



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

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27 November 2009

FIRST SECTION

Application no. 29520/09
by Witomila WOŁK-JEZIERSKA and Others
against Russia
lodged on 24 May 2009

STATEMENT OF FACTS

THE FACTS

The applicants are thirteen Polish nationals listed below who live in Warszawa, Laski, Olsztyn and Wrocław in Poland and also in Staten Island, NY, USA. They are represented before the Court by Mr I. Kamiński, Mr R. Nowosielski and Mr B. Sochański, lawyers practising respectively in Kraków, Gdańsk and Szczecin, Poland, and also by Mr R. Karpinskiy and Ms A. Stavitskaya, lawyers practising in Moscow, Russia.

A. Historical facts

On 23 August 1939 the foreign ministers of Germany and the USSR signed a non-aggression treaty (known as the Molotov-Ribbentrop Pact) which included an additional secret protocol, whereby the parties agreed to settle the map of their “spheres of interests” in the event of a future “territorial and political rearrangement” of then independent countries of Central and Eastern Europe, including Poland. According to the protocol, the Eastern part of the Polish territory was “to fall on” the Soviet Union.

On 1 September 1939 Germany invaded Poland, starting World War II. On 17 September 1939 the Soviet Red Army marched into the Polish territory on the pretext that it was acting to protect the Ukrainians and Belarussians living in the eastern part of Poland because the Polish state had collapsed in the fact of the German attack and could no longer guarantee the

security of its own citizens. The Polish Army did not offer military resistance. The USSR annexed the territory newly under its control and in November 1939 declared that the 13.5 million Polish citizens who lived there were since then Soviet citizens.

In the wake of the Red Army's advance around 250,000 Polish soldiers, border guards, policemen, prison guards, State officials and other functionaries were detained. After their disarmament, about half of them were set free; the others were sent to special prison camps established by the NKVD (People's Commissariat for Internal Affairs, the predecessor of the KGB) in Kozelsk, Ostashkov and Starobelsk. On 9 October 1939 a decision was taken on quartering the Polish officer corps at the camps in Kozelsk and Starobelsk and the remaining functionaries, including policemen and prison guards, in Ostashkov.

On 5 March 1940 Mr Lavrentiy Beria, head of the NKVD, sent a written proposal to Joseph Stalin, General Secretary of the USSR Communist Party, to approve shooting up Polish prisoners of war because all of them were "enemies of the Soviet authorities, full of hatred towards the Soviet system". The proposal specified that the POW camps held 14,736 former Polish officers, officials, landowners, policemen, gendarmes, prison guards, settlers and intelligence officers, and the prisons in Western regions of Ukraine and Belarus accommodated a further 18,632 arrested former Polish citizens.

On the same day the Politburo of the Central Committee of the USSR Communist Party, the highest governing body of the Soviet Union, took the decision to consider, "using a special procedure" and employing "the capital punishment – shooting", the cases of 14,700 former Polish officers held in the prisoner-of-war camps, as well as the cases of 11,00 members of various counter-revolutionary and espionage organisations, former landowners, industrialists, officials and refugees held in the prisons of the Western Ukraine and Belarus. The cases were to be examined "without summoning the detainees and without bringing any charges, with no statement concluding the investigation and no bill of indictment". The examination was delegated to the three-person panel ("troika") composed of NKVD officials that operated on the basis of lists of detainees compiled by the regional branches of the NKVD. The decision on execution of Polish prisoners was signed by all members of the Politburo, including Stalin, Voroshilov, Mikoyan, Molotov, Kalinin and Kaganovich.

The killings took place in April and May 1940. Prisoners from the Kozelsk camp were murdered in the usual mass murder site near Smolensk, known as the Katyń forest; those from the Starobelsk camp were shot in the inner NKVD prison of Kharkov and their bodies were buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the inner NKVD prison of Kalinin (now Tver) and buried in Mednoye. The circumstances of the executions of prisoners from the prisons in Western Ukraine and Belarus have remained unknown to date.

The precise numbers of murdered prisoners were given in a written note which Mr Shelepin, chairman of the State Security Committee (KGB), addressed on 3 March 1959 to Nikita Khrushchev, the Secretary General of the USSR Communist Party: "all in all, on the basis of decisions of the Soviet NKVD's special *troika* a total of 21,857 persons were shot, of whom

4,421 persons in the Katyń forest (Smolenskiy district), 3,820 persons in the Starobelsk camp near Kharkov, 6,311 persons in the Ostashkov camp (Kalininskiy district), and 7,305 persons in other camps and prisons in Western Ukraine and Belarus”.

In 1943, the German Army discovered a burial pit in the Katyń forest and conducted the exhumation works from April to June. The remains of 4,243 Polish officers were excavated, of which 2,730 were identified. An international commission of twelve forensic experts concluded that the Soviets had been responsible for the massacre.

The Soviet authorities responded with the tactic of putting the blame on the Germans who – according to Moscow – had in the summer of 1941 allegedly taken control of the Polish prisoners and therefore had murdered them. Following liberation of the Smolensk district by the Red Army in September 1943, the NKVD set up a special commission chaired by Mr Burdenko which purported to collect evidence of German responsibility for the killing of Polish officers. In its communiqué of 22 January 1944, the commission announced that the Polish prisoners had been executed by the Germans in autumn 1941.

In his above-mentioned note of 3 March 1959, Mr Shepelin recommended to Nikita Khrushchev “to destroy all the [21,857] records on the persons shot in 1940 in the... operation... [T]he protocols of the meetings of the NKVD USSR *troika* that sentenced those persons to be shot, and also the documents on execution of that decision, could be preserved.” It is not known whether the files have been actually destroyed.

B. The applicants and their relationship with the massacre victims

The first and second applicants, Ms Witomiła Wołk-Jeziarska and Ms Ojcumiła Wołk, were born respectively in 1940 and 1917. They are daughter and wife of Mr Wincenty Wołk, born in 1909, who had been lieutenant of heavy artillery in the Polish Army before World War II. He had been taken prisoner-of-war by the Red Army in the night of 19 September 1939 and held in Kozelsk special camp (listed in position 3 on the NKVD dispatching list 052/3 04.1940). He had been killed on 30 April 1940 and buried in Katyń. His body had been identified during the 1943 exhumation (no. 2564).

The third applicant, Ms Wanda Rodowicz, was born in 1938. She is granddaughter of Mr Stanisław Rodowicz, born in 1883, who had been a reserve officer in the Polish Army. He had been taken prisoner-of-war by the Red Army at the Hungarian Border around 20 September 1939 and held in Kozelsk special camp (listed in position 94 on the list 017/2). He had been killed and buried in Katyń. His body had been identified during the 1943 exhumation (no. 970).

The fourth applicant, Ms Halina Michalska, was born in 1929. She is daughter of Mr Stanisław Uziemiło, born in 1929. An officer of the Polish Army, Mr Uziemiło had been taken a POW by the Soviets near Białystok, Poland, and detained at the special NKVD camp at Starobelsk (pos. 3400). Presumably killed in Kharkov and buried at Pyatikhatki near Kharkov (now Ukraine).

The fifth applicant, Mr Artur Tomaszewski, was born in 1933. He is son of Mr Szymon Tomaszewski, born in 1900. The fifth applicant's father, a commander of the police station at the Polish-Soviet border in Kobylia, had been arrested there by the Soviet troops, taken to the special NKVD camp at Ostashkov (position 5 on the list 045/3). He had been killed in Tver and buried in Mednoye.

The sixth applicant, Mr Jerzy Lech Wielebnowski, was born in 1930. His father, Mr Aleksander Wielebnowski, born in 1897, had been a police officer working in Luck in the eastern Poland. In October 1939 he had been arrested by the Soviet troops and placed in the Ostashkov camp (position 10 on the list 033/2). He had been killed in Tver and buried in Mednoye.

The seventh applicant, Mr Gustaw Erchard, was born in 1935. His father, Mr Stefan Erchard, born in 1900, had been headmaster of a primary school in Rudka, Poland. He had been arrested by the Soviets and detained at the Starobelsk camp (pos. 3869). Presumably killed in Kharkov and buried at Pyatikhatki.

The eighth and ninth applicants, Mr Jerzy Karol Malewicz and Mr Krzysztof Jan Malewicz, born respectively in 1928 and 1931, are children of Mr Stanisław August Malewicz. Their father had been born in 1889 and served as a doctor in the Polish Army. He had been taken prisoner-of-war at Równe, Poland, and kept at the Starobelsk camp (pos. 2219). Presumably killed in Kharkov and buried at Pyatikhatki.

The tenth and eleventh applicants, Ms Krystyna Krzyszkowiak and Ms Irena Erchard, born respectively in 1940 and 1936, are daughters of Mr Michał Adamczyk. Born in 1903, he had been the commander of the Sarnaki police station. He had been arrested by the Soviets, detained at the Ostashkov camp (position 5 on the list 037/2), killed in Tver and buried in Mednoye.

The twelfth applicant, Ms Krystyna Mieszczankowska, born in 1930, is daughter of Mr Stanisław Mielecki. Her father, a Polish officer, had been born in 1895 and was kept at the Kozelsk camp after his arrest by the Soviet troops. He had been killed and buried in Katyń, his body had been identified during the 1943 exhumation.

The thirteenth applicant, Mr Krzysztof Romanowski, born in 1953, is a nephew of Mr Ryszard Żołędziowski. Mr Żołędziowski, born in 1887, had been kept at the Starobelsk camp (pos. 1151) and presumably killed in Kharkov and buried in Pyatikhatki.

C. Investigation (case no. 159)

On 22 March 1990 the Kharkov prosecutor's office opened, on its own initiative, a criminal investigation upon the discovery of the mass graves of Polish citizens in the city's wooded park. On 6 June 1990 the Kalinin (Tver) prosecutor's office instituted a criminal case into "the disappearance" in May 1940 of the Polish prisoners-of-war held in the NKVD camp in Ostashkov. On 27 September 1990 the Chief Military Prosecutor's office joined the two criminal cases under number 159 and assigned it to a group of military prosecutors.

On 21 September 2004 the Chief Military Prosecutor's office decided to discontinue criminal case no. 159 on the ground that the persons allegedly

responsible for the crime had already died. That decision was made officially public only on 11 March 2005 at a press-conference by the Chief Military Prosecutor Mr Savenkov.

In the meantime, on 22 December 2004, as many as 116 volumes of the case-file – out of the total 183 volumes – were declared to contain State secrets and were classified. The decision of 21 September 2004 was also classified.

D. Appeal against the decision to discontinue the investigation

On 20 August 2008 counsel for the applicants filed a judicial appeal against the decision of 21 September 2004 to discontinue the criminal proceedings. They submitted that the applicants' relatives had been among the imprisoned Polish officers whose execution had been ordered by the Politburo of the USSR Communist Party on 5 March 1940. However, the applicants had not been granted the victim status in criminal case no. 159 and could not file motions and petitions, have access to the file materials or receive copies of the decisions. They also claimed that the investigation had not been effective, contrary to the requirements of Article 2 of the Convention, because the applicants had not been granted the victim status and because no attempt had been made to take biological samples from them to identify the excavated remains.

On 14 October 2008 the Military Court of the Moscow Command rejected the appeal. It found that in 1943 the International Commission and the Technical Commission of the Polish Red Cross had excavated the remains and then reburied them, without identifying the bodies. A subsequent excavation in 1991 had only identified 22 persons and the applicants' relatives had not been among those identified. The Military Court acknowledged that the names of the applicants' relatives had been included in the NKVD lists for the Ostashkov, Starobelsk and Kozelsk camps, however, "the 'Katyn' investigation... had not established the fate of the said individuals." As their bodies had not been identified, there existed no grounds to grant the victim status to their relatives. Moreover, classified materials could not be made accessible to "representatives of foreign States".

Counsel submitted a statement of appeal, in which they pointed out that the lack of information on the fate of the applicants' relatives had been the result of ineffective investigation. The identification of the twenty-two persons had been done only on the basis of the military identify tags found at the burial places and the investigators had not undertaken any measures or commissioned any expert examination to identify the excavated remains. Furthermore, it was a publicly known fact that the 1943 excavation had uncovered the remains of 4,243 people, of which 2,730 individuals had been identified. Among those identified were three persons whose relatives had been the claimants in the proceedings. Finally, counsel emphasised that the Katyn criminal case file did not contain any information which would support the conclusion that any of the Polish officers held in the Soviet camps had remained alive or died of natural causes.

On 29 January 2009 the Military Panel of the Supreme Court of the Russian Federation upheld the judgment of 14 October 2008 in its entirety.

It repeated verbatim the findings of the Moscow Military Court, but also added that the decision of 21 September 2004 could not be quashed because the prescription period had expired and because the proceedings in respect of certain suspects had been discontinued on “rehabilitating grounds”.

E. Proceedings for rehabilitation of the applicants’ relatives

The applicants asked several times different Russian authorities, first of all the Chief Military Prosecutor’s office, for information on the Katyn criminal investigation and for rehabilitation of their relatives.

On 18 January 2006 the first and second applicants were informed that their rehabilitation requests were rejected as the Chief Military Prosecutor’s office could not establish on what legal grounds their husband and father had been sentenced to death.

On 13 March 2008 the Chief Military Prosecutor’s office rejected a renewed request for rehabilitation submitted by counsel on behalf of all the applicants. It stated that it was unable to determine the legal basis for repression of Polish citizens in 1940.

Counsel lodged a judicial appeal against the prosecutors’ refusal.

After several rounds of judicial proceedings, on 24 October 2008 the Khamovnicheskiy District Court of Moscow dismissed the appeal. It found that there was no reasons to assume that the ten Polish prisoners-of-war (the applicants’ relatives) had been actually killed and that Russian counsel had no legal interest in the rehabilitation of the Polish citizens.

On 25 November 2008 the Moscow City Court rejected, in a summary fashion, the appeal against the District Court’s judgment.

COMPLAINTS

The applicants complained under Article 2 of the Convention that the Russian authorities had not carried out an adequate and efficient criminal investigation into the circumstances leading to, and surrounding, the death of their relatives. In particular, the applicants were not granted the victim status in criminal case no. 159, the remains of only twenty-two individuals were identified, the authorities classified the decisions and materials collected during the Katyn investigation, and the readily available evidence was disregarded by the prosecutors and courts.

The applicants complained that the way the Russian authorities reacted to their requests and applications amounted to the treatment proscribed under Article 3 of the Convention. This was exemplified by the fact that the Russian courts’ had consistently put into doubt that the applicants’ relatives had been killed in 1940 by the Soviet authorities.

The applicants complained under Article 6 of the Convention that the Russian authorities refused them the victim status in criminal case no. 159.

The applicants complained under Article 8 of the Convention about the Russian authorities’ refusal to rehabilitate their relatives and their refusal to give them access to the case file which could have indicated, in particular, the burial places of their relatives. The applicants also invoked Article 9 of

the Convention in connection with the latter issue because of their inability to pay religious respect to their relatives.

Finally, the applicants complained under Article 13 of the Convention that they were denied an effective remedy which would have been able to reveal the true circumstances, in which their relatives had been killed. They pointed out that the above-mentioned deficiencies of the criminal investigation undermined the efficiency of other remedies, as the success of civil-law measures was made dependent on the result of criminal investigation.

QUESTIONS TO THE PARTIES

1. Having regard in particular to the Court's finding on its jurisdiction *ratione temporis* in the *Varnava and Others* case (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 136-150, 18 September 2009), was the investigation into the death of the applicants' relatives carried out by the Russian authorities, adequate and efficient as required by Article 2 of the Convention? In particular, were the applicants given sufficient access to the materials of the investigation, including the collected evidence and procedural decisions?

2. The Government are requested to produce a copy of the decision to discontinue criminal proceedings in the "Katyń" case (no. 159) dated 21 September 2004.

3. The parties are requested to produce documents concerning the applicants' relatives, such as the relevant entries in the NKVD lists and the protocols of the 1943 excavations in the part concerning the identification of three of the applicants' relatives.

4. Having regard to the applicants' attempts to obtain information about their disappeared relatives and the way in which the Russian authorities responded to those enquiries, were the applicants subjected to the treatment of the kind proscribed by Article 3 of the Convention (see, for example, *Gongadze v. Ukraine*, no. 34056/02, §§ 184-186, ECHR 2005-XI)?

5. Was it compatible with Article 6 of the Convention that the applicants were denied the status of the victims in the criminal proceedings (case no. 159) and/or access to the documents concerning the investigation into the death of their relatives?

6. Finally, did the applicants have an effective domestic remedy for their grievances at their disposal, as required by Article 13 of the Convention?