading of the Government's bill on compensation for property or other assets taken over by the State (*projekt ustawy o rekompensatach za przejęte przez państwo nieruchomosci oraz inne składniki mienia*) ("the 2006 Compensation Bill"). In general, compensation claims were to be subject to a statutory ceiling of 15% of the value of the original property taken over by the State. The claims of the owners of property nationalised under the provisions of the 1946 Act were included in the list of claimants entitled to compensation. The work on the 2006 Compensation Bill was discontinued in September 2007 since snap parliamentary elections were called following the collapse of the government coalition.

34. In 2008 the new Government started preparatory work on fresh restitution legislation, i.e. the "Bill on pecuniary benefits to be granted to some persons who were subject to nationalisation procedures" (*projekt ustawy o świadczeniach pieniężnych przyznawanych niektórym*

3. Approximately 54,200,000 euros (EUR).

osobom, których dotyczyły procesy nacjonalizacji) ("the 2008 Compensation Bill").

35. The 2008 Compensation Bill provided for no restitution of nationalised properties and was based on the principle of limited compensation, corresponding to a certain – not stipulated in the bill but to be determined in the Minister for Treasury's future ordinance – percentage of the value of the property in question on the date of its nationalisation.

36. In the Minster for Finance's report on the assessment of the budgetary impact of the implementation of the 2008 Compensation Bill (drawn up in 2008) the total value of the claims to be covered by the 2008 Compensation Bill was estimated at PLN 100,000,000,000[4].

It was expected that some 80,000 applications for compensation will be submitted under the provisions of the new legislation. The process of the realisation of cash payments was to be spread over the period of 15 years and instalments were to be indexed each year in accordance with the consumer price index.

The entry into force of the bill was tentatively foreseen for 2012.

37. In February 2010 the Minister for Finance was asked to make an analysis of the consequences of the implementation of the 2008 Compensation Bill.

38. On 5 March 2010 the Minister for Finance submitted a report stating that if the bill entered into force in 2012, there would be an abrupt increase in the public debt by PLN 18,000,000,000[5] which would correspond to 1.00-1.10% of the Gross National Product (GNP). In the circumstances, the allocation of PLN 20,000,000,000[6] for securing nationalisation claims might result in Poland's exceeding the permissible limits of the national debt in relation to GNP as set by the European Union.

39. In March 2011 the Minister for Treasury issued a press release on the Ministry's website, informing the public that the Government had decided not to submit the 2008 Compensation Bill to Parliament. That statement gives the following explanation:

> "In view of the considerable savings that have been made in recent years, connected with the global financial crisis in many sectors of our social and economic life and the large financial burden resulting from the planned legislation, in the present economic situation, [the 2008 Compensation Bill] cannot be enacted."[7]

4. Approximately EUR 24,000,000,000.
5. Approximately EUR 4,306,000,000.
6. Approximately EUR 4,800,000,000.
7. www.msp.gov.pl

COMPLAINTS

40. The applicants complained that they had been deprived of their property in violation of Article 1 of Protocol No. 1 to the Convention on account of the fact that their right to compensation, as laid down in the 1946 Act, had not been satisfied although the legal basis for their claim was still in force.

They further asserted that the State's failure to issue the ordinance enabling them to enforce their right constituted a continuing situation affecting the property rights of thousands of persons whose property was nationalised under the 1946 Act.

THE LAW

41. The applicants alleged a breach of Article 1 of Protocol No. 1 to the Convention in that they had been continually unable to obtain compensation for their property nationalised under the 1946 Act notwithstanding the fact that the authorities were obliged to compensate them under the provisions of that Act.

A. The first applicant's wife's standing in the proceedings before the Court

1. The parties' submissions

42. The applicants asked the Court to accept the first applicant's widow's request to allow her to pursue the application on his behalf.

43. The Government refrained from commenting.

2. The Court's assessment

44. As noted above, the applicant, Mr Henryk Pikielny, died after he had lodged his application with the Court (see paragraph 1 above). His widow confirmed to the Court that she wished to continue the Convention proceedings on his behalf. The Court, having regard to its established case-law on the matter (see, among many other examples, *Krasuski v. Poland* (dec.), no. 74958/01, 11 December 2007) , concludes that she has standing to pursue the application in his stead.

B. The Government's preliminary objections in general

45. The Government made a number of preliminary objections to the admissibility of the application. They submitted that it was incompatible *ratione temporis*, *ratione personae* and *rationae materiae* with the provisions of the Convention. They further pleaded non-exhaustion of domestic remedies and non-compliance with the six-month term laid down in Article 35 § 1 of the Convention.

However, the Court finds it unnecessary to deal in detail with each and every objection raised by the Government since it considers that the application should in any event be rejected in accordance with the principle of subsidiarity for non-compliance with the rule of exhaustion of domestic remedies laid down in Article 35 § 1 of the Convention.

This Article states, in so far as relevant, as follows:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ... ."

C. Non-exhaustion of domestic remedies

1. The parties' submissions

(a) The Government

46. The Government began by stressing the importance of the principle of subsidiarity. In their view, it should be respected unconditionally, in particular in cases like the present one, involving complex issues related to the existence of a property right and its enforcement, issues which must first be put before the domestic courts or authorities for examination. However, the applicants had failed to submit the substance of the claim that they asserted in the Court in Strasbourg before the national authorities. Indeed, they had never initiated any proper legal procedure to seek the enforcement of what they considered to be their property right or, rather, an entitlement to compensation.

47. In the Government's submission, the applicants had used legal means that were completely inadequate to obtain relief in their case. None of those remedies had been aimed at obtaining compensation. They had attempted to overturn the legal effects of the 1948 decision without ever challenging the decision itself. Instead, they should have sought, first, to have that decision declared null and void under Article 156 of the CAP. Had the effects of the decision been considered irreversible, they could have sought to have it declared as having been issued in breach of the law under Article 158 of the CAP. Subsequently, they could have claimed compensation for unlawful nationalisation under Article 160 of that Code.

The applicants were fully aware of the existence of that remedy, but they had declined to make use of it.

48. The effectiveness of this procedure in practice was confirmed by hundreds of positive rulings. In that context, the Government cited statistics relating to the period before the case had been lodged and communicated which, they stressed, fully confirmed that there had been reasonable prospects of success for asserting the alleged right to compensation (see paragraph 31 above).

49. The Government considered that the applicants' conclusion that the annulment procedure provided for by Article 156 § 1 was ineffective and inadequate for vindicating their claim, was wrong and premature. One could not prejudge whether the prerequisites for declaring the nationalisation decision null and void existed before testing the remedy. Moreover, as stated above, numerous examples from domestic practice showed that this procedure could lead to an award of pecuniary compensation.

50. In that connection, the Government also cited the Court's decision in the case of *Bergauer and 89 others v. the Czech Republic* (no. 17120/04; decision of 13 December 2005) in which in a similar context of post-war nationalisation the Court held that even if domestic courts questioned in their well-established jurisprudence the compensation claims of persons whose property had been taken over by the communist State, this did not discharge applicants from the obligation to lodge a compensation claim at national level. The same conclusion applied to the present case. Moreover, citing *Krasuski v. Poland* (no. 61444/00, judgment of 14 June 2005, § 71) they maintained that even if the applicants claimed that the annulment procedure would have been unsuccessful in their case, mere doubts as to the effective functioning of that statutory remedy did not dispense them from having recourse to it.

In sum, the Government concluded that the applicants had failed to exhaust "all domestic remedies" as required by Article 35 § 1 and asked the Court to reject the application as inadmissible under Article 35 § 4 of the Convention.

(b) The applicants

51. The applicants disagreed and maintained that in the particular circumstances of their case the annulment and compensation procedures referred to by the Government were not effective for the purposes of Article 35 § 1 and could not reasonably be used before bringing their claims to the Court for the following reasons.

52. Firstly, there were no grounds for declaring the 1948 decision null and void under Polish law. That decision had been taken in accordance with the 1946 Act, whereas in order to avail themselves of Article 156 of the CAP, the applicants would have to establish a flagrant breach of the law.

The nationalisation of the company had been, as an act of the State under its *iure imperii*, lawful under Polish law; thus, the company had undoubtedly fulfilled the criteria of belonging to the "large and medium-size enterprises of the textile industry" for the purposes of section 3(16) of the 1946 Act. Apparently, the take-over had been carried out in the public interest. The fact that compensation had not been paid did not in itself amount to a sufficient reason to annul the decision.

53. Secondly, the provisions of the CAP provided that only a party or its legal successors to the proceedings were entitled to initiate proceedings for annulment of an administrative decision. The applicants had not been parties to the nationalisation proceedings. Although the applicants were entitled to demand compensation on the basis of section 7 of the 1946 Act as successors of the nationalised company's shareholders, they were not the successors of the company itself.

54. In any case, should the Polish Government admit that the 1948 decision had been flawed by a defect which should result in its being null and void and that the applicants had *locus standi* to seek such relief under Polish law, the applicants would be prepared to suspend the proceedings before the Court and discontinue them if the nationalised assets of the company, including real estate, were returned to them.

55. Referring to the annulment and compensation procedure initiated in the related case of *Ogórek v. Poland* (no. 28490/03), the applicants maintained that, while they were aware that the applicants in *Ogórek* had resolved their financial claims with the Government, their case in Poland was entirely unrelated to the issues arising in the present case.

It was true that there was some similarity as regards certain facts and legal aspects of the two cases. However, the principal legal issues were entirely different. While the *Ogórek* brothers relied on unlawfulness of the nationalisation based on the authorities' failure to satisfy certain statutory pre-requisites, the principal legal argument in the instant case concerned the failure to implement the Cabinet's obligation to provide compensation for the nationalisation of property.

In addition, in *Ogórek*, the proceedings before the Court were, in effect, supplementary to the case brought by those applicants in Poland. For that reason, the outcome of their case in Poland had no impact whatsoever on the ruling in *Pikielny*. Moreover, the rulings of the Polish courts in *Ogórek* followed the administrative procedure brought by the claimants, who had proved that the nationalisation of their property had been illegal *ab initio.* Consequently, Poland had been obliged to pay compensation in this regard.

In contrast, the applicants in the present case had never challenged the nationalisation *per se*, fully recognising the political, legal and historical reasons behind it. The applicants only wanted to exercise their right to compensation which they had been refused because the Polish authorities

had not issued the specific ordinance provided by the 1946 Act. In these circumstances, it could not be said that they should have recourse to the remedy suggested by the Government.

In view of the foregoing, the applicants asked the Court to dismiss the Government's preliminary objection.

2. The Court's assessment

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

56. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, *Demopoulos and Others v. Turkey* [GC], (dec.) no. 46113/99, ECHR 2010-..., § 69; and *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV).

In line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 164, ECHR 2009)

57. The rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.

In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was

accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. The mere doubts regarding the effectiveness of the relevant remedy, if not supported by material evidence, in particular examples from the established domestic practice, are not sufficient to absolve an applicant from his duty under Article 35 § 1 (*ibid*.; see also, *mutatis mutandis*, *Krasuski v. Poland* no. 61444/00, 14 June 2005, §§ 68-72).

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

58. The Court would first wish to refer to the facts of the case *Ogórek v. Poland*, which is examined simultaneously with the present application.

As established in the Court's decision in *Ogórek*, the applicants successfully challenged the Minister of Industry and Commerce's decision of 14 June 1948 whereby their father's enterprise had been nationalised under the 1946 Act. Their application was based on Article 156 § 1 of the CAP, which enabled a person to seek the annulment of an unlawful administrative decision (see paragraph 28 above). The nationalisation decision was declared null and void for lack of legal grounds on 30 July 2007. On 23 February 2009 the applicants had a further related decision given in the nationalisation procedure likewise annulled (see *Ogórek v. Poland* no. 28490/03, (dec.) no. 28490/03, [ ] September 2012, §§ 6-12).

The annulment of those decisions opened for them the possibility of seeking compensation under Article 160 of the CAP (see also paragraphs 28-29 above). Subsequently, they lodged a civil action for damages resulting from the issuance of the unlawful nationalisation decision. On 2 June 2011 the claim was granted in its entirety at first instance. The Warsaw Regional Court awarded each applicant some 8,378,000 Polish zlotys[8], for loss they suffered, which corresponded to the value of the nationalised limestone plant and limestone deposits exploited by the State. That judgment was upheld on appeal in the part granting the applicants compensation for the value of the enterprise consisting in its buildings, machines and technical equipment and in this part is final. The remainder of the claim, regarding limestone deposits is to be determined after an expert report has been obtained (ibid. §§ 33-36).

8. Approximately EUR 2,004,000.

59. In the present case the Government maintained that the applicants should have used an identical combination of domestic remedies, namely they should have initiated the annulment procedure and, if successful, have sought compensation for their nationalised factory (see paragraphs 46-50 above). The applicants, however, insisted that these legal means were not relevant for their case because they only wished to assert their claim for compensation without contesting the nationalisation as such (see paragraphs 51-55 above).

60. The Court is not persuaded by the applicants' arguments. It would note, first, that, in contrast to the applicants in the *Ogórek* case who repeatedly attempted to use several different legal avenues to assert their Convention claim (*Ogórek*, cited above §§ 6-36), they have never initiated any procedure aimed at restitution or financial reparation in Poland. Nor have they made any attempt whatsoever to have their claims for compensation recognised, let alone examined, by the national courts or other authorities so that they could obtain a final decision determining their property rights. A mere inquiry regarding a general possibility of obtaining compensation for the nationalised property addressed to the Minister for Economy and Labour (see paragraph 14 above), without any subsequent effort to start the legal process – be it even unsuccessful – aimed at enforcing their right, cannot suffice for the purposes of Article 35 § 1.

61. It is true that the applicants have asserted that they derived their Convention claim for protection of their property right from the State's continued failure to enact an ordinance setting our rules for compensation. They stressed that, in their view, the nationalisation of the company, in contrast to *Ogórek*, had been lawful as it had a legal basis in section 3(16) of the 1946 Act. They also stated that they did not consider it appropriate to contest the lawfulness of the 1948 decision, considering that any such effort would inevitably be unsuccessful (see paragraphs 52-55 above).

It is not the Court's role to advise the applicants whether, and if so, on the basis of which legal or factual arguments they could challenge the 1948 decision. Nevertheless, despite the general, apparently uncertain, situation of similar restitution claims in Poland (see paragraphs 23-26 and 32-39 above; see also *Ogórek*, cited above, §§ 13-32), the annulment procedure constitutes a legal avenue opening up a possibility of claiming damages for nationalisation. As shown by the facts in *Ogórek* (ibid. §§ 6-12 and 33-36) and examples of hundreds of cases where nationalisation decisions were annulled and compensation for nationalised property was granted (see paragraph 31 above), the procedures under Articles 156 § 1 and 160 of the CAP offer reasonable prospects of success for the purposes of Article 35 § 1 and are capable of providing compensation corresponding to the actual loss sustained (cf. paragraphs 56-57 above). Even if, considering the legal obstacles to the annulment of the 1948 decision alleged by the

applicants (see paragraphs 52-53 above), there may be doubts as to the effectiveness of the remedies advanced by the Government, the applicants cannot be absolved from their duty to have recourse to the annulment procedure before bringing their case to the Court. Indeed, "reasonable prospects of success" for the purposes of Article 35 § 1 are not tantamount to certainty of a favourable outcome (see paragraph 57 above). As rightly pointed out by the Government (see paragraphs 49-50 above), without the applicants' testing that remedy in practice, it cannot be regarded as inadequate or ineffective in their case.

62. In consequence, the Court finds that it would be inconsistent with the subsidiarity principle to accept their application for substantive examination without requiring them first to submit the substance of their Convention claim to the domestic authorities (see paragraphs 56-57 above).

This ruling is without prejudice to the applicants' right to lodge a fresh application under Article 34 of the Convention if they are unable to obtain appropriate redress in the domestic proceedings.

63. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

David Thór Björgvinsson
President