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

GRAND CHAMBER

CASE OF HUTTEN-CZAPSKA v. POLAND

(Application no. 35014/97)

JUDGMENT
(Friendly settlement)

STRASBOURG

28 April 2008

This judgment is final but may be subject to editorial revision.

In the case of Hutten-Czapska v. Poland,

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

Jean-Paul Costa, *President,*
Luzius Wildhaber,
Christos Rozakis,
Bostjan M. Zupančič,
Giovanni Bonello,
Peer Lorenzen,
Kristaq Traja,
Snejana Botoucharova,
Mindia Ugrekhelidze,
Vladimiro Zagrebelsky,
Khanlar Hajiyev,
Renate Jaeger,
Egbert Myjer,
Sverre Erik Jebens,
David Thór Björgvinsson,
Ineta Ziemele, *judges*
Anna Wyrozumska, ad hoc *judge,*
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 31 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 35014/97) 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 French national, Mrs Maria Hutten-Czapska ("the applicant"), on 6 December 1994.

2. The applicant was represented by Mr B. Sochański, a lawyer practising in Szczecin. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs

3. In a judgment of 19 June 2006 ("the principal judgment"), the Court (Grand Chamber) held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. It found that that violation had originated in a systemic problem connected with the malfunctioning of domestic legislation in that: (a) it had imposed, and continued to impose, restrictions on landlords' rights, including defective provisions on the determination of

rent; (b) it had not and still did not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance (see the third operative provision of the principal judgment).

In that connection, the Court directed that, in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention (see the fourth operative provision 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 was not ready for decision in so far as the applicant's claim for pecuniary damage was concerned and reserved the said question, 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, in particular, to notify the Court of any agreement that they might reach (see the fifth operative provision 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 *Hutten–Czapska v. Poland* [GC], no. 35014/97, § 247, ECHR 2006-VIII).

Lastly, the Court awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary damage and EUR 22,500 in respect of costs and expenses up to that stage of the proceedings before the Court and dismissed the remainder of her claim for non-pecuniary damage.

4. The parties, following an extension of the relevant time-limit granted at the Government's request, submitted their observations on 2 April 2007. Further pleadings were filed by the Government on 14 May 2007 and by the applicant on 1 June 2007. In her pleading, the applicant suggested that friendly-settlement negotiations, which the parties had started in March 2007, should be continued with the Registry's assistance.

5. On 21 June 2007 the Government asked the Deputy Registrar for assistance in negotiations between the parties, aimed at reaching a friendly settlement of the case.

6. The representatives of the Registry held meetings with the parties in Warsaw on 7 and 8 February 2008. On 8 February 2008 the parties signed a friendly-settlement agreement, the text of which is set out below in the "Law" part of the judgment (see paragraph 27 below).

THE FACTS

7. The applicant, who is a French national of Polish origin, was born in 1931 and lives in Poznań.

I. DEVELOPMENTS FOLLOWING THE PRINCIPAL JUDGMENT

8. On 17 May 2006, on an application of 24 August 2005 by the Ombudsman (*Rzecznik Praw Obywatelskich* – see *Hutten-Czapska* cited above, §§ 143-146), the Constitutional Court (*Trybunał Konstytucyjny*) declared unconstitutional a number of provisions of the Act of 21 June 2001 on the protection of the rights of tenants, housing resources of municipalities and on amendments to the Civil Code (*Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego* – "the 2001 Act"), in particular those on rent increases (see also paragraph 12 below).

In implementation of that judgment, Parliament enacted amending legislation of 15 December 2006, which introduced, among other things, new provisions on rent increases (see paragraphs 15-18 below).

9. On 11 September 2006 the Constitutional Court declared unconstitutional further provisions of the 2001 Act which limited municipalities' civil liability for failure to provide social accommodation to a tenant in respect of whom a landlord obtained an enforceable eviction order (see paragraphs 13, 19 and 20 below).

10. Laws on the State's financial assistance for social accommodation and on the system for monitoring the levels of rent within Poland were introduced on 8 December 2006 and 24 August 2007 respectively (see paragraphs 14 and 21 below).

11. On 29 February 2008 the Government submitted a Bill on Supporting Thermo-Modernisation and Renovations (*projekt ustawy o wspieraniu termomodernizacji i remontów*) to Parliament (see also paragraphs 22-26 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional Court's judgments

1. Judgment of 17 May 2006 (no. K 33/05)

12. The Constitutional Court partly granted the Ombudsman's application and repealed sections 8a (5), 8a (7) 1) of the 2001 Act with effect from 23 May 2006 and sections 8a (6) 1 and 9 (1) of that Act with

effect from 31 December 2006, holding that they were incompatible with Article 2 (the rule of law), Article 31 § 3 (principle of proportionality), Article 64 §§ 1 and 2 (principle of protection of property rights and principle of equality before the law) and Article 76 § 1 (duty to protect citizens against dishonest market practices) of the Constitution.

It made the following findings in particular:

> "The protection of tenants, the manner of determining rent and charges and the rights of landlords are among the issues which have frequently been examined by the Constitutional Court. On the one hand, this demonstrates the particular importance of these issues for society, on the other this may simply prove the legislature's exceptional and enduring inability to resolve them in a fair, constitutional manner respecting – *ex aequo et bono* – the rights of both parties to the legal relations between landlords and tenants. ...
>
> The Constitutional Court – with concern – notes the relevant authorities' complete lack of reaction to the criticism of [the 2001 Act] expressed in this court's judgments and the Ombudsman's appeals. In the light of the information in this court's possession, it appears that at present no legislative work aimed at removing the unconstitutionality of the provisions of the 2001 Act is being done in Parliament and that the Government's work is at an early stage of consultations within ministries. This is the situation nearly one year after the Constitutional Court issued its recommendations for Parliament. This practice – which in fact is tantamount, on the part of the legislative and executive authorities, to ignoring clear directives to implement amendments necessary from the point of view of citizens' rights and freedoms – together with the authorities' approach of waiting for the Constitutional Court's next judgment repealing unconstitutional provisions, must be assessed critically."

Referring to the challenged provisions on rent increases, the court stressed their unforeseeability, in particular the lack of clear criteria for "justified cases" where landlords could raise rent above the ceiling of 3% of the reconstruction value of the dwelling within one year – which made judicial control of rent increases illusory and arbitrary for both landlords and tenants. It criticised, as it had done in its recommendations of 29 June 2005 (see *Hutten-Czapska*, cited above, § 142), the lack of statutory elements of rent and the lack of reference to relevant factors for increases in rent, such as costs of repairs and maintenance and "decent profit" (*godziwy zysk*).

2. Judgment of 11 September 2006 (no. P 14/06)

13. The judgment was given in response to a legal question put by the Kościan District Court (*Sąd Rejonowy*), concerning the constitutionality of section 18(4) of the 2001 Act in so far as it limited the civil liability of a municipality responsible for the provision of social accommodation to a tenant in respect of whom the landlord obtained an enforceable eviction order (see also paragraph 19 below).

Pursuant to section 18(3) of the 2001 Act, as long as the municipality has not supplied social accommodation, the protected tenant pays the same amount of rent that he would have paid if the tenancy had not been terminated. According to section 18 (1) and (2), other tenants in respect of whom the tenancy has terminated and who have not vacated the flat pay compensation to a landlord corresponding to the market-related rent that the landlord could normally receive. If such compensation does not cover losses incurred by a landlord, he may seek supplementary compensation.

Section 18(4) limited the compensation which a landlord could seek from a municipality for its failure to supply social accommodation to a protected tenant to the shortfall between the market-related rent that he could normally receive and the rent that he actually received from the protected tenant, supplementary compensation not being recoverable from the municipality.

The Constitutional Court ruled that the impugned provision was incompatible with Article 77 § 1 (right to compensation for unlawful acts of public authorities) and Article 64 §§ 1 and 3 (principle of protection of property rights and prohibition of disproportionate interference with property rights) of the Constitution.

B. The Act of 8 December 2006

14. The Act of 8 December 2006 on financial assistance for social accommodation, protected accommodation, night shelters and houses for homeless (*ustawa o finansowym wsparciu tworzenia lokali socjalnych, mieszkań chronionych, noclegowni i domów dla bezdomnych*) sets out conditions for obtaining financial assistance from the State for the construction of buildings or dwellings designated for social accommodation (as defined by the 2001 Act) and for the purpose of securing other forms of accommodation for the less well-off.

Such assistance can be obtained by municipalities, unions of municipalities and public benefit organisations (*organizacje pożytku publicznego*) in connection with the construction, renovation, conversion, alteration of use or purchase of buildings. Depending on the nature of the development, the subsidies available vary from 20% to 40% of the costs of the investment.

The payments are secured by the State Economy Bank (*Bank Gospodarstwa Krajowego*) from money allocated to the Subsidies Fund (*Fundusz Dopłat*).

C. The December 2006 Amendment

15. The Act of 15 December 2006 on amendments to the 2001 Act on the protection of the rights of tenants, housing resources of municipalities

and on amendments to the Civil Code ("the December 2006 Amendment") (*ustawa o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego*) entered into force on 1 January 2007.

1. New statutory definition of expenses involved in maintenance of a rented dwelling

16. The December 2006 Amendment added a new subsection 8a to section 2(1) of the 2001 Act. Section 2(1) 8a reads:

> "If this law refers to expenses connected with maintenance of a dwelling, [this expression] should be understood as expenses incumbent on the landlord and calculated proportionally to the usable surface of the dwelling in relation to the total usable surface of all dwellings in the building, including a fee for perpetual use of the land, property tax and the [following] costs:
>
> (a) maintenance and keeping property in a proper technical condition, as well as renovations;
>
> (b) administration of property;
>
> (c) upkeep of shared premises, lifts, collective aerial installations, intercoms and greenery;
>
> (d) property insurance;
>
> (e) other [items], if they are stipulated in a [lease] agreement."

2. New provisions on rent increases

17. Following the December 2006 Amendment Section 8a (4) of the 2001 Act[1] is worded as follows:

> "An increase whereby rent or other charges for the use of the dwelling would exceed 3% of the reconstruction value of the dwelling within 1 year, may take place only in justified cases referred to in subsections 4(a) and 4(e). At the tenant's written request, the landlord shall, within 14 days from receipt of the request, give reasons for the increase and its calculation in writing, failing which the increase shall be null and void."

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1. The provision as applicable on the date of the adoption of the principal judgment read: *"An increase whereby rent or other charges for the use of the dwelling would exceed 3% of the reconstruction value of the dwelling within 1 year, may take place only in justified cases. At the tenant's written request, the landlord shall, within 7 days, give reasons for the increase and its calculation in writing."* (see *Hutten-Czapska*, cited above, § 125).

18. Amended rules for rent increases are set out in the above-mentioned new subsections 4(a)-4(e) which were inserted into section 8a. They read, in so far as relevant, as follows:

> "4(a) If the landlord does not receive income from rent or other charges for the use of a dwelling at a level covering the costs of maintenance of the dwelling, as well as securing to him a return on capital investment and profit ... an increase enabling him to reach that level shall be considered justified if it remains within the limits set out in subsection 4(b).
>
> 4(b) In an increase of rent or other charges for the use of a dwelling, the landlord may include:
>
> (1) a return on capital investment at the maximum level per year:
>
> (a) 1.5% of the investments made by the landlord for the construction or purchase of a dwelling; or
>
> (b) 10% of the investments made by the landlord for the permanent improvement of the dwelling, increasing its usable value
>
> until the full return [of such investments];
>
> (2) decent profit.
>
> ...
>
> 4(e) An increase in rent or other charges for the use of dwelling which does not exceed the average general yearly retail price index in the previous calendar year shall be considered justified. The average general yearly retail price index for the previous calendar year shall be published, in the form of a communiqué, by the President of the Central Statistical Office in the Official Gazette of the Polish Republic '*Monitor Polski*'."

3. New rule governing the civil liability of municipalities for failure to supply social accommodation to a protected tenant

19. Section 18(3) of the 2001 Act still maintains favourable provisions on the amount of rent to be paid during the period between the issue of an eviction order and the vacation of the flat by protected tenants who, on account of their low income, are entitled to social accommodation from a municipality (see paragraph 13 above and, as regards the situation concerning the provision of social accommodation to tenants under the rent-control scheme as applicable until the adoption of the principal judgment, see also *Hutten-Czapska*, cited above, §§ 79 and 89).

However, in connection with the implementation of the Constitutional Court's judgment of 11 September 2006 (see paragraph 13 above) the December 2006 Amendment added a new provision (subsection (5)) to section 18, which makes the municipality liable, under the rules of tort, for

any damage sustained by the landlord on account of its failure to provide the tenant with social accommodation. This provision reads as follows:

> "(5) If the municipality has not provided social accommodation to a person who is entitled to it by virtue of a judgment, the landlord shall have a claim for damages against the municipality, on the basis of Article 417 of the Civil Code."

Consequently, the municipality's failure is statutorily deemed to be an "unlawful omission" within the meaning of Article 417 of the Civil Code.

D. Article 417 of the Civil Code

20. Article 417 of the Civil Code reads, in so far as relevant, as follows:

> "1. The State Treasury, municipality or another legal person wielding public power by virtue of the law shall be liable for damage caused by an unlawful act or omission in the exercise of that power."

E. The August 2007 Amendment

21. The Act of 24 August 2007 on amendments to the 1997 Land Administration Act and certain other statutes ("the August 2007 Amendment") (*ustawa o zmianie ustawy o gospodarce nieruchomościami oraz o zmianie niektórych innych ustaw*) introduced an information system for monitoring the levels of rent within Poland. That system is referred to as a "rent mirror" (*lustro czynszowe*). It gives information on the average rent levels in a given region, thus creating an additional tool for civil courts adjudicating on disputes arising from rent increases by landlords (see *Hutten-Czapska*, cited above, § 138).

Under section 186 a of the 1997 Land Administration Act, a new provision introduced by the August 2007 Amendment, a manager administering property including flats for rent is obliged to supply information to the relevant local government concerning the level of rent for rented flats in relation to the building's location, its age and technical condition, the usable surface of the flat and its characteristics, resulting from tenancy agreements concluded in respect of dwellings in buildings administered by him.

Pursuant to section 6 of the August 2007 Amendment, the municipality is required to publish in the regional official gazette (*wojewódzki dziennik urzędowy*) an inventory of data concerning levels of rent for privately-owned residential dwellings situated within its administrative borders.

F. The Government's Bill

22. The Government's Bill on Supporting Thermo-Modernisation and Renovations ("the Bill") was submitted by the former Cabinet to Parliament in its original version in September 2007. Following the dissolution of Parliament and early parliamentary elections in October 2007 the legislative process was discontinued.

The present Government intend to give priority to the Bill. It was re-examined by the Cabinet, adopted on 19 February 2008 and transmitted to the Government Centre for Legislation (*Rządowe Centrum Legislacji*).

On 29 February 2008 the Bill was submitted to Parliament.

23. The Bill is part of the Government's housing programme, aimed at improving the existing housing resources. In particular, it concerns tenement houses – both State and privately-owned – that, as stated in an explanatory report on the Bill, have been neglected and fallen into disrepair as a result of the operation of the rent-control scheme, which made it impossible for landlords to receive rent that would secure investment in proper maintenance and renovations. The explanatory report states that within the next 8 years it will become necessary to demolish 40,000 tenement houses with 200,000 flats belonging to private individuals, municipalities or housing communes.

24. Under sections 3-7 of the Bill, an investor who has carried out renovation or thermo-modernisation work will be entitled to the so-called "renovation refund" (*premia remontowa*) or "thermo-modernisation refund" (*premia termomodernizacyjna*). A renovation refund means in practice a partial refund of a loan taken out for the purposes of renovating a building, including the replacement of windows, renovations of balconies, fitting of the necessary installations or equipment or alteration of the building resulting in its improvement. Under section 9, a renovation refund will constitute 20% of a loan spent by an investor but not more than 15% of the entire renovation project. Thermo-modernisation refunds are subject to ceilings of 20% and 16% respectively.

The refund payments are to be secured by the State Economy Bank from money allocated to the Thermo-Modernisation and Renovations Fund (*Fundusz Termomodernizacji i Remontów*).

25. Recently, before the friendly-settlement negotiations had begun, the Government decided to propose their own amendment to the Bill. The amendment will introduce a system of compensatory refunds (*premie kompensacyjne*) available to owners whose property was subject to the rent-control scheme between 12 November 1994 and 25 April 2005[1] (see also *Hutten-Czapska*, cited above, §§ 71-72, 136-141 and 194).

1. The date of entry into force of the Constitutional Court's judgment of 19 April 2005 (see *Hutten-Czapska*, cited above, §§ 136-141).

Given that the final stage of the preparation of the Bill by the Government has been reached and in order to accelerate the process of passing the Bill through Parliament, the Cabinet has decided that the amendment will be proposed once the parliamentary proceedings have started.

26. The Government produced the text setting out the amendments to be proposed to Parliament. Section 1(13) of the amended Bill reads:

> " A dwelling subject to the rent-control scheme is a dwelling within the meaning of [the 2001 Act] in respect of which the lease originated in an administrative decision on allocation to a dwelling or had another legal basis dating back to the time before State management of housing matters or the special lease scheme were introduced in the relevant town, and in respect of which rent was:
>
> (a) controlled;
>
> (b) statutorily limited to 3% of the reconstruction value of the dwelling within 1 year;
>
> (c) statutorily limited in its ... increase to 10% within 1 year
>
> during any period between 12 November 1994 and 25 April 2005."

Section 9a reads:

> "1. An investor – a physical person who on 25 April 2005 was an owner or heir of an owner of a building in which there was at least one dwelling subject to the rent-control scheme – shall be entitled to a refund hereinafter referred to as a 'compensatory refund'.
>
> 2. A compensatory refund in relation to one building shall be granted only once.
>
> 3. A compensatory refund shall be set aside for paying off a loan granted for carrying out:
>
> (1) a renovation project; or
>
> (2) the renovation of a one-family house
>
> if [such a project] concerns the building referred to in subsection 1.
>
> 4. Except for cases defined in subsection 3(2), a compensatory refund shall be granted together with a renovation refund."

Section 9b reads, in so far as relevant, as follows:

> "1. ... a compensatory refund shall be equal to the product of the indicator of the costs of the investment and a sum amounting to 2.1% of the conversion index for each square metre of the usable surface of the dwelling subject to the rent-control scheme and for each year in which the limitations referred to in section 2(13) applied in the period from 12 November 1994 to 25 April 2005 or, if the building was not acquired through succession, from the date of acquisition to 25 April 2005.

...

3. The formula for the calculation of a compensatory refund is set out in the annex to this law."

Under section 16, the State Economy Bank will transfer refunds to the lending bank if the project has been carried out within the time-limit set in the loan agreement.

Section 16(3) reads:

" The State Economy Bank shall transfer a compensatory refund [to the lending bank] after the amount of the loan spent [has reached the level of] the renovation refund granted."

Section 17 provides that the State Economy Bank is to keep an electronic database register of buildings in respect of which refunds have been granted.

THE LAW

I. THE FRIENDLY-SETTLEMENT AGREEMENT

27. On 8 February 2008 the parties reached a friendly settlement (see paragraph 6 above). Their agreement, signed by the parties and witnessed by the representatives of the Court's Registry, reads as follows:

"FRIENDLY SETTLEMENT

IN THE CASE OF

Hutten-Czapska v. Poland

Application no. 35014/97

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 Mrs Maria Hutten-Czapska ('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 and Mr Piotr Styczeń, the Deputy

Minister for Infrastructure, the applicant being represented by Mr Bartłomiej Sochański, an advocate practising in Szczecin.

I. PREAMBLE

Having regard to

(1) the judgment delivered on 19 June 2006 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 above violation had originated in a systemic problem connected with the malfunctioning of domestic legislation in that:

(a) it had imposed, and continued to impose, restrictions on landlords' rights, including defective provisions on the determination of rent;

(b) it had not and still did not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance;

- directed that, in order to put an end to the systemic violation identified in the present case, the respondent State must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention;

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

decided, in respect of any 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 EUR 30,000 (thirty thousand euros) in respect of non-pecuniary damage and EUR 22,500 (twenty-two thousand five hundred euros) in respect of costs and expenses 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;

(2) the Polish Constitutional Court's recommendations of 29 June 2005 as set out in paragraph 142 of the principal judgment and referred to in paragraph 239 of that judgment, in particular its findings concerning the need for clear statutory elements of rent, for clear criteria in respect of justification for rent increases by landlords, and the need to secure 'decent profit' from rent to landlords;

(3) the Polish Constitutional Court's judgment of 17 May 2006 (no. K 33/05), declaring unconstitutional, *inter alia*, the 2001 Act's defective provisions on rent increases and further stressing the need for the introduction of clear statutory criteria for elements of rent, for justification for rent increases by landlords and for securing to them the above-mentioned “decent profit” from rent;

(4) the Polish Constitutional Court's judgment of 11 September 2006 (no. P 14/06), declaring unconstitutional certain provisions of the 2001 Act in so far as they limited municipalities' civil liability for damage suffered by landlords on account of their failure to provide entitled tenants with social accommodation following an eviction order;

(5) the Act of 8 December 2006 on financial assistance for social accommodation, protected accommodation, night shelters and houses for the homeless (*ustawa o finansowym wsparciu tworzenia lokali socjalnych, mieszkań chronioninych, noclegowni i domów dla bezdomnych*), whereby the State introduced subsidies for the purpose of securing various forms of accommodation for the less well-off;

(6) the Act of 15 December 2006 on amendments to the 2001 Act on the protection of the rights of tenants, housing resources of municipalities and on amendments to the Civil Code ('the December 2006 Amendment') (*ustawa o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego*), which was enacted with a view to taking account of the findings of the Court's principal judgment as well as the conclusions of the above-mentioned recommendations and judgments by the Constitutional Court, and through which the State introduced provisions enabling landlords to increase rent in order to cover the costs of maintenance of property, to obtain a return on capital investment and to receive 'decent profit';

(7) the Act of 24 August 2007 on amendments to the 1997 Land Administration Act and certain other statutes ('the August 2007 Amendment') (*ustawa o zmianie ustawy o gospodarce nieruchomościami oraz o zmianie niektórych innych ustaw*), introducing the system of monitoring levels of rent in Poland;

(8) the Government's Bill on Supporting Thermo-Modernisation and Renovations (*rządowy projekt ustawy o wspieraniu termomodernizacji i remontów*) ('the Bill'), aimed at securing to owners partial refunds of loans taken out for the purpose of renovation and/or thermo-modernisation of tenement buildings;

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

- the fact that the restrictions on landlords' rights found by the Court to have been in breach of Article 1 of Protocol No. 1 to the Convention resulted from the difficult housing situation in Poland and the acute shortage of flats available for lease at an affordable level, a state of affairs inherited from the communist regime;

- the fact that the Polish State'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, Mrs Hutten-Czapska, and the prejudice sustained by her as a result of the violation of her right of property found by the Court in this 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 Mrs Hutten-Czapska but also general measures covering other landlords (see the fourth operative provision of the principal judgment).

III. INDIVIDUAL MEASURES

2. 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 262,500 (two hundred and sixty-two thousand five hundred) Polish zlotys (PLN) to a bank account named by her. 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.

3. The above lump sum is made up as follows:

(a) an amount of 240,000 (two hundred and forty thousand) Polish zlotys (PLN) representing the entirety of the pecuniary damage suffered by the applicant on account of the operation of the rent-control scheme. The parties, in determining this amount, have been guided by the provisions on renovation and compensatory refunds which are to be available to owners under the provisions of the above-mentioned Bill (see paragraph (1) (b) (8) above).

(b) 22,500 (twenty-two thousand five hundred) Polish zlotys (PLN), this sum being exclusive of VAT, for the costs and expenses incurred by her in addition to those covered by the award made in the principal judgment.

4. In the event of failure to pay the above sum within the said time-limit of 15 (fifteen) days referred to in paragraph 2, 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.

5. The applicant accepts that the above payment once received by her shall constitute the full and final settlement of all her claims under her application no. 35014/97 before the Court.

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

(c) waives any future claims against the Polish authorities that may arise in connection with the future implementation of the above-mentioned Bill, in particular in respect of renovation, thermo-modernisation and compensatory refunds.

IV. GENERAL MEASURES

7. The Government shall make, as an integral part of this settlement, the following declaration as to general measures which have been, or 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 *Hutten-Czapska v. Poland* (application no. 35014/97), in particular those relating to general measures to be adopted in order to secure in the respondent State's domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights, as indicated in the fourth operative provision of the judgment and explained in paragraph 239 of the judgment,

The Government of the Republic of Poland,

emphasising that, in execution of the principal judgment, they have already introduced a number of the necessary general measures as indicated in the fourth operative provision of that judgment, in particular:

- they have set up a scheme for State financial assistance as regards investment in social housing and social and protected accommodation;

- they have created, through the enactment of the December 2006 Amendment, conditions enabling landlords to receive market-related rent, including 'decent profit';

- they have introduced a mechanism for the monitoring of the levels of rent in Poland with a view to facilitating the transparency of rent increases (the so-called 'rent-mirror' (*lustro czynszowe*)),

DECLARE

(a) that they undertake to continue to implement as soon 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:

(i) they will, as rapidly as practicable, submit the above-mentioned Bill to Parliament;

(ii) they will continue their endeavours

- to introduce new, and to improve the existing, means of promoting investment in housing in relation to both private and State-owned tenement buildings, as well as in social and protected accommodation;

- to secure to landlords, in law and in practice, 'decent profit' from rent, thereby creating conditions for them to be able to receive market-related rent;

(b) that, in addition to adopting general measures designed to execute the principal judgment, the Government recognise their obligation to make available to other persons in a similar situation some form of redress for any damage caused to them by the operation of the impugned rent-control legislation. In this connection, the Government consider that the measures provided for in the above-mentioned Bill will be capable of furnishing appropriate redress.

For the Government	For the applicant
Jakub Wołąsiewicz	Bartłomiej Sochański
[Agent]	[Advocate]
Piotr Styczeń	
[Deputy Minister for Infrastructure]	

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

Michael O'Boyle	Renata Degener

Done in Warsaw, on 8 February 2008."

II. THE COURT'S ASSESSMENT

A. General rules on striking a case out of the Court's list of cases following a friendly settlement

28. 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."

29. The exercise of this power is, however, subject to the conditions set out in Article 37 § 1 and Article 38 § 1(b) of the Convention, which respectively govern the striking out of applications and friendly-settlement proceedings.

Article 37 of the Convention reads, in so far as relevant:

"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 reads, in so far as relevant:

"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."

30. Accordingly, 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" (see also *Broniowski v Poland* (friendly settlement) [GC], no. 31443/96, §§ 32-33, ECHR 2005-IX).

B. Implications of the pilot-judgment procedure applied in the case

31. The present case has been examined under the pilot-judgment procedure in view of the Court's finding of a systemic problem underlying the violation of Article 1 of Protocol No. 1 to the Convention in the applicant's individual case (see *Hutten-Czapska*, cited above, §§ 231-237 and *Broniowski v. Poland* [GC], no. 31443/96, § 190, ECHR 2004-V).

32. The Court identified the underlying problem as "a combination of restrictions on landlords' rights, including defective provisions on the determination of rent, which was and still is exacerbated by the lack of any legal ways and means enabling them at least to recover losses incurred in connection with property maintenance" (see *Hutten-Czapska*, cited above, § 237).

As regards the general measures to be applied by the Polish State to put an end to the systemic violation identified above, the Court, having regard to the social and economic impact of the violation, including the State's

duties in relation to the social rights of other persons, considered that the respondent State "must above all, through appropriate legal and/or other measures, secure in its domestic legal system a mechanism maintaining a fair balance between the interests of landlords, including their right to derive profit from property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention" (ibid., § 239).

33. One of the fundamental implications of the pilot-judgment procedure is that the Court's assessment of the situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicant and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons (see *Hutten-Czapska*, cited above, § 238; and *Broniowski* (friendly settlement), cited above, § 36).

Accordingly, in the context of a friendly settlement reached, as in the present case, after delivery of a pilot judgment on the merits of the case, the notion of "respect for human rights" requires the Court to examine the case also from the point view of "relevant general measures" (ibid.).

34. Indeed, it cannot be ruled out 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 might be led to give a judgment striking out the "pilot" application on the basis of a friendly settlement (Article 37 § 1(b) and Article 39) or awarding just satisfaction to the applicant (Article 41) (see *Broniowski* (friendly settlement), cited above, § 36).

Nonetheless, in view of the systemic 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 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 the principle of subsidiarity underlying the system (ibid.)

35. In these circumstances, in determining whether it can strike the present application out of its list pursuant to Article 39 and Article 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 the further examination of this case, the Court will 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 (see *Broniowski* (friendly settlement), cited above, § 37).

C. Terms of the friendly settlement agreed by the parties

36. The friendly settlement reached between the parties 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 in the principal judgment. In particular, it is expressly stated in the general considerations for the agreement that the terms of the settlement are intended to take into account "not only the interests of the individual applicant, Mrs Hutten-Czapska, and the prejudice sustained by her as a result of the violation of her right of property found by the Court in this particular case, but also the interests and prejudice of complainants in similar applications pending before the Court or liable to be lodged with it", as well as "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 Mrs Hutten-Czapska but also general measures covering other landlords" (see clause 1 of the agreement in paragraph 27 above).

In consequence, the parties have recognised, for the purposes of their friendly settlement, the implications of the pilot-judgment procedure applied in the case.

1. General measures

37. Over the period following the delivery of the principal judgment the respondent State enacted several laws in the area of housing. They included an amending statute – "the December 2006 Amendment" – whereby a number of provisions of the 2001 Act, most notably on the determination of rent, the criteria for judicial control of rent increases and the civil liability of municipalities for failure to provide social accommodation to protected tenants, were repealed or changed with a view to implementing two judgments of the Polish Constitutional Court declaring the defective provisions of the 2001 Act unconstitutional (see paragraphs 8-21 above). As stated in the Preamble to the agreement, the December 2006 Amendment "was enacted with a view to taking account of the findings of the Court's principal judgment as well as the conclusions of the ... recommendations and judgments by the Constitutional Court" and through the Amendment "the State introduced provisions enabling landlords to increase rent in order to cover the costs of maintenance of property, to obtain a return on capital investment and to receive 'decent profit'" (see paragraph 27 above).

Furthermore, the State introduced an information system for monitoring levels of rent within Poland, a tool designed to assist civil courts in

resolving disputes arising from rent increases by landlords. It also set up a system of subsidies available to the local government or public benefit organisations for the construction of buildings or dwellings designated for social accommodation or other forms of accommodation for the less well-off (see paragraphs 14 and 21 above).

38. A few weeks after the conclusion of the agreement, the Government submitted to Parliament their Bill on Supporting Thermo-Modernisation and Renovations. This statute, if successfully passed by the legislature, will introduce, on the one hand, a system of subsidies for owners, securing to them so-called "renovation" and "thermo-modernisation" refunds of loans taken out for the purpose of renovating a building and, on the other, a special scheme of extra "compensatory refunds" of loans available to landlords whose property was subject to the restrictions imposed by the rent-control scheme under the 1994 and the 2001 Acts, from the date of the former Act's entry into force to the date of the entry into force of the Constitutional Court's judgment of 19 April 2005 (see paragraphs 22-26 above; and *Hutten-Czapska*, cited above, §§ 136-141).

39. In the principal judgment the Court found that "the violation of the right of property in the present case is not exclusively linked to the question of the levels of rent chargeable but, rather, consists in the combined effect of defective provisions on the determination of rent and various restrictions on landlords' rights in respect of termination of leases, the statutory financial burdens imposed on them and the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with maintenance of property or to have the necessary repairs subsidised by the State in justified cases" (see *Hutten-Czapska*, cited above, § 224). The enactment of the December 2006 Amendment, together with the Government's undertaking to rapidly bring before Parliament their Bill concerning subsidies for owners (see paragraphs 11 and 22 above) and their commitment to continue the improvement of the housing situation and to secure to landlords "decent profit" from rent, "thereby creating conditions for them to be able to receive market-related rent" (see clause 7 (a) of the agreement in paragraph 27 above), are clearly aimed at removing the restrictive aspects of the 2001 Act which were mentioned in the principal judgment.

40. In particular, the new provisions introduced by the December 2006 Act clarifying the criteria for rent increases and enabling landlords to increase rent in order not only to cover costs of maintenance of property but also to receive a return on capital investment and "decent profit" seem to remove the previous legal obstacles to raising rent above rigid statutory percentage ceilings based solely on the so-called "3% reconstruction value of the dwelling", whatever the particular condition or characteristics of property. While the said "3%" remains as one of the points of reference, an increase in rent in order to secure "decent profit" has been recognised as a

"justified case" where a landlord may legitimately raise the rent (see paragraphs 15-17). This, in comparison to the previous situation as described in the principal judgment (see *Hutten-Czapska*, cited above, §§ 71-146), must be seen as a significant improvement.

41. Furthermore, the Government's commitment in the agreement "to continue to implement as soon 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" is supported by the list of effective actions aimed at securing in Poland's legal order a "mechanism maintaining a fair balance between the interests of landlords ... and the general interest of the community" (see *Hutten-Czapska*, cited above, § 239; and paragraph 32 above), which they have taken after the delivery of the judgment. Certain steps have been made in relation to the development of social accommodation (see paragraph 14 above). The new rules enlarging the scope of the authorities' civil liability for failure to provide protected tenants with social accommodation enable landlords to recover compensation for losses incurred in that connection (see paragraphs 19-20 above). It is true that the results of the State's subsidies will be seen only in a longer time-frame. Nevertheless, these two measures in combination are evidently designed to remove the effects of the previous and remaining restrictions on the termination of leases and the eviction of tenants (see *Hutten-Czapska*, cited above, §§ 76-77, 79 and 87-89).

42. As regards the issue of relief for the violation of the right of property suffered by other persons affected by the operation of the rent-control scheme, it is to be noted that the Government, as confirmed by their declaration, have recognised their obligation to make available to such persons some form of redress for any damage caused by the impugned legislation (see clause 7 (b) of the agreement in paragraph 27 above). The Government considered that the refunds provided for in the Bill would afford appropriate redress to that end.

The Court observes that the relevant legislative process is under way and that the special scheme offering compensatory refunds to persons affected by the rent-control legislation is not included in the Bill but will be proposed later by the Government (see paragraphs 22-26 above). While the Government's proposal can obviously be regarded as an important step towards securing the requisite fair balance between the interests of landlords and the general interest of the community (see *Hutten-Czapska*, cited above, § 239, and paragraph 32 above), it will fall to the Committee of Ministers to assess what impact this measure would have – if adopted – on the implementation of the principal judgment.

43. By virtue of Article 46 of the Convention, it will be for the Committee of Ministers to evaluate the general measures adopted by the Polish State 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).

However, the Court, in exercising its own competence to decide whether or not to strike the case out of its list under Article 37 § 1 (b) and Article 39 following the friendly settlement between the parties, will take into account the fact that the Government have demonstrated an active commitment to take measures aimed at resolving the systemic problem identified in the principal judgment and will rely on their 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 *Broniowski* (friendly settlement), § 42).

The above remarks are without prejudice to the merits of any pending or future cases arising out the application of existing or future legislative enactments in this field.

2. Measures in the applicant's case

44. As to the reparation afforded to the individual applicant, the Court notes that the payment to be made by the Government covers the pecuniary damage sustained by her and the costs and expenses involved in the friendly-settlement proceedings, her remaining claims under Article 41 of the Convention having been addressed by the Court's awards in the principal judgment (see paragraph 3 *in fine* above).

D. Conclusion

45. In view of the foregoing and having regard to both the general measures for addressing the systemic problem identified by the Court in the principal judgment and the individual measures of redress afforded to the applicant under the terms of the agreement, the Court is satisfied that the settlement is based on respect for human rights as defined in the Convention or its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

46. 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 reached 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 application out of its list of cases.

Done in English and in French, and notified in writing on 28 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Judge Zagrebelsky joined by Judge Jaeger;

(b) concurring opinion of Judge Ziemele.

J.-P.C.
M.O.B.

SEPARATE OPINION OF JUDGE ZAGREBELSKY JOINED BY JUDGE JAEGER

(Translation)

I regret that I am unable to adhere to the reasoning adopted by the majority of the Grand Chamber.

The acceptance of the agreement between the applicant and the Government does not pose any problems in my opinion. The applicant has obtained nearly everything she sought. The fact that the Court has already found a violation of Article 1 of Protocol No. 1 in the applicant's case and has given ample reasons for that finding means that there is no cause to continue the proceedings in the interests of respect for human rights (Article 37 of the Convention). A judgment dealing solely with the award to be made for pecuniary damage, the only issue that still had to be resolved, would be of no interest. Indeed, that is the reason why I voted in favour of striking the application out of the list of cases following the conclusion of the friendly settlement. In my view, that conclusion should also have been reached even if the Government had done nothing, in terms of taking general measures, after the judgment on the merits.

However, the interest of the present judgment and the reason for my separate opinion plainly lie elsewhere, as the lengthy statement of facts and the Court's arguments indicate. The main issue relates to the measures taken and to be taken by the State in order to afford redress for the violations of Article 1 of Protocol No. 1 that have already occurred and to prevent any breaches that might occur in future. Such measures, at this stage of the proceedings, have no connection with the applicant's situation.

The Court's focus on general measures is naturally linked to the systemic nature of the violation and to the so-called pilot-judgment procedure, whereby it adjourns its examination of applications concerning similar complaints to those being dealt with in the "pilot" case. Adjournment is clearly justified by the capacity of the measures to be taken by the Government to resolve the systemic problem and to afford redress for violations forming the subject of pending cases. Indeed, following the logic behind the pilot-judgment procedure, the Court took care in its judgment in *Broniowski v. Poland* (merits) ([GC], no. 31443/96, § 194, ECHR 2004-V) to explain the precise scope of the general measures to be taken, in stating that "the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu".

Poland has abandoned the collectivist communist system and moved to a market economy, the fundamental requirement of which is the right to private property. It is now in the process of transforming its economic system. The social problems arising during the transition are obviously complex, so it is understandable that they cannot be addressed from one day to the next. The Constitutional Court has already found on many occasions that the statutory rent system is unconstitutional. Our Court's judgment on the merits has therefore encountered a climate favourable to the reforms needed to overhaul the Polish system in accordance with the country's new political, social and legal order. It is thus perfectly natural that a number of legislative measures have been taken and that others are envisaged in the Government's programme of action.

But from the Court's point of view, what can be said of the impact of the measures that have been taken and are envisaged on pending (adjourned) cases and on similar applications that might be lodged in future?

The reply, to my mind, is clear. The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants. What, for example, is "decent profit", as referred to in the Constitutional Court's judgments and the statements by the Government in the friendly settlement? What is its value in relation to the claims that a Polish landlord might submit to the Court, which would then have to examine and rule on them? And what is the relevance in the present judicial proceedings of the Government's promises "to continue to implement as soon as possible ..." or "to continue their endeavours ..."?

These, to my mind, are undertakings which could be taken into consideration by the Committee of Ministers in its initial interim resolution. The Court, however, should be wary of making comments on that issue, both on account of the need to exercise caution in relation to future applications it might have to examine impartially in adversarial proceedings and so as not to disturb unduly the balance provided in the Convention system between its own role and that of the Committee of Ministers.

Furthermore, I consider it relevant to draw attention, *mutatis mutandis*, to the Court's approach in its judgment in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 32772/02, 4 October 2007 – now referred to the Grand Chamber), where it did not conceal its somewhat critical view of a decision by the Committee of Ministers to close its procedure for supervising the execution of a judgment of the Court solely on the basis of "the existence of the remedy of a request for revision, without awaiting its outcome". The difference between a "possibility" or "undertaking" and its "realisation", again following the logic behind the pilot-judgment procedure, should in my view be taken into account in connection with the

criteria for assessing a friendly settlement, as adopted by the Court in *Broniowski v. Poland* (friendly settlement) ([GC], no. 31443/96, § 36, ECHR 2005-IX). The Court observed in that case that "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" (see also *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, § 35, 4 December 2007).

However, similar cases already before the Court which have been adjourned (see paragraph 247 of the judgment on the merits) pending a solution in the form of Government initiatives following the pilot judgment are not affected in any way by the reforms introduced in Poland. I am referring to the fact that the applicants in such cases are seeking compensation for a violation of which they claim to be the victims.

In the present case, the Government's response is to be found at the end of the friendly settlement, where they acknowledge "their obligation to make available to other persons in a similar situation some form of redress for any damage caused to them ...". However, the Government add that they "consider that the measures provided for in the above-mentioned Bill will be capable of furnishing appropriate redress". A Bill, then, which is already appropriate and sufficient in their view, but whose content, it must be added, may change during its passage through Parliament, and which the applicants concerned will have had no opportunity to discuss (even less than Mrs Hutten-Czapska). I have no difficulty in concluding that, for the time being, there will be no impact on the other cases, which will consequently remain pending ten years after being brought before the Court.

The Court adopted the pilot-judgment procedure (with, as its corollary, the individual yet at the same time "pilot" friendly settlement) in an effort "to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. 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, so that the Court does not have to repeat its finding in a lengthy series of comparable cases" (see *Broniowski* (merits), cited above, § 193). That objective has clearly not been achieved. As is rightly pointed out in paragraph 43 of the judgment in the present case, when the Court resumes its examination of the pending cases, it will review them on a case-by-case basis, as usual.

As to the "effective resolution of a dysfunction established" and the solution of the problem in relation to other applicants, the effect I can see is a weakening – at least in terms of length of proceedings – of the protection of the rights of individuals availing themselves of their right of access to the Court (Article 34 of the Convention) and, as a consequence, an unjustified

advantage for the respondent Government, who have had the good fortune to see the Court adopt the pilot-judgment procedure and adjourn its examination of other cases. For no apparent reason, other Governments in other situations involving a systemic violation have not been so fortunate (see *Scordino v. Italy (no. 1*) [GC], no. 36813/97, ECHR 2006-V, or *Driza v. Albania*, no. 33771/02, 13 November 2007).

I should like to add a few concluding remarks. A procedure such as the one which resulted in the Court's judgment in the present case, and which took on the aspect of a Committee of Ministers procedure, calls into question the Court's role and authority without entailing any benefits for applicants, the functioning of the Court and human-rights protection in general. Execution of the operative provisions of the pilot judgment will still have to wait, notwithstanding the positive attitude of the respondent Government and the Court's direct involvement through the negotiation of a friendly settlement, which in turn purports to be of a "pilot" and hence "systemic" nature. The Court has included in the operative provisions of the pilot judgment an obligation for the State to take general measures to remedy the systemic problem and links its acceptance of the friendly settlement to the implementation of such measures, yet at the same time, and not without some contradiction, it confines itself to taking note of (and appreciating) what is merely the start of a course to be pursued.

In my view, the judgment in the present case raises the issue of whether the operation of the pilot-judgment procedure, with the adjournment of similar cases, has proved to be coherent and productive in relation to the aims pursued by the Court.

CONCURRING OPINION OF JUDGE ZIEMELE

I voted with the majority in favour of striking the application out of the list of cases in view of the friendly settlement reached by the parties (see Article 37 § 1). Nevertheless, the hesitations of Judges Zagrebelsky and Jaeger in their separate opinions are important. They raise the questions of the basis and the scope of the Court's competence as concerns the assessment of general measures "aimed at resolving the underlying general defect in the ... legal order" (see *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, § 37, ECHR 2005-IX) of the respondent State, in particular for the purposes of the friendly settlement in such circumstances as those presented by the *Hutten-Czapska* case.

As to the basis of the Court's competence, the arguments that have been used so far by the Court in explaining its approach in so-called pilot judgment cases may be summed up as follows.

First of all, the Court explains that the notion of "respect for human rights" requires it to examine cases from the point of view of "relevant general measures" (ibid., § 36). Secondly, in the *Broniowski* case the Court, by reference to the Committee of Ministers' Resolution (Res(2004)3) of 12 May 2004 and Recommendation (Rec (2004)6) of the same day, pointed out that under Article 46 it could indicate the type of measure that the respondent State might take to put an end to the systemic situation (see *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-194, ECHR 2004-V). Thirdly, through the development of the relevant case-law the Court has already created a legal basis for the assessment of cases disclosing a systemic problem.

In my view the development of the so-called pilot-judgment procedure is also linked to the notion of inherent powers of an international court. The international courts, including the European Court of Human Rights, have resorted to these powers on a regular basis. Indeed, the Court can resort to its inherent powers to make the assessment of general measures part of a friendly settlement, especially where respect for human rights so requires. Furthermore, it should not be overlooked that important elements of State consent are present allowing the Court to take this direction, not least because the invitation to the Court to identify an underlying systemic problem and its source passed through the procedure adopted in the Committee of Ministers for important matters (see Article 15 (b) and Article 20 (a) of the Statute of the Council of Europe).

As to the scope of the Court's competence, the fact that the Court has the jurisdiction to develop procedures, especially where States have invited it to do so, does not answer the question about the scope and the limits of the exercise of such a power. In this connection, the question that the International Court of Justice has faced is pertinent: "... The real question is

not one of power, but whether the exercise of power in a given case is consonant with due administration of justice"[1].

In *Hutten-Czapska*, as evidenced by the list of measures and interests to be taken into consideration (see paragraph 247 of the judgment on the merits), the structural problem is truly a large-scale one and requires the adoption and carrying out of complex measures of a legislative and administrative character with an economic and social content. Such cases raise legal and practical difficulties that the Committee of Ministers is much better equipped to monitor than the Court, especially as to the implementation of complex, long-term measures. A friendly settlement with an individual applicant where general measures are also being assessed thus constitutes a tricky matter for the Court. In my view the Court has to be very careful and it has to base its reasoning on the compliance of such an approach with the underlying principle of individual justice in the European Convention system, with the principle of due administration of justice (potentially affected persons might well be better served if and when the State implements the general measures) and with the natural limits of the action of a judicial body regarding a non-exhaustive list of suggestions it may have made following the finding of a general defect in the legal system of a respondent State.

1. Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock, Nuclear Tests Case (Australia v. France), ICJ Reports 1974, para. 23.