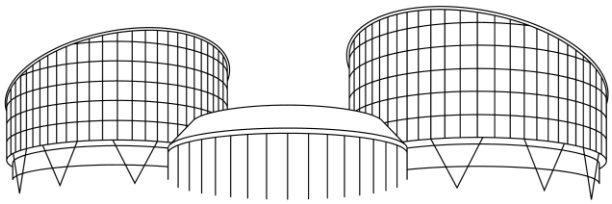

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF POTOMSKA AND POTOMSKI v. POLAND

(Application no. 33949/05)

JUDGMENT

STRASBOURG

29 March 2011

FINAL

15/09/2011

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

In the case of Potomska and Potomski v. Poland**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 8 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 33949/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Polish nationals, Mr Zygmunt Potomski and Mrs Zofia Potomska ("the applicants"), on 22 August 2005.

2. The applicants, who had been granted legal aid, were represented by Ms K. Wicher-Kluczkowska, a lawyer practising in Koszalin. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged a breach of the right to the peaceful enjoyment of their possessions.

4. On 27 August 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1937 and 1939 and live in Darłowo. They are a married couple.

A. Facts prior to 10 October 1994

6. On 25 November 1970 the Board of the Sławno District National Council (*Prezydium Powiatowej Rady Narodowej*) informed the Board of the Darłowo Municipal National Council (*Prezydium Gromadzkiej Rady Narodowej*) that pursuant to the decision of the Minister of Municipal Economy (*Minister Gospodarki Komunalnej*) of 25 September 1970 a cemetery located in Rusko was to be closed. The closure was to be carried out on the basis of the 1959 Cemeteries Act.

7. On 12 September 1973 the Sławno District National Council issued a preliminary decision in which the applicants were informed of the conditions subject to which they could build a house on plot no. 59 located in Darłowo Municipality, Rusko settlement.

8. On 15 March 1974 the Head of Darłowo Municipality (*Naczelnik Gminy*) issued a decision in which he named Mr Potomski as the buyer of plot no. 59, owned by the State Land Fund (*Państwowy Zasób Ziemi*).

9. On 14 November 1974 the applicants bought from the State a plot of land with a surface area of 12 acres. The plot, no. 59, was classified as farming land. The applicants intended to build a house and a workshop on it.

10. On 4 May 1987 the Koszalin Regional Inspector of Historic Monuments (*Wojewódzki Konserwator Zabytków*) issued a decision adding the applicants' property to the register of historic monuments (*rejestr zabytków*) on the grounds that a Jewish cemetery had been established on it at the beginning of the nineteenth century. It was one of the few remnants of the former Jewish culture in the region. The Inspector found that the layout of the cemetery was discernible and that certain parts of the cemetery were intact (the foundations of a house of prayer, a stone wall and some gravestones). The applicants were advised as to the scope of their obligations deriving from the 1962 Protection of the Cultural Heritage and Museums Act (*ustawa o ochronie dóbr kultury i o muzeach*). They were prohibited from developing their property unless they obtained a permit from the Regional Inspector of Historic Monuments. The applicants did not appeal against the decision.

11. On 30 May 1988 the applicants requested the Governor of Koszalin to offer them an alternative plot of land on which they could construct a house. On 15 June 1988 the Koszalin Regional Inspector of Historic Monuments requested the Mayor of Darłowo to grant the applicants' request. On 5 July 1988 the Mayor of Darłowo informed the applicants that the exchange of plots requested by them would be possible only in the event of the Mayor receiving a subsidy from the Governor of Koszalin.

12. On 30 September 1988 Darłowo Municipality adopted a local development plan. The plan provided that the applicants could build a house on their property (*zabudowa zagrodowa*).

13. On 28 January 1991 the Mayor of Darłowo (*Burmistrz*) requested the Koszalin Governor's Office to expropriate the applicants' plot. On 12 March 1991 the Koszalin Governor's Office transmitted that request to the Koszalin District Office (*Urząd Rejonowy*) as the competent authority in the matter.

14. On 4 May 1992 the Governor of Koszalin requested the Koszalin Regional Inspector of Historic Monuments to apply to the Head of the Koszalin District Office (*Kierownik Urzędu Rejonowego*) to institute expropriation proceedings pursuant to section 46(2)(2) of the 1985 Land Administration and Expropriation Act. The Governor considered that expropriation and payment of compensation would enable the applicants to buy another plot for the construction of their house.

15. On 14 May 1992 the Regional Inspector requested the Head of the Koszalin District Office to institute expropriation proceedings in respect of the applicants' property. On 14 August 1992 the Head of the District Office decided to discontinue the proceedings, finding that no entity was interested in purchasing the cemetery. The Head of the District Office further found that the applicants, who had been aware in 1974 that they were purchasing a Jewish cemetery, were obliged to protect the site until they could find an entity interested in its purchase. The applicants appealed and requested that the issue be resolved. They stated that they were not interested in the maintenance and protection of the site.

16. On 2 October 1992 the Governor of Koszalin quashed the decision and remitted the case. He held that the lower authority had to examine a number of issues, in particular whether the property could be expropriated following negotiations with the applicants. No information was provided to the Court about the follow-up to that decision.

B. Facts after 10 October 1994

17. On 13 February 1995 the applicants requested the Head of the Koszalin District Office to provide Darłowo Municipality with an alternative plot of land which could then be offered to the applicants. On 7 March 1995 the Koszalin District Office replied that it did not have any such plots. On 25 April 1995 the Head of the District Office informed the applicants that it did not have any plot which could be the subject of an exchange. He further advised them to lodge a request with the Mayor of Darłowo.

18. On an unspecified date in 2000 the applicants wrote to the Minister of Culture and National Heritage about the problem with their property. Their letter was dealt with by the National Inspector of Historic Monuments.

19. On 1 August 2000 the National Inspector informed the applicants that the Sławno District Office (*starostwo powiatowe*) was the competent

authority to deal with the matter. Furthermore, the Regional Inspector of Historic Monuments could request the Sławno District Office to commence expropriation proceedings under sections 33 and 34(1) of the Protection of the Cultural Heritage Act. They were informed that section 33 of that Act provided that a monument of particular historic, scientific or artistic value could be acquired by the State if the public interest so required. The National Inspector informed the applicants that the former Jewish cemetery in Rusko belonged to that category of monuments, being one of the few remnants of Jewish culture in the Middle Pomerania Region. The applicants were advised to contact the Sławno District Office as the representative of the State Treasury, whose duty it was to resolve their problem.

20. On 17 October 2000 Darłowo Municipality informed the applicants that there was no legal basis for the municipality to acquire their plot or to offer them another plot in exchange. They were further informed that they could request the Mayor of Sławno District (*Starosta powiatu*) to expropriate their land pursuant to the Protection of the Cultural Heritage Act. A request could also have been submitted by the Regional Inspector.

21. On 26 January 2001 the Koszalin Regional Inspector of Historic Monuments requested the Mayor of Sławno District to initiate expropriation proceedings. The Regional Inspector stated that in 1974 the applicants had bought the property as a construction plot. Subsequently, following the 1987 listing decision, the applicants had been prevented from developing their land in any manner. The Regional Inspector expressed the opinion that the expropriation of the plot and its ensuing transfer to the Jewish community would be consistent with the provisions of the 1997 Act on Relations between the State and the Jewish Community (*ustawa o stosunku Państwa do gmin wyznaniowych żydowskich*) and the policy concerning the Jewish monuments agreed between Poland and Israel.

22. On 23 September 2002 the applicants informed the Mayor of Darłowo that they would be prepared to exchange their plot for a plot situated in Bobolin or Dąbki.

23. On 24 March 2003 Darłowo Municipality requested the Sławno District Office to provide it with a plot of land which would in turn enable the municipality to arrange for an exchange of plots with the applicants.

24. On 19 May 2003 the Sławno District Office informed the Mayor of Darłowo that the State Treasury's Property Resources did not have plots situated in Bobolin suitable for such an exchange. However, there was one plot in Dąbki that could be exchanged. By a letter of 14 July 2003 the Mayor of Darłowo informed the Sławno District Office that Mr Potomski had refused to exchange his plot for the plot situated in Dąbki. He further requested the District Office to initiate expropriation proceedings with a view to resolving the issue of the applicants' plot.

25. On 7 August 2003 the Mayor of Darłowo again requested the Sławno District Office to commence expropriation proceedings with a view

to resolving the applicants' case. It reminded the District Office that in accordance with section 6 of the 1997 Land Administration Act the protection of properties classified as part of the cultural heritage was in the public interest. The Mayor also noted that the 1987 decision unambiguously excluded any development of the applicants' plot.

26. On 14 August 2003 the Sławno District Office informed the applicants of the possibility of exchanging their plot of land for a plot situated in Rusko, the village where they lived. The proposed plot was designated in the local development plan for housing and services. They were further informed that in the event of a refusal on their part the only solution would be the institution of expropriation proceedings at the request of the Regional Inspector of Historic Monuments. However, that procedure could be set in motion only if the Inspector had secured a subsidy from the Governor for the purpose. Accordingly, the applicants were informed that it was not possible to specify when their case might be finally resolved.

27. By a letter of 22 August 2003 the applicants refused the exchange, stating that the proposed plot did not satisfy their expectations. They expressed their preference for expropriation.

28. On 30 September 2003 the Mayor of Sławno District informed the Regional Inspector that the negotiations concerning the exchange of plots had failed. In his view, the only solution to the problem consisted in expropriation of the applicants' property in accordance with the Land Administration Act 1997, and having regard to its section 6(5). Under the 1962 Protection of the Cultural Heritage Act the expropriation could be requested by the regional inspector or the district Mayor. However, the district Mayor did not have the necessary funds to pay compensation in the event of expropriation. Consequently, he informed the Regional Inspector that he could institute the expropriation proceedings only once the Inspector had secured an amount corresponding to the appropriate level of compensation.

29. On an unspecified date the Union of Jewish Communities in Poland (*Związek Gmin Wyznaniowych Żydowskich w RP*) requested the Regulatory Commission (*Komisja Regulacyjna ds. Gmin wyznaniowych żydowskich*) to transfer ownership of the property owned by the applicants to it on the grounds that the land had formerly been used as a Jewish cemetery. On 30 March 2005 the Commission discontinued the proceedings concerning that application as the property in question had been owned by private individuals (the applicants).

30. In April 2005 the Governor of the Zachodniopomorski Region (*Wojewoda Zachodniopomorski*) informed the Mayor of Sławno District that it would not be possible to grant a subsidy with a view to purchasing the applicants' property. On 14 October 2005 the Mayor of Sławno District apprised the applicants of that decision. He informed them that there was no possibility as matters stood of resolving the issue of their property.

II. RELEVANT LAW

A. The Council of Europe Convention for the Protection of the Architectural Heritage of Europe, adopted on 3 October 1985

31. Poland signed this Convention on 18 March 2010 but has not yet ratified it. The relevant parts of the Convention provide:

Article 3

"Each Party undertakes:

1. to take statutory measures to protect the architectural heritage;

2. within the framework of such measures and by means specific to each State or region, to make provision for the protection of monuments, groups of buildings and sites."

Article 4

"Each Party undertakes:

...

2. to prevent the disfigurement, dilapidation or demolition of protected properties. To this end, each Party undertakes to introduce, if it has not already done so, legislation which:

...

(d) allows compulsory purchase of a protected property."

B. Protection of monuments

32. At the material time issues relating to protection of the country's heritage were regulated by the Protection of the Cultural Heritage Act of 15 February 1962 (*Ustawa o ochronie dóbr kultury* – "the Protection of the Cultural Heritage Act"). A decision on listing a real property in the register of historic monuments was taken, in principle, by the Regional Inspector of Historic Monuments (section 14(1)). Following such a decision no work could be carried out on the historic monument unless a permit was granted by the regional inspector (section 21). Section 25 of the Act imposed various obligations on the owners of listed monuments; in particular a duty to protect them against any damage.

Section 33 provides, in so far as relevant:

> "...ownership of a monument of particular historic, scientific or artistic value may be acquired by the State with a view to making it accessible to the general public where the public interest so requires."

Section 34 provided that the acquisition of ownership took place at the request of the district Mayor or the regional inspector, in accordance with the Land Administration Act 1997.

33. On 17 November 2003 the Protection of the Cultural Heritage Act was repealed and the Protection and Conservation of Monuments Act of 23 July 2003 (*Ustawa o ochronie zabytków i opiece nad zabytkami*) came into force. In contrast to the former Act, section 50(4) of the Protection and Conservation of Monuments Act provides that immovable monuments may be expropriated at the request of a regional inspector only where there is a risk of irreversible damage to the monument.

C. Expropriation of land

34. From 29 April 1985 to 1 January 1998 the rules governing the administration of land held by the State Treasury and the municipalities were laid down in the Land Administration and Expropriation Act of 29 April 1985 ("the Land Administration Act 1985").

On 1 January 1998 the Land Administration Act 1985 was repealed and the Land Administration Act of 21 August 1997 (*Ustawa o gospodarce nieruchomościami* – "the Land Administration Act 1997") came into force.

Section 6(5) of the Act, which was introduced by the Protection and Conservation of Monuments Act, stipulates that the protection of real properties classified as monuments within the meaning of the Protection of the Cultural Heritage Act is a public-interest aim.

Under section 112 of that Act, expropriation consists in taking away, by virtue of an administrative decision, ownership or other rights *in rem.* Expropriation can be carried out where public-interest aims cannot be achieved without restriction of those rights and where it is impossible to acquire those rights by way of a civil-law contract. Section 113(1) stipulates that expropriation can only be carried out for the benefit of the State Treasury or the local municipality.

Section 114(1) of the Act provides that the institution of expropriation proceedings is to be preceded by negotiations on acquisition of the property under a civil-law contract between the State, represented by the district Mayor, and the owner. In the framework of those negotiations the State may propose an alternative property to the owner.

Section 115(1) of the Act stipulates that expropriation proceedings for the benefit of the State Treasury are to be instituted of the latter's own motion. The expropriation proceedings for the benefit of the local municipality are instituted at the request of the latter. Only where the request is submitted by the local municipality does refusal take the form of an administrative decision (*decyzja*; section 115(4)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

35. The applicants complained that they had been prevented from developing their land following the listing decision of 4 May 1987. They further complained that the authorities had failed to expropriate their land or to provide them with an alternative plot on which they could construct their house as originally intended. They did not invoke any provision of the Convention.

36. In their observations of 29 March 2010 the applicants further alleged a breach of Article 13 in that they had been deprived of the right to an effective remedy in respect of the decisions given in their case. No expropriation proceedings had been instituted and the applicants had not received any redress. Their requests concerning the property had either been redirected to a different authority or had produced responses citing a lack of financial resources or lack of a legal basis for resolving the case.

37. The Court considers that the thrust of the applicants' grievances concerns the interference with the peaceful enjoyment of their possessions. It is therefore appropriate to examine their complaints under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Compatibility ratione temporis

38. The Government submitted that the complaint was compatible *ratione temporis* only in so far as it concerned facts and decisions after 10 October 1994, the date on which Protocol No. 1 to the Convention became binding on Poland.

39. The applicants argued that the Government's responsibility was engaged in the period following 10 October 1994 on account of omissions which occurred after that date.

40. The Court's jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent State. From the ratification date onwards, all the State's alleged acts and omissions must conform to the Convention or its Protocols and subsequent facts fall within the Court's jurisdiction even where they are merely extensions of an already existing situation (see *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 43, ECHR 2000-I).

41. Accordingly, the Court is competent to examine the facts of the present case for their compatibility with the Convention only in so far as they occurred after 10 October 1994, the date of ratification of Protocol No. 1 by Poland. It may, however, have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (see *Broniowski v. Poland* (dec.) [GC], no. 31443/96, § 74, ECHR 2002-X). The Court further observes that the applicants' complaint is not directed against a single measure or decision taken before, or even after, 10 October 1994 but refers to their continued inability to develop their property or have it expropriated.

2. Exhaustion of domestic remedies

42. The Government claimed that the applicants had not exhausted domestic remedies as they had failed to lodge an appeal against the Regional Inspector of Historic Monuments' decision of 4 May 1987 with the Minister of Culture.

43. The applicants disagreed. They admitted that they had not appealed against the Inspector's decision but stressed that there had been no legal grounds for mounting a successful challenge. They had not contested the fact that the plot had been previously used as a cemetery and that some tombs had been discovered.

44. The Court notes that the Government did not suggest that the Inspector's decision had been unlawful or indicate on what grounds it could have been challenged. In the circumstances of the case, and bearing in mind in particular that the applicants did not contest the nature of the property as a historical monument, the Court finds that an appeal would not have resulted in a different decision. Accordingly, and without prejudice to the question whether the examination of the Government's plea falls within its temporal jurisdiction, the Court dismisses the Government's objection.

45. Secondly, the Government pleaded non-exhaustion of domestic remedies since the applicants had not taken advantage of the possibility offered by the local authorities of exchanging the plot.

46. The applicants submitted that the first plot located in Dąbki did not correspond to the value or the attractiveness of their plot. The plot they had been offered consisted of fields and swamps and could not be used without restrictions. The applicants considered the proposal as an inadequate attempt to satisfy their claim. The refusal to accept the plot was thus fully justified. The applicants could not be considered to have been obliged to accept any plot merely because the State did not have other properties at its disposal. Furthermore, the Government had not provided any valuation of the property in dispute or the property offered to the applicants, and thus it had not been possible to objectively assess the offer. In respect of the second plot, the applicants stated that it was unsatisfactory and that they could not accept it.

47. In so far as the Government's objection relates to the applicants' refusal to accept the exchange of plots, the Court observes that this issue is linked to the Court's assessment of compliance with the requirements of Article 1 of Protocol No. 1 to the Convention. The Court accordingly joins this part of the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies to the merits of the case.

48. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicants' submissions

49. The applicants argued that they had not been aware that the property in dispute had been used as a Jewish cemetery. Mr Potomski had come to Rusko from Germany in 1945 and since his arrival the property at issue had not been used as a cemetery and the authorities had done everything possible to eliminate any signs that it had been ever used for burying the dead. The authorities had taken a decision to close the cemetery (the fence

and the chapel had been dismantled) and the land had been designated as a building plot (rural housing area). Even if the applicants had known that the property had been used as a cemetery, it could not automatically be inferred that it could not be used for development. In any event, the applicants' knowledge was irrelevant since what mattered was the designation of the property as determined in the local development plan. When buying the property, the applicants had been aware of its designation for rural housing development. They assumed that between 25 November 1970, when the local authorities decided to close the cemetery, and the date of purchase in 1974 the cemetery had already been closed. Furthermore, the applicants had not known about the Jewish tombstones present on the site, since at the time of purchase the tombstones had been covered by trees, shrubs and brushwood.

50. The applicants contested the argument that they had already known in 1974 that it would be impossible to build on the property. They submitted that in the 1970s and 1980s many cemeteries left by the Germans had been built over, and the simple fact that properties had been previously used as cemeteries did not exclude them from development. From the day on which their property was listed in the heritage register in 1987, the applicant had been unable to take any action to develop the property as they would not have obtained the requisite permit. At the time, they had had investment plans consisting of building a house together with a locksmith's workshop. The decision of 4 May 1987 had put an end to those plans.

51. The applicants argued that they had been deprived of the right to make full use of the property and had not obtained appropriate redress, in the form of either compensation or an alternative plot. They had been unable to use the property for the purpose it had been purchased for. It had been bought "for the construction of a house combined with a service workshop", as confirmed in the applicant's requests of 23 July 1973 and 11 August 1973.

52. It was right for the Government to protect the cultural heritage, but the applicants should have been provided with just redress. The costs of protection of the heritage had been borne only by the applicants and thus an excessive burden had been imposed on them. That state of affairs had persisted after 10 October 1994, the date relevant for the purposes of Article 1 of Protocol No. 1.

53. The Government had not instituted expropriation proceedings after 10 October 1994 with a view to resolving the issue and providing redress to the applicants, and had thus avoided their financial responsibility for the property repurchase. The fact that no valuation of the property at issue had been provided indicated that the aim of the proceedings had not been the genuine settlement of the case. The authorities' efforts had failed owing to the lack of resources for repurchase of the property. The applicants argued

that they had undertaken a series of legal measures in order to obtain appropriate redress, but to no avail.

54. The applicants had a right to expect that a plot offered in exchange would be fit for purpose and would provide them with adequate redress, and would not merely constitute an attempt by the Government to avoid their financial responsibility for protection of the heritage. The various authorities had shifted responsibility for the situation between themselves, without securing adequate compensation to the applicants. The failure to complete the domestic proceedings had resulted from the lack of financial resources for awarding compensation or offering a satisfactory alternative property. The Government bore the responsibility for the failure to expropriate the land belonging to the applicants, who had expressed their interest in having the property expropriated and handed over either to the State or to the Union of Jewish Communities.

2. The Government's submissions

55. The Government admitted that in the instant case there had been interference with the applicants' right to the peaceful enjoyment of their possessions. It clearly followed from the domestic courts' case-law that a decision whereby a property was added to the list of historic monuments constituted such interference. However, the interference had been prescribed by law, namely section 14 of the Protection of the Cultural Heritage Act and had pursued a legitimate aim (the protection of historic monuments). The grounds for the listing decision were explained therein and had therefore been known to the applicants.

56. The Government submitted that both the public authorities and the applicant had been aware that the property at issue had previously been used as a Jewish cemetery. In their view, the formal decision on the closure of the cemetery which had been given on 25 September 1970 merely meant that the cemetery could no longer be used as a burial place. The applicants had been aware of the decision of 25 September 1970 and it could be assumed that they had been aware of the location of the Jewish cemetery. Moreover, the current pictures of their plot clearly showed that there were many remains of Jewish graves on it and it had to be assumed that they had been visible at the time when the applicants bought the property. In the light of the above information there could be no doubt that the applicants had bought an old Jewish cemetery and that they had been perfectly aware of it. The applicants had not displayed due diligence when buying the plot and the Government could not now bear any responsibility for the decisions taken by the applicants in the 1970s.

57. The Government admitted that on 12 September 1973 the Sławno District National Council had issued a preliminary decision known as an "information decision" informing the applicants under what conditions they could construct a house on plot no. 59. However, owing to the passage of time it was difficult to say what kind of documents had constituted the basis for the issuing of the decision. In addition, the decision had been subject to the fulfilment of certain additional conditions specified in the law. The applicants had not submitted any documents proving that they had fulfilled those conditions.

58. Furthermore, the applicants had not taken advantage of the possibility offered by the authorities to exchange the plot at issue for another plot offered by the Sławno District Office. They had been informed that in the event of refusing the second exchange proposal the only solution would be the expropriation of their property; this, however, was conditional on the grant of a subsidy by the authorities. The Government maintained that the applicants had been informed that because financial resources were limited it was impossible to say when their case might be resolved. In their view, by refusing the exchange the applicants had accepted that the expropriation could not be carried out until such time as the appropriate financial resources were available; they should therefore bear the consequences of their decisions.

59. The Government further stressed that according to the notarial deed the applicants had paid 462 Polish zlotys for the plot. As indicated by the Central Statistics Office, average remuneration in the year 1974 had amounted to 3,185 Polish zlotys. Hence, the amount paid by the applicants for their plot amounted to one-fifth of average remuneration at the relevant time. The Government also stressed that in the period between the purchase of the property by the applicants and the date of the listing decision the applicants had not taken any steps to achieve the purpose for which they had allegedly bought the plot.

60. In the Government's view, the authorities had done more to improve the applicants' situation than they had been obliged to. The applicants had knowingly bought the remains of an old Jewish cemetery and even in 1974 it had been quite obvious that they would not be able to build anything on the visible remains of the cemetery. The authorities had undertaken numerous measures with a view to exchanging the applicants' plot for another one but their proposals had been disregarded. In conclusion, the Government argued that the applicants' complaint was manifestly ill-founded or, alternatively, that there had been no violation of Article 1 of Protocol No. 1.

3. The Court's assessment

(a) Nature of the interference

61. Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, as a recent authority with further references, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 62, ECHR 2007-...).

62. In the present case the Government admitted that there had been interference with the applicants' right to the peaceful enjoyment of their possessions (see paragraph 55 above) and the Court cannot discern any reason to hold otherwise.

The applicants complained of the effects which stemmed from the decision of 4 May 1987 listing their property in the register of historic monuments, and in particular of the effective prohibition on building a house with a workshop on the property as originally intended. Furthermore, they alleged that in the period following the decision at issue the authorities had failed to expropriate the property or to offer them a suitable property in exchange.

63. The Court notes that the 1987 listing decision did not deprive the applicants of their possessions but subjected the use of those possessions to significant restrictions; hence, it may be regarded as a measure to control the use of property (see *SCEA Ferme de Fresnoy v. France* (dec.), no. 61093/00, ECHR 2005-XIII (extracts)). However, the applicants' complaint also relates to the authorities' prolonged failure to expropriate the property or to provide them with an alternative property. Having regard to the different facets of the applicants' complaint, the Court considers that it should examine the situation complained of under the general rule established in the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis*, *Skibińscy v. Poland*, no. 52589/99, § 80, 14 November 2006).

64. It was common ground that the interference at issue had been provided for by law, namely the relevant provisions of the 1962 Protection of the Cultural Heritage Act. Similarly, it was not disputed that the interference had pursued a legitimate aim, namely the protection of the country's cultural heritage. The Court reiterates that the conservation of the cultural heritage and, where appropriate, its sustainable use, have as their aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants. As such, they are an essential value, the protection and promotion of which are incumbent on the public authorities (see *SCEA Ferme de Fresnoy*, cited above; *Debelianovi v. Bulgaria*, no. 61951/00, § 54, 29 March 2007; and *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 54, ECHR 2009-...). In this connection the Court refers to the Convention for the Protection of the Architectural Heritage of Europe, which sets out tangible measures, specifically with regard to the architectural heritage (see paragraph 31 above).

(b) Proportionality of the interference

65. Any interference with the right to the peaceful enjoyment of possessions must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52). In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his of her possessions. In each case involving the alleged violation of that Article the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden (see, amongst other authorities, *The former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 89-90, ECHR 2000-XII; *Sporrong and Lönnroth*, cited above, § 73; *Broniowski v. Poland* [GC], no. 31443/96, § 150, ECHR 2004-V; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 93, ECHR 2005-VI).

66. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms – if the situation is akin to the taking of property – but also the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from

practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, § §§ 110 *in fine*, 114 and 120 *in fine*, ECHR 2000-I; *Sovtransavto Holding v. Ukraine*, no. 48553/99, §§ 97-98, ECHR 2002-VII; *Broniowski*, cited above, § 151; and *Plechanow v. Poland*, no. 22279/04, § 102, 7 July 2009).

67. With particular reference to the control of the use of property and therefore interference with proprietary rights, the State has a wide margin of discretion as to what is "in accordance with the general interest", particularly where environmental and cultural heritage issues are concerned (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], cited above, § 112; *Kozacıoğlu v. Turkey* [GC], cited above, § 53; and *Yildiz and Others* v. Turkey (dec.), no. 37959/04, 12 January 2010). Moreover it must not be assumed that every listing of property after its purchase by an individual amounts to a violation of the third rule of Article 1 of Protocol No. 1, or that once a property is listed the owner is invariably entitled to some form of compensation (see, *mutatis mutandis*, J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom [GC], no. 44302/02, § 79, ECHR 2007-X; and *Depalle v. France* [GC], no. 34044/02, § 91, ECHR 2010-...). Property, including privately owned property, has also a social function which, given the appropriate circumstances, must be put into the equation to determine whether the "fair balance" has been struck between the demands of the general interest of the community and the individual's fundamental rights. Consideration must be given in particular to whether the applicant, on acquiring the property, knew or should have reasonably known about the restrictions on the property or about possible future restrictions (see *Allan Jacobsson v. Sweden (no. 1)*, 25 October 1989, §§ 60-61, Series A no. 163; *Łącz v. Poland* (dec.), no. 22665/02, 23 June 2009), the existence of legitimate expectations with respect to the use of the property or acceptance of the risk on purchase (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 54, Series A no. 192), the extent to which the restriction prevented use of the property (see *Katte Klitsche de la Grange v. Italy*, 27 October 1994, § 46, Series A no. 293-B; *SCEA Ferme de Fresnoy v. France* (dec.), cited above), and the possibility of challenging the necessity of the restriction (see *Phocas v. France*, 23 April 1996, § 60, *Reports of Judgments and Decisions* 1996-II; Papastavrou and Others v. Greece, no. 46372/99, § 37, ECHR 2003-IV).

68. The Government placed emphasis on the fact that the applicants had been aware that they had bought a former Jewish cemetery and that even at the time of the transaction they had known that they would not be able to build on the plot. However, on the basis of the material in its possession, the Court stresses that the authorities took a formal decision to close the cemetery in 1970. Subsequently, the plot was classified as farming land and

sold to the applicants on 14 November 1974. The authorities were aware of the applicants' intention to build a house and workshop on the property, as the applicants had expressed their intentions in their two requests in 1973. In addition, on 12 September 1973 the authorities issued a preliminary decision specifying the conditions attaching to the construction of a house. In this connection the Court observes that it is not disputed that the applicants bought farming land with a view to building a house on it and that the authorities apparently did not object to that intention at the relevant time. The applicants also submitted that according to the local development plan in force at the relevant time plot no. 59 had been designated for rural housing development; the Government did not contest that argument. Furthermore, it emerges from the Koszalin Regional Inspector's request to the Mayor of Sławno District that the authorities considered the applicants to have bought a building plot (see paragraph 21 above).

69. The Court considers that the main issue in the case concerns the legal effects on the status of the applicants' property flowing from the Regional Inspector's decision of 4 May 1987. On the basis of that decision the applicants' real property was added to the register of historic monuments, on the grounds that a Jewish cemetery had formerly been located on the plot. That cemetery was one of the few remnants of Jewish culture in the Middle Pomerania Region. Subsequently, the authorities declared that the former cemetery belonged to the category of monuments which were of particular historic, scientific or artistic value (see paragraph 19 above).

70. The 1987 decision resulted in a number of far-reaching restrictions on the use of the property by the applicants, as provided by the 1962 Protection of the Cultural Heritage Act and subsequently the 2003 Protection and Conservation of Monuments Act. The applicants were under an obligation to preserve the historical monument and protect it from damage. They were prohibited from carrying out any work on the monument unless they obtained a permit from the Regional Inspector. The Court notes that since the entire plot at issue was classified as a historic monument there was no possibility for the applicants to develop even part of their property (contrast *SCEA Ferme de Fresnoy*, cited above). This was confirmed by the Koszalin Regional Inspector in his letter of 26 January 2001 addressed to the Mayor of Sławno District (see paragraph 21 above).

71. In order to assess whether a fair balance was struck in the case, the Court needs to examine what measures counterbalancing the interference with the applicants' right to the peaceful enjoyment of their possessions were available to the applicants. The Court considers that in the circumstances of the case the most fitting measure would have been expropriation with payment of compensation or offer of a suitable alternative property.

72. The Court notes that the domestic law provided for a particular arrangement with regard to the expropriation of properties which were listed and which the domestic authorities considered as monuments of particular cultural significance. In accordance with sections 33 and 34 of the 1962 Protection of the Cultural Heritage Act, which were in force until 16 November 2003, a monument of particular historic, scientific or artistic value could be acquired by the State if the public interest so required. The expropriation was to be carried out at the request of the district Mayor or the regional inspector in accordance with the 1997 Land Administration Act. Thus, the expropriation could be carried out only at the request of the public authorities or of their own motion, and the applicants did not have any formal involvement in that procedure. The applicants' role in the process was limited to submitting requests to initiate expropriation proceedings. These requests had no binding effect on the authorities and the latter enjoyed complete discretion in this regard. The above-mentioned arrangements were even further restricted with the entry into force of the Protection and Conservation of Monuments Act on 17 November 2003, which specified that immovable monuments could be expropriated at the request of a regional inspector only where there was a risk of irreversible damage to the monument. Having regard to the above, the Court finds that as the applicants had no right to compel the State to carry out the expropriation, their position *vis-à-vis* the authorities was clearly disadvantageous.

73. The first request to expropriate the applicants' property made by the Regional Inspector of Historic Monuments in 1992 produced no result. During the period falling within the Court's temporal jurisdiction, in 2001 the Regional Inspector requested the Mayor of Sławno to expropriate the applicants' property, apparently to no avail (see paragraph 21 above). In 2003, following the unsuccessful negotiations on the exchange of plots, the Mayor of Sławno District informed the Regional Inspector of Historic Monuments that expropriation proceedings could be instituted on condition that the Regional Inspector could secure a subsidy for that purpose. The district Mayor declared that he did not have sufficient funds to pay compensation to the applicants and therefore, for practical reasons, decided not to institute expropriation proceedings. In this connection the Court reiterates that a lack of funds cannot justify the authorities' failure to remedy the applicants' situation (see, *mutatis mutandis*, *Prodan v. Moldova*, no. 49806/99, § 61, ECHR 2004-III (extracts); *Burdov v. Russia (no. 2)*, no. 33509/04, § 70, ECHR 2009-...; and *Polańscy v. Poland*, no. 21700/02, § 75, 7 July 2009).

74. The Court reiterates that the genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State's duty not to interfere, but may give rise to positive obligations (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII;

Broniowski, cited above, § 143; and *Plechanow v. Poland*, cited above, § 99). Such positive obligations may entail the taking of measures necessary to protect the right to property, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions, even in cases involving litigation between private entities. This means, in particular, that States are under an obligation to provide a judicial mechanism for settling effectively property disputes and to ensure compliance of those mechanisms with the procedural and material safeguards enshrined in the Convention. This principle applies with all the more force when it is the State itself which is in dispute with an individual (see *Anheuser-Busch Inc.*, cited above, § 83, and *Plechanow v. Poland*, cited above, § 99).

75. In the context of restrictions on the development of land resulting from a development plan, the availability of a claim to have the property purchased by the authorities is a relevant factor to consider (see *Phocas v. France*, cited above, § 60). In the present case, the domestic law did not provide a procedure by which the applicants could assert before a judicial body their claim for expropriation and require the authorities to purchase their property (see, *mutatis mutandis*, *Skibińscy v. Poland*, cited above, §§ 34-39 and 94-95, 14 November 2006, concerning owners who were threatened with expropriation of their property at an undetermined point in the future). Consequently, the Court finds that the applicants were deprived of any means of compelling the State authorities to expropriate their property (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 56, ECHR 1999-V). In the assessment of the proportionality of the measures complained of, the lack of such a procedure weighs considerably against the authorities.

76. The Court observes that the expropriation procedure was regulated by the 1985 Land Administration and Expropriation Act and subsequently by the 1997 Land Administration Act which came into force on 1 January 1998. Section 114 of the 1997 Land Administration Act stipulated that the institution of expropriation proceedings should be preceded by negotiations on acquisition of the property by agreement between the State and the owner. In the framework of those negotiations the State could propose an alternative property to the owner.

77. In this connection, the Court observes that the applicants' first request to be provided with an alternative plot was made in 1995 to the Head of the Koszalin District Office, the authority competent in the matter at the material time. However, the request was to no avail. In 2002 the applicants expressed their willingness to resolve the matter by means of an exchange of land. In 2003, seeking to resolve the situation, the authorities twice offered the applicants an alternative property. However, the applicants refused both offers, considering that the plots did not match their expectations. Specifically, in respect of the first plot the applicants argued

that it did not correspond to the value of their property and consisted of fields and swamps. The Court notes the applicants' argument that the Government did not provide a valuation of their property or the two alternative properties. It does appear that no such valuation was provided by the Mayor of Sławno District, the competent authority in the matter of expropriation, an omission which arguably prevented the applicants from making an objective assessment of the offers. Furthermore, the Court notes that the domestic law did not compel them to accept an offer of alternative property even if it matched in value the original plot.

78. More generally, the Court observes that in the event of a dispute as to the suitability of a property offered in lieu by the authorities in the framework of pre-expropriation negotiations, a procedural mechanism should have been available to resolve such dispute, and thus to ensure that a fair balance was struck between the competing interests (see, *mutatis mutandis*, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 221, ECHR 2006-VIII where the Court noted the lack of any procedure or statutory mechanism enabling landlords to mitigate or compensate for losses incurred in connection with the maintenance or repairs of property). In those circumstances, the Court considers that the applicants could not have been blamed for refusing both offers, as it appears that they had no guarantee that their interests would be sufficiently protected. Having regard to the above, the Court finds that the Government's objection as to the exhaustion of domestic remedies on the ground of the applicants' refusal to accept the alternative plots should be rejected.

79. Furthermore, the Court observes that the interference with the applicants' right to the peaceful enjoyment of their possessions began on 4 May 1987 and has apparently persisted to the present day. The considerable length of time for which the applicants have had to put up with the interference at issue is another element in the Court's assessment of the proportionality of the measures complained of. In addition, the applicants' situation was compounded by the state of uncertainty in which they found themselves, in view of the continued impossibility of developing their property or having it expropriated.

80. Having regard to all the foregoing factors, the Court finds that the fair balance between the demands of the general interest of the community and the requirements of the protection of the right of property was upset and that the applicants had to bear an excessive burden.

There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

82. With regard to pecuniary damage, the applicants claimed 10,000 Polish zlotys (PLN) per year since 1987, the year in which the authorities had decided to list their property in the register of monuments (in total 230,000 PLN). The estimated amount consisted of possible benefits that could have been obtained from the property if it had been turned into a locksmith's workshop as the applicants had originally intended. Currently, in view of their age, further benefits could have been obtained from leasing the land or using the property for residential purposes.

83. The applicants also claimed 100,000 PLN in respect of non-pecuniary damage on account of the distress they had suffered because of the consideration of their case over many years. In this regard they referred to their advanced age, their loss of trust in the authorities and the absence of effective procedures in their case.

84. The Government, having argued that the applicants' complaints were manifestly ill-founded or, alternatively, that there had been no violation, submitted that their claims in respect of both heads of damage were irrelevant.

85. In the circumstances of the case and having regard to the parties' submissions, the Court considers that the question of the application of Article 41 of the Convention as regards pecuniary and non-pecuniary damage is not ready for decision and reserves it, due regard being had to the possibility that an agreement between the respondent State and the applicants may be reached (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

86. The applicants were paid EUR 850 in legal aid by the Council of Europe. They did not file a claim for costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection regarding the applicants' refusal to accept alternative plots and *declares* the complaint under Article 1 of Protocol No. 1 to the Convention admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention and *dismisses* the above-mentioned objection;

3. *Holds* that as far as any pecuniary and non-pecuniary damage is concerned, the question of the application of Article 41 is not ready for decision and accordingly,
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicants to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 29 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President