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

CASE OF BRONIOWSKI v. POLAND

(Application no. 31443/96)

JUDGMENT
(Friendly settlement)

STRASBOURG

28 September 2005

In the case of Broniowski v. Poland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr L. CAFLISCH,
Mrs V. STRÁŽNICKÁ,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr M. UGREKHELIDZE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI, *judges*,
and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 19 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 31443/96) against the Republic of Poland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Jerzy Broniowski ("the applicant"), on 12 March 1996. Having been designated before the Commission by the initials J.B., the applicant subsequently agreed to the disclosure of his name.

2. The applicant, who had been granted legal aid, was represented by Mr Z. Cichoń and Mr W. Hermeliński, lawyers practising in Cracow and Warsaw respectively. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

3. In a judgment of 22 June 2004 ("the principal judgment"), the Court (Grand Chamber) held that there had been a violation of Article 1 of Protocol No. 1. It found that that violation had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement

the "right to credit" of Bug River claimants (see point 3 of the operative provisions of the principal judgment), with the consequence that not only the applicant in this particular case but also a whole class of individuals had been or were still denied the peaceful enjoyment of their possessions (see *Broniowski v. Poland* [GC], no. 31443/96, § 189, ECHR 2004-V).

In that connection, the Court directed that the respondent State should, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1 (see point 4 of the operative provisions of the principal judgment).

In respect of the award to the applicant for any pecuniary or non-pecuniary damage resulting from the violation found in the present case, the Court held that the question of the application of Article 41 of the Convention was not ready for decision and reserved that question as a whole, inviting the Government and the applicant to submit, within six months from the date of notification of the principal judgment, their written observations on the matter and to notify the Court of any agreement they might reach (see point 5 of the operative provisions of the principal judgment). More specifically, in respect of Article 41, the Court considered that that issue should be resolved not only having regard to any agreement that might be reached between the parties but also in the light of such individual or general measures as might be taken by the respondent Government in execution of the principal judgment. Pending the implementation of the relevant general measures, the Court adjourned its consideration of applications deriving from the same general cause (see *Broniowski*, cited above, § 198).

Lastly, the Court awarded the applicant 12,000 euros in respect of costs and expenses incurred up to that stage of the proceedings before the Court.

4. Within the above-mentioned term of six months, the parties filed their observations on the award of just satisfaction under Article 41 in the case. The Government submitted their observations on 31 January 2005. The applicant's pleading was received at the Registry on 14 February 2005.

5. On 7 March 2005, after an exchange of the parties' pleadings, the Government asked the Registrar for assistance in negotiations between the parties, aimed at reaching a friendly settlement of the case. At the same time, they submitted their written proposal for such a settlement.

6. Following instructions by the President of the Grand Chamber, the representatives of the Registry held meetings with the parties in Warsaw on 23 and 24 June 2005. On the latter date, the parties, having regard, among other things, to the progress of the Polish parliament's work on new Bug River legislation, decided that the friendly settlement negotiations should be adjourned pending the expected enactment of that legislation in the near future (see also paragraphs 12 and 13 below).

7. On 26 July 2005 the Government informed the Court that the new Bug River legislation had been passed by Parliament on 8 July 2005 (see also paragraph 13 below). They asked the Registrar to resume the friendly settlement negotiations.

8. At the close of a second round of the friendly settlement negotiations in Warsaw, on 5 and 6 September 2005, the parties signed a friendly settlement agreement, the text of which is set out below in the "Law" part of the judgment (see paragraph 31).

THE FACTS

9. The applicant, Mr Jerzy Broniowski, was born in 1944 and lives in Wieliczka, Poland.

I. DEVELOPMENTS FOLLOWING THE DELIVERY OF THE PRINCIPAL JUDGMENT

10. On 15 December 2004, on an application of 30 January 2004 by a group of members of the Polish parliament challenging the constitutionality of certain provisions of the Law of 12 December 2003 on offsetting the value of property abandoned beyond the present borders of the Polish State against the price of State property or the fee for the right of perpetual use (*Ustawa o zaliczaniu na poczet ceny sprzedaży albo opłat z tytułu użytkowania wieczystego nieruchomości Skarbu Państwa wartości nieruchomości pozostawionych poza obecnymi granicami Państwa Polskiego*) ("the December 2003 Act") (see also *Broniowski*, cited above, §§ 37-38 and 120), the Constitutional Court (*Trybunał Konstytucyjny*) declared unconstitutional, *inter alia*, the provisions imposing quantitative limitations on the "right to credit", namely section 3(2), which fixed a ceiling of 15% of the original value of Bug River property but not more than 50,000 Polish zlotys (PLN), and section 2(4), which excluded from the scope of the compensation scheme under that Act persons who, like the applicant, had received at least some compensation by virtue of previous laws.

11. The Constitutional Court's judgment became effective on 27 December 2004, the date of its publication in the Journal of Laws (*Dziennik Ustaw*), except for its part relating to section 3(2), in respect of which the court ruled that it should be repealed on 30 April 2005.

12. On 2 March 2005 the Government submitted to Parliament a Bill on the realisation of the right to compensation for property left beyond the present borders of the Polish State (*projekt ustawy o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami państwa polskiego*). The bill proposed that the maximum

compensation available to Bug River claimants should be 15% of the value of the original Bug River property. It was proposed that the "right to credit" could be realised in two forms, depending on the claimant's choice: either, as previously, through an auction procedure, or through a cash payment from a special compensation fund.

The first reading of the bill took place on 15 April 2005, following which the matter was referred to the Parliamentary Commission for the State Treasury. During discussions that took place in May and June 2005, the ceiling of 15% was criticised by many deputies and it was suggested that, in order to secure compliance with the Court's principal judgment in the present case, the level of compensation should be increased.

13. On 8 July 2005 the *Sejm* (first house of the Polish parliament) passed the Law on the realisation of the right to compensation for property left beyond the present borders of the Polish State (*Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami państwa polskiego*) ("the July 2005 Act"). The statutory ceiling for compensation for Bug River property was set at 20%. The law was passed by the *Senat* (second house of the Polish parliament) on 21 July 2005 and signed by the President of Poland on 15 August 2005. It will come into force on 7 October 2005, that is to say thirty days after its publication in the Journal of Laws.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitutional Court's judgment of 15 December 2004

14. The Constitutional Court's judgment of 15 December 2004 was its second major ruling on the Bug River claims (see also *Broniowski*, cited above, §§ 79-87), containing extensive reasoning and a detailed examination of the legal and social context of the Bug River legislation from the point of view of, *inter alia*, the principles of the rule of law and social justice (Article 2 of the Constitution), prohibition of expropriation without just compensation (Article 21), proportionality (Article 31), equality before the law (Article 32), and protection of property rights (Article 64).

15. With regard to the difference in treatment between Bug River claimants laid down in section 2(4) of the December 2003 Act (see also *Broniowski*, cited above, §§ 115, 119 and 186), the Constitutional Court held, among other things:

> "Exclusion from the 'right to credit' of persons who, on the basis of other statutes, have acquired ownership, or the right of perpetual use, in respect of property having a value lower than the value of the 'right to credit' as set forth in the December 2003 Act under review and who, *ipso facto*, have enjoyed merely part of this right ..., infringes the constitutional principles of equal protection of property rights (Article 64

§ 2) and equal treatment and non-discrimination (Article 32). It constitutes an unjustified difference in the treatment of persons who have not hitherto benefited from the 'right to credit' in any way and persons who have enjoyed this right to a lesser extent than envisaged by the Act being reviewed. Such provision is also socially unjust, undermines citizens' confidence in the State and, in consequence, does not comply with Article 2 of the Constitution."[1]

16. With regard to the statutory ceilings of 15% and PLN 50,000 laid down in section 3(2) of the December 2003 Act (see also *Broniowski*, cited above, §§ 116 and 186), the Constitutional Court stated, among other things:

"The quantitative restrictions imposed on the 'right to credit' in the provisions indicated in point I.5 of the Constitutional Court's ruling are excessive and, accordingly, do not conform either to the principles of protecting acquired rights and of citizens' confidence in the State, as derived from the constitutional principle of the rule of law, or to the principle of social justice (Article 2 of the Constitution).

In particular, the adoption of a uniform maximum limit for all entitled persons on the value of compensation at a level of 50,000 Polish zlotys leads to unequal treatment of entitled persons and fails to comply with Article 32 § 1 of the Constitution. Furthermore, it results in unequal protection of their property rights, contrary to Article 64 § 2 of the Constitution."

17. The Constitutional Court also referred to permissible restrictions on the "right to credit" and to alleged discrimination against Bug River claimants in the following terms:

"Statutory limitation of citizens' property rights is permissible for the following reasons: public interest, ... financial constraints ... on the State – which constitutes a common good in accordance with Article 1 of the Constitution – and, as regards ... the financial repercussions of this ruling, consideration for the State's ability to perform its basic functions. ...

The determination of the scale of justified limitations placed upon the 'right to credit', and the balancing of the rights of persons who left their property beyond the Bug River against the financial capacity of the State and protected constitutional values, require a thorough and careful assessment on the legislature's part. When specifying the scope of limitations placed upon the 'right to credit', the legislature should, in particular, take into account the passing of time as regards persons who left their property beyond the Bug River and their heirs who have hitherto not realised their entitlement to compensation on the basis of earlier statutes.

The compensation promised sixty years ago primarily took the form of 'aid to relocated citizens', enabling Polish citizens to make a fresh start following the loss of property left beyond the new borders of the Polish State. Accordingly, it is necessary to formulate dynamically the [State's] compensation obligations with the passing of time, and to exercise very great caution in applying current instruments for protecting the property rights of natural persons to situations which arose in different historical

1. The English translation of the passages from the judgment of 15 December 2004 is based on a document available on the Constitutional Court's website, revised by the Registry in order to achieve conformity with the terminology used in the principal judgment.

circumstances and are characterised by different sensibilities as regards observance of these rights.

In the light of historical facts, it is unjustified to allege that persons who left their property beyond the Bug River represent a category discriminated against in comparison with other groups of citizens who lost their property during, and following, the Second World War. It should be remembered that property owners possessing Polish citizenship were in no way compensated for the loss of property (also in the form of real estate) resulting from wartime confiscations.

Owners of property taken over with a view to agricultural land reform did not obtain equivalent compensation. An equivalent, or even a very modest, 'pension' that domestic owners of property nationalised on the basis of the Nationalisation of the Basic Branches of the National Economy Act 1946 were supposed to receive was very often not paid.

Owners of land situated within the borders of the City of Warsaw in the year 1939 that was taken into communal ownership without payment of compensation directly after the Second World War have hitherto not obtained compensation. Moreover, it is also unfounded to suggest that discrimination against persons who left their property beyond the Bug River resulted from a delay in realising their expectations of compensation or from the fact that such compensation was in kind, as opposed to being in pecuniary form. It should be borne in mind that the pecuniary obligations which would have arisen and would have been confirmed and realised prior to the entry into force of the Amendment of the Monetary System Act 1950 would probably have been subject to the disadvantageous mechanism of monetary exchange, as envisaged by that Act. ..."

B. The July 2005 Act

18. Pursuant to section 26 of the July 2005 Act, the "right to credit" referred to in other, previous, statutes is to be considered a "right to compensation" (*prawo do rekompensaty*) under the provisions of this Act.

19. Section 13 defines the right to compensation as follows:

"(1) The right to compensation shall be realised in one of the following forms:

1. offsetting of the value of the property left beyond the present borders of the Polish State against:

(a) the sale price of property owned by the State Treasury;

(b) the sale price of the right of perpetual use of land owned by the State Treasury;

(c) the fees for perpetual use of land owned by the State and the sale price of buildings and other premises or dwellings situated thereon; or

(d) the fee for transformation of the right of perpetual use into the right of ownership of property, as referred to in separate provisions; or

2. a pecuniary benefit [*świadczenie pieniężne*] to be paid from the resources of the Compensation Fund [*Fundusz Rekompensacyjny*] referred to in section 16.

(2) Offsetting of the value of property left beyond the present borders of the Polish State shall be effected up to a value equal to 20% of the value of that property. The amount of the pecuniary benefit shall constitute 20% of the value of such property.

(3) In determining the amount to be offset and the pecuniary benefit referred to in subsection (2), the value of [property] that has already been acquired as partial realisation of the right to compensation shall be included ..."

(4) Offsetting of the value of property left beyond the present borders of the Polish State and payment of the pecuniary benefit shall be effected upon submission of the decision or certificate confirming the right to compensation, issued on the basis of this Law or other provisions."

20. Pursuant to section 16, a Compensation Fund is to be set up in order to finance and secure the payments of pecuniary benefits to Bug River claimants. The fund will derive its resources from: the sale of property belonging to the Resource of Agricultural Property of the State Treasury (*Zasób Własności Rolnej Skarbu Państwa*), the total amount of land designated for that purpose being not less than 400,000 hectares; from the interest on money set aside on the fund's bank accounts; and, in the event of a shortage of income from those sources, from loans from the State budget in an amount determined by the relevant Budget Act.

C. The remedies under the Civil Code

1. Amendments to the Civil Code

21. 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") came into force. The relevant amendments enlarged the scope of the State Treasury's liability for tort under Article 417 of the Civil Code. That included adding a new Article 417-1 and making provision for the State's tortious liability for its omission to enact legislation, a concept known as "legislative omission" (*zaniedbanie legislacyjne*).

2. Civil action for material damage under the law of tort

(a) Articles 417 and 417-1 of the Civil Code

22. In the version applicable until 1 September 2004, Article 417 § 1, which laid down a general rule concerning the State's liability in tort, read as follows:

"The State Treasury shall be liable for damage caused by a State official in the performance of his duties."

23. Since 1 September 2004 the relevant part of Article 417 has read:

"1. The State Treasury or [,as the case may be,] a self-government entity or other legal person responsible for exercising public authority, shall be liable for any damage caused by an unlawful act or omission [committed] in connection with the exercise of public authority."

24. 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 which subsisted before that date.

25. The relevant parts of Article 417-1 read as follows:

"1. If damage has been caused by the enactment of a law, reparation for [the damage] may be sought after it has been established in the relevant proceedings that that statute was incompatible with the Constitution, a ratified international agreement or another statute.

...

3. If damage has been caused by a failure to give a ruling [*orzeczenie*] or decision [*decyzja*] where there is a statutory duty to do so, reparation for [the damage] may be sought after it has been established in the relevant proceedings that the failure to give a ruling or decision was contrary to the law, unless other specific provisions provide otherwise.

4. If damage has been caused by the failure to enact a law where there is a statutory duty to do so, the court dealing with the case shall declare that such failure is incompatible with the law."

(b) The Supreme Court's relevant case-law

26. In its judgments of 30 June and 6 October 2004 concerning the availability to Bug River claimants of an action for damages for material prejudice under the law of tort, the Supreme Court confirmed the opinion expressed in its first landmark judgment on that matter, given on 21 November 2003 (see also *Broniowski*, cited above, §§ 107-08), and held that the Polish State was liable for material damage resulting from the non-enforcement of the "right to credit" on account of the defective operation of the Bug River legislation.

Both judgments were given by the Supreme Court following the examination of cassation appeals lodged by Bug River claimants whose claims for damages on account of the non-enforcement of the "right to credit" had been dismissed by the courts at first and second instance. The Supreme Court quashed the appellate judgments and remitted the cases to the relevant courts of appeal.

27. In the judgment of 30 June 2004 (no. IV CK 491/03) delivered by the Civil Division in *E.B and A.C. v. the State Treasury – the Governor of Pomerania and the Minister of Finance*, the Supreme Court found that the Polish State's legislative activity (*działalność legislacyjna*), which made it impossible for it to discharge the obligations arising from the Republican Agreements, could be regarded as a "legislative tort" (*delikt normatywny*) causing damage to the Bug River claimants concerned. It also held that the

State was liable for such damage under Article 77 § 1 of the Constitution (see *Broniowski*, cited above, § 75) and Article 417 of the Civil Code. It stated, *inter alia*, the following:

> "According to the case-law of both the Constitutional Court and the Supreme Court, it is possible [for an individual] to seek damages from the State Treasury for so-called 'legislative lawlessness' [*bezprawie normatywne*] ... [which] consists in [the State's] failure to enact, in good time, legislation that is necessary from the constitutional point of view, a failure whose consequences directly infringe the individual's rights. ...
>
> The defendant State did, on the one hand, introduce provisions which were to ensure compensation for property left in the former territories of the Polish State but, on the other, enacted legislation that excluded or made practically illusory the possibility of implementing the 'right to credit'. Such acts on the part of the defendant, resulting in a factual situation in which the realisation of the ... 'right to credit' was for all practical purposes extinguished, disclose features of unlawful conduct qualifying as a legislative tort. The unlawfulness of the defendant authorities' conduct is demonstrated by the fact that, when determining the form and procedure for the realisation of the 'right to credit' within the framework of their legislative autonomy, they in fact made the whole mechanism an illusory instrument of compensation, which resulted in an inadmissible dysfunction of the legal system. ...
>
> Nevertheless, granting the applicants' claim for damages under Article 77 § 1 of the Constitution also requires a prior finding of all the combined elements of civil liability, namely the defendant's unlawful conduct, damage sustained by the claimants and a normal causal link between these two aspects. The State Treasury may also be liable under Article 77 § 1 of the Constitution for damage caused by such legislative acts by the public authority as have resulted in the practical deprivation or limitation of the possibility of enforcing entitlements provided for by another law, which makes the legal system dysfunctional and internally inconsistent in that regard."

28. In the third successive judgment concerning the State's liability for non-enforcement of the "right to credit" (no. I CK 447/03), given by the Civil Division in *A.P. and J.P. v. the State Treasury – the Minister for the Treasury and the Governor of M. Province* on 6 October 2004, the Supreme Court held:

> "Before the entry into force of the amendments to the Civil Code on 1 September 2004, Article 417 of the Civil Code accordingly constituted a direct legal basis for vindicating claims for damages arising from the enactment of legislation incompatible with the law which was removed from the legal system in the manner specified in Article 188 of the Constitution [in other words, declared unconstitutional by the Constitutional Court]. ... [A] basis for the claimant's claim for damages was Article 77 § 1 of the Constitution read in conjunction with Article 417 in the version applicable before 1 September 2004.
>
> The State authorities' duty is not only to create legal guarantees for the protection of property rights but also to refrain from enacting such regulations as to restrict or extinguish those rights. The defendant State, on the one hand, introduced provisions which were to ensure compensation for Bug River property but, on the other hand, enacted legislation that excluded or made illusory the possibility for the entitled persons to enjoy the 'right to credit'.

> There is no doubt that those actions reduced the value of the 'right to credit' and that this reduction constitutes a material loss covered by the notion of damage. In order to determine [the damage] it is necessary to compare the value of the 'right to credit' in a hypothetical legal situation free from the possible omissions and laws found to have been defective with the situation obtaining in reality, i.e. taking into account the reduced pool of State property and, thereby, the [reduced] value of the 'right to credit' caused by the operation of the [defective] laws until their repeal by the Constitutional Court."

3. Civil action for non-material damage caused by an infringement of personal rights

(a) Article 23 of the Civil Code

29. Article 23 of the Civil Code contains a non-exhaustive list of the so-called "personal rights" (*prawa osobiste*). This provision states:

> "The personal rights of an individual, such as in particular health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements shall be protected by the civil law regardless of the protection laid down in other legal provisions."

(b) Article 448 of the Civil Code

30. Under Article 448, a person whose personal rights have been infringed may seek compensation. The relevant part of that provision reads:

> "The court may grant an adequate sum as pecuniary compensation for non-material damage [*krzywda*] suffered to everyone whose personal rights have been infringed. Alternatively, the person concerned, regardless of seeking any other relief that may be necessary to remove the consequences of the infringement sustained, may ask the court to award an adequate sum for the benefit of a specific social interest. ..."

THE LAW

I. THE FRIENDLY SETTLEMENT AGREEMENT

31. On 6 September 2005 the parties reached a friendly settlement (see paragraph 8 above). Their agreement, signed by them and witnessed by the Court's Registry, reads as follows:

"FRIENDLY SETTLEMENT

IN THE CASE OF

Broniowski v. Poland

application no. 31443/96

The present document sets out the terms of the friendly settlement concluded between

the Government of the Republic of Poland ('the Government'), on the one hand,

and Mr Jerzy Broniowski ('the applicant'), on the other,

collectively referred to as 'the parties', in accordance with Article 38 § 1 (b) of the European Convention on Human Rights ('the Convention') and Rule 62 § 1 of the Rules of Court of the European Court of Human Rights ('the Court');

The Government being represented by their Agent, Mr Jakub Wołąsiewicz, Ambassador, of the Ministry of Foreign Affairs, the applicant being represented by Mr Zbigniew Cichoń and Mr Wojciech Hermeliński, advocates practising in Cracow and Warsaw respectively.

I. PREAMBLE

Having regard to

(a) the judgment delivered on 22 June 2004 by the Grand Chamber of the Court in the present case ('the principal judgment'), in which the Court;

– found a violation of the right of property protected by Article 1 of Protocol No. 1 to the Convention;

– held that the violation originated in a systemic problem of malfunctioning of domestic legislation and practice, caused by the failure to set up an effective mechanism to implement the 'right to credit' (*prawo zaliczania*) of Bug River claimants (see the third operative provision of the principal judgment), with the consequence that not only the complainant in the particular case, namely Mr Broniowski, but also a whole class of individuals have been or are still being denied the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1;

– directed that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1;

– as regards the award of just satisfaction to the applicant,

decided, in respect of any pecuniary or non-pecuniary damage resulting from the violation found, that the question of the application of Article 41 of the Convention was not ready for decision and reserved it as a whole, and

awarded the applicant 12,000 euros (EUR) for costs and expenses incurred by him up to that stage of the proceedings before the Court;

– further placed itself at the parties' disposal with a view to securing a friendly settlement in accordance with Article 38 § 1 (b) of the Convention;

(b) the Polish Constitutional Court's judgment of 15 December 2004 (no. K2/04), declaring unconstitutional the provisions of the December 2003 Act (see paragraphs 114-120 of the principal judgment) imposing quantitative limitations on the 'right to credit' (15% of the original value but not more than 50,000 Polish zlotys (PLN)) and excluding from the operation of the compensation scheme persons who had earlier received any compensation for their Bug River property;

(c) the Law of 8 July 2005 on the realisation of the right to compensation for property left beyond the present borders of the Polish State (*Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami państwa polskiego*) ('the July 2005 Act'), which was enacted with a view to taking account of the findings of the Court's principal judgment as well as those of the above-mentioned judgment of 15 December 2004 by the Constitutional Court;

the parties, with the assistance of the Court's Registry, have now reached an agreement on the terms of a friendly settlement as follows:

II. GENERAL CONSIDERATIONS

1. The terms of the following settlement are intended to take into account

– that the wrong and injustice addressed by the Polish Bug River legislation is not one created by the Polish State;

– that the latter's responsibility under the Convention is limited to the operation of the relevant legislation during the period falling within the Court's jurisdiction, which started on 10 October 1994;

– not only the interests of the individual applicant, Mr Broniowski, and the prejudice sustained by him as a result of the violation of his right of property found by the Court to have occurred in his particular case, but also the interests and prejudice of complainants in similar applications pending before the Court or liable to be lodged with it;

– the obligation of the Polish Government under Article 46 of the Convention, in executing the principal judgment, to take not only individual measures of redress in respect of Mr Broniowski but also general measures covering other Bug River claimants (see the fourth operative provision of the principal judgment).

2. Given that the actual value of the property to which attaches the applicant's entitlement under the Bug River legislation ('the Bug River property') is disputed between the parties, a notional value has been agreed solely for the purposes of the present friendly settlement. This valuation does not bind either party in any further domestic or international proceedings brought in relation to the property.

3. For the purposes of the present friendly settlement, the parties have agreed that the valuation of the applicant's entitlement under the Bug River legislation shall be made by reference to the terms of the July 2005 Act, in particular the maximum statutory ceiling of 20% laid down in section 13(2) of that Act.

4. The present friendly settlement does not preclude the applicant from seeking and recovering compensation over and above the current 20% ceiling fixed by the 2005 Act in so far as Polish law allows this in the future.

III. INDIVIDUAL MEASURES

5. The Government shall pay to the applicant, within 15 (fifteen) days from the date of delivery of the Court's judgment striking the case out of its list of cases under Rule 62 § 3 of the Rules of Court, the lump sum of 237,000 (two hundred and thirty-seven thousand) Polish zlotys (PLN) to a bank account named by him. The amount included therein regarding costs and expenses shall be paid together with any value added tax that may be chargeable thereon, the remaining amount being free of any tax or charge.

6. The preceding lump sum is made up as follows:

(a) an amount of 213,000 (two hundred and thirteen thousand) Polish zlotys (PLN) representing

(i) 20% of the agreed notional value of the applicant's Bug River property as determined according to the terms of the July 2005 Act, to be paid without the applicant's having to undertake the normal procedure foreseen in the July 2005 Act and notwithstanding the fact that his ascendants have already received partial compensation amounting to 2% of the value of the original property; and

(ii) compensation for all and any prejudice which may have been sustained by the applicant as a consequence of the violation of his right of property under Article 1 of Protocol No. 1 to the Convention, covering both

– non-pecuniary damage arising from the uncertainty and frustration involved in the prolonged hindrance by the Polish authorities on his exercise of his 'right to credit' during the period falling within the Court's temporal jurisdiction and

– assumed but unquantified material damage;

(b) 24,000 (twenty-four thousand) Polish zlotys (PLN) for the costs and expenses incurred by him in addition to those covered by the award made in the principal judgment.

7. In the event of failure to pay the above sum within the said time-limit of 15 days referred to in paragraph 5, the Government undertake to pay until settlement simple interest on the amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

8. The applicant accepts that the above payment once received by him shall

(a) constitute the final and full settlement of all his claims under his application no. 31443/96 before the Court, and

(b) exhaust his entitlement by virtue of the Bug River legislation as it stands under the July 2005 Act.

9. The applicant accordingly

(a) undertakes not to seek any damages from the respondent State in respect of pecuniary and/or non-pecuniary prejudice arising from the facts found by the Court to constitute a violation of Article 1 of Protocol No. 1 to the Convention in the present case;

(b) waives any further claims against the Polish authorities in Polish civil courts, including those under the provisions of the Civil Code on the law of tort (Article 417 et seq.), and any claims that may be brought in relation to those facts before the Court or any other international body.

10. Nothing in the present friendly settlement constitutes an acknowledgement by the applicant of the legitimacy of the statutory ceiling of 20% fixed by the July 2005 Act or its compatibility with the Polish Constitution or the Convention.

IV. GENERAL MEASURES

11. The Government make, as an integral part of this settlement, the following declaration as to general measures which are to be taken in accordance with the terms of the Court's principal judgment.

DECLARATION BY THE GOVERNMENT OF THE REPUBLIC OF POLAND

Having regard to their obligations under Article 46 of the Convention as to the execution of the Court's principal judgment in the case of *Broniowski v. Poland* (application no. 31443/96), in particular those relating to general measures to be adopted in order to secure the implementation of the 'right to credit' not only of the applicant in that case but also of remaining Bug River claimants, the Government of the Republic of Poland

DECLARE

(a) that they undertake to implement as rapidly as possible all the necessary measures in respect of domestic law and practice as indicated by the Court in the fourth operative provision of the principal judgment, and that, to this end, they will intensify their endeavours to make the new Bug River legislation effective and to improve the practical operation of the mechanism designed to provide the Bug River claimants with compensation, including the auction-bidding procedure and payments from the Compensation Fund (*Fundusz Rekompensacyjny*) referred to in the July 2005 Act;

(b) that, as regards the auction-bidding procedure, they will ensure that the relevant State agencies will not hinder the Bug River claimants in enforcing their 'right to credit';

(c) that, in addition to adopting general measures designed to remove obstacles in implementing the 'right to credit', they recognise their obligation to make available to the remaining Bug River claimants some form of redress for any material or non-material damage caused to them by the defective operation of the Bug River legislative scheme in their regard; in this connection,

– noting that, in respect of material damage, it is common ground that a civil action under Article 417 or, as the case may be, Article 417-1 of the Civil Code constitutes a remedy for affording such redress;

– pointing out that, in respect of non-material damage, in particular uncertainty and frustration, this obligation was taken into account in incorporating in the July 2005 Act more favourable modalities for implementation of the 'right to credit' than those existing in the preceding legislation, these more favourable modalities being, firstly, the possibility of obtaining pecuniary compensation (*świadczenia pieniężnego*) as an alternative to the more cumbersome procedure of participating in auction bidding and, secondly, the raising of the statutory ceiling for compensation from 15% to 20%; and

– further, undertaking not to contest before domestic courts that Article 448 read in conjunction with Article 23 of the Civil Code is capable of providing a legal basis for making a claim in respect of non-material damage.

For the Government — For the applicant

Jakub Wołąsiewicz — Jerzy Broniowski Zbigniew Cichoń

[signature] — Wojciech Hermeliński

[signatures]

Made in three original copies and witnessed, on behalf of the Registry of the European Court of Human Rights, by

Paul Mahoney — Renata Degener

[signature] — [signature]

Done in Warsaw, on 6 September 2005"

II. THE COURT'S ASSESSMENT

A. General considerations

32. The Court's power to strike a case out of its list of cases in the event of a friendly settlement is conferred by Article 39 of the Convention, which provides:

> "If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached."

The exercise of this power is, however, subject to the conditions stated in Articles 37 § 1 and 38 § 1 (b) of the Convention, which respectively govern the striking out of applications and the finding of friendly settlements. The relevant parts of these two provisions read:

Article 37
(Striking out applications)

"1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved; ...

...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

Article 38
(Examination of the case and friendly settlement proceedings)

"1. If the Court declares the application admissible, it shall

...

(b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto."

33. It thus follows that the Court may strike an application out of its list only if it is satisfied that the solution of the matter embodied in the settlement arrived at between the parties is based on "respect for human rights as defined in the Convention and the Protocols thereto". This requirement is incorporated in Rule 62 § 3 of the Rules of Court, which provides:

"If the Chamber is informed by the Registrar that the parties have agreed to a friendly settlement, it shall, after verifying that the settlement has been reached on the basis of respect for human rights as defined in the Convention and the Protocols thereto, strike the case out of the Court's list in accordance with Rule 43 § 3."

Rule 43 § 3 specifies that "the decision to strike out an application which has been declared admissible" – as in the present case – "shall be given in the form of a judgment".

B. Implications of a "pilot judgment procedure"

34. The friendly settlement in the present case has been reached after the Court delivered a judgment on the merits of the case in which it held that the violation of the applicant's Convention right originated in a widespread, systemic problem as a consequence of which a whole class of persons had been adversely affected (see *Broniowski*, cited above, § 189). In that connection, the Court directed that "the respondent State must, through appropriate legal measures and administrative practices, secure the

implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1" (see point 4 of the operative provisions of the principal judgment).

The Court thereby made clear that general measures at national level were called for in execution of the judgment and that those measures must take into account the many people affected and remedy the systemic defect underlying the Court's finding of a violation. It also observed that they should include a scheme offering to those affected redress for the Convention violation. It stressed that once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention (ibid., § 193).

This kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a "pilot judgment procedure" (see, for example, the Court's Position Paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003 (CDDH(2003)006 Final), unanimously adopted by the Court at its 43rd Plenary Administrative Session on 12 September 2003, paragraphs 43 to 46; and Response by the Court to the CDDH Interim Activity Report prepared following the 46th Plenary Administrative Session on 2 February 2004, paragraph 37).

35. The object in designating the principal judgment as a "pilot judgment" was to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the right of property in the national – Polish – legal order. One of the relevant factors considered by the Court was the growing threat to the Convention system and to the Court's ability to handle its ever increasing caseload that resulted from large numbers of repetitive cases deriving from, among other things, the same structural or systemic problem (see Broniowski, cited above). Indeed, the pilot judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on the Court which would otherwise have to take to judgment large numbers of applications similar in substance. It will be recalled that, in the pilot judgment in Mr Broniowski's application, the Court, after finding a violation, also adjourned its consideration of applications deriving from the same general cause "pending the implementation of the relevant general measures" (ibid., § 198).

36. In the context of a friendly settlement reached after delivery of a pilot judgment on the merits of the case, the notion of "respect for human rights as defined in the Convention and the Protocols thereto" necessarily extends beyond the sole interests of the individual applicant and requires the Court to examine the case also from the point view of "relevant general measures".

It cannot be excluded that even before any, or any adequate, general measures have been adopted by the respondent State in execution of a pilot judgment on the merits (Article 46 of the Convention), the Court would be led to give a judgment striking out the "pilot" application on the basis of a friendly settlement (Articles 37 § 1 (b) and 39) or awarding just satisfaction to the applicant (Article 41). Nonetheless, in view of the systemic or structural character of the shortcoming at the root of the finding of a violation in a pilot judgment, it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand. The respondent State has within its power to take the necessary general and individual measures at the same time and to proceed to a friendly settlement with the applicant on the basis of an agreement incorporating both categories of measures, thereby strengthening the subsidiary character of the Convention system of human rights protection and facilitating the performance of the respective tasks of the Court and the Committee of Ministers under Articles 41 and 46 of the Convention. Conversely, any failure by a respondent State to act in such a manner necessarily places the Convention system under greater strain and undermines its subsidiary character.

37. In these circumstances, in determining whether it can strike the present application out of its list pursuant to Articles 39 and 37 § 1 (b) of the Convention on the ground that the matter has been resolved and that respect for human rights as defined in the Convention and its Protocols does not require its further examination, it is appropriate for the Court to have regard not only to the applicant's individual situation but also to measures aimed at resolving the underlying general defect in the Polish legal order identified in the principal judgment as the source of the violation found.

C. Terms of the friendly settlement agreed by the parties

38. In this connection, the Court notes that the friendly settlement reached between Mr Broniowski and the Government addresses the general as well as the individual aspects of the finding of a violation of the right of property under Article 1 of Protocol No. 1 made by the Court in the principal judgment. In the very first clause of the agreement, the terms of the settlement are expressly stated to be intended to take into account "not only the interests of the individual applicant ... and the prejudice sustained by him as a result of the violation of his right of property found by the Court to have occurred in his particular case, but also the interests and prejudice of

complainants in similar applications pending before the Court or liable to be lodged with it"; and "the obligation of the Polish Government under Article 46 of the Convention, in executing the principal judgment, to take not only individual measures of redress in respect of Mr Broniowski but also general measures covering other Bug River claimants" (see paragraph 31 above). The parties have thereby recognised the implications, for the purposes of their friendly settlement, of the principal judgment as a pilot judgment.

1. General measures

39. Prior to the settlement, the respondent Government introduced amended legislation, namely the July 2005 Act (see paragraphs 18-20 above), which, as stipulated in the Preamble to the agreement, was "enacted with a view to taking account of the findings of the Court's principal judgment as well as those of the ... judgment of 15 December 2004 by the Constitutional Court" (see paragraphs 10-11, 14-17 and 31 above).

In its principal judgment, the Court found that the unjustified hindrance on the applicant's "peaceful enjoyment of his possessions" as guaranteed by Article 1 of Protocol No. 1 derived from State conduct whereby "the [Polish] authorities, by imposing successive limitations on the exercise of the applicant's right to credit, and by applying the practices that made it unenforceable and unusable in practice, rendered that right illusory and destroyed its very essence"(see *Broniowski*, cited above, § 185). The Court also observed, in relation to the ultimate legal extinguishment of the applicant's "right to credit" by virtue of the December 2003 Act (ibid., § 186), that there was "no cogent reason why such an insignificant amount [namely the 2% of compensation already received by the applicant's family] should *per se* deprive him of the possibility of obtaining at least a proportion of his entitlement on an equal basis with other Bug River claimants" (ibid., § 185 *in fine*). The July 2005 Act taken together with the Government's undertakings in their declaration in the friendly settlement are evidently designed to remove these practical and legal obstacles on the exercise of the "right to credit" by Bug River claimants. Likewise, the July 2005 Act is aimed at removing the restrictive aspects of the December 2003 Act which were specifically condemned by the Constitutional Court in the reasoning of its December 2004 judgment, namely the maximum ceiling of PLN 50,000 for compensation and the exclusion from any further "right to credit" of all Bug River claimants, such as the applicant, who had previously received any compensation, whatever the amount (see paragraphs 10-20 above).

The Court observes that, in that latter judgment, the Constitutional Court, in its given function of interpreting and applying the Polish Constitution, played an important role in setting for the Polish legislature and executive standards for observance of human rights (see *Broniowski*, cited above, §§ 77-86; and paragraphs 14-17 above) and thereby creating within the

domestic legal order better conditions for securing "the rights and freedoms as defined in ... [the] Convention", in implementation of the principle of subsidiarity laid down in Article 1 of the Convention.

40. As to the declaration made by the Government in the friendly settlement in regard to general measures, the Court notes that its content relates both to the future functioning of the Bug River legislative scheme and to the affording of redress for any past prejudice, material or non-material, suffered by Bug River claimants as a result of the previously defective operation of that scheme.

41. In particular, the Government have referred to specific civil-law remedies in connection with enabling the remaining Bug River claimants to seek compensation before the Polish courts for any material and/or non-material damage caused by the systemic situation found to be in breach of Article 1 of Protocol No. 1 in the principal judgment and thus to claim redress, as would be possible under Article 41 of the Convention if the Court were to deal with their cases on an individual basis.

The existence of an available civil remedy in respect of material damage caused by State action or omission seems clearly established in the light of the case-law of the Polish courts and, in particular, of the Supreme Court (see paragraphs 22-28 above).

On the other hand, the position in Polish law regarding recovery of compensation from State authorities for non-material damage is less clear (see paragraphs 29-30 above). In their declaration in the friendly settlement, the respondent Government have suggested that compensation in kind for past non-material damage suffered by Bug River claimants, in particular frustration and uncertainty, has already been afforded by the provision in the July 2005 Act of more favourable modalities for implementing the "right to credit". Be that as it may, the Government have in addition undertaken not to contest that Article 448 taken in conjunction with Article 23 of the Civil Code would be capable of providing a legal basis for a claim in respect of non-material damage should any Bug River claimant wish to bring one before the Polish courts.

42. In their amending legislation and in their declaration in the friendly settlement, the respondent Government have, in the Court's view, demonstrated an active commitment to take measures intended to remedy the systemic defects found both by the Court in its principal judgment and by the Polish Constitutional Court in its judgment of December 2004. While, by virtue of Article 46 of the Convention, it is for the Committee of Ministers to evaluate these general measures and their implementation as far as the supervision of the execution of the Court's principal judgment is concerned (see also Rule 43 § 3 of the Rules of Court), the Court, in exercising its own competence to decide whether to strike the case out of its list under Articles 37 § 1 (b) and 39 following a friendly settlement between the parties, cannot but rely on the respondent's Government's actual and promised remedial action as a positive factor going to the issue of "respect

for human rights as defined in the Convention and the Protocols thereto" (see paragraph 37 above).

2. Individual measures

43. As to the reparation afforded to the individual applicant, Mr Broniowski, the Court notes that the payment to be made to him under the settlement provides him with both accelerated satisfaction of his "right to credit" under the Bug River legislative scheme as it now stands after the July 2005 Act and compensation for any pecuniary and non-pecuniary damage sustained by him. Also, he remains free to seek and recover compensation over and above the current 20% ceiling on compensation fixed by the July 2005 Act in so far as Polish law allows that in the future and there is nothing to prevent a future challenge of that 20% ceiling before either the Polish Constitutional Court or ultimately this Court (see clauses 6 and 10 of the agreement in paragraph 31 above).

D. Conclusion

44. In view of the foregoing, the Court is satisfied that the settlement in the present case is based on respect for human rights as defined in the Convention and its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Takes note* of the terms of the friendly settlement agreement and of the modalities for ensuring compliance with the undertakings referred to therein (Rule 43 § 3 of the Rules of Court);

2. *Decides* to strike the case out of the list.

Done in English and in French, and notified in writing on 28 September 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Luzius WILDHABER
President

Paul MAHONEY
Registrar