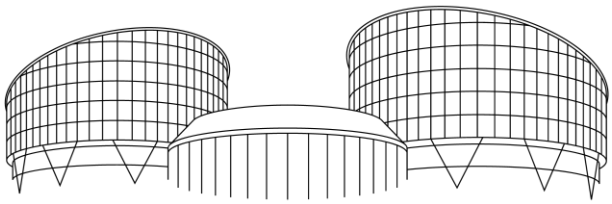

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF WALDEMAR NOWAKOWSKI v. POLAND

(Application no. 55167/11)

JUDGMENT
(merits)

STRASBOURG

24 July 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Waldemar Nowakowski v. Poland**,**

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

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 55167/11) 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 a Polish national, Mr Waldemar Nowakowski ("the applicant"), on 22 August 2011.

2. The applicant, who had been granted legal aid, was represented by Mr M. Heleniak, a lawyer practising in Warszawa. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant complained about an alleged breach of his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the Convention.

4. On 17 November 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1933 and lives in Warsaw.

6. The applicant is a veteran of the Polish Resistance during the Second World War and a former professional officer of the Polish Army. His veteran status on the grounds of his involvement in the underground Scouts

movement during that war was recognised by an administrative decision given on an unspecified date by the Director of the Veterans' Office.

7. For the last fifty years the applicant collected antique arms and weapons from the period of the Second World War and earlier.

8. On 7 and 8 July 2008 the police searched the applicant's home and summer cottage. They confiscated the applicant's collection which at that time numbered 199 pieces.

9. On 16 July 2008 the Director of the Warsaw Uprising Museum ("the Museum") in Warsaw issued a statement for the purposes of an investigation against the applicant which had been instituted immediately after the search and seizure. He stated that the applicant had been co-operating with the Museum as a specialist in old weaponry and that on a number of occasions he had lent certain pieces of his collection for the purposes of their being exhibited at the Museum. He stated that the applicant's expertise was highly valued by the Museum.

10. On 8 July and 29 August 2008 the prosecuting authorities ordered that an expert opinion be prepared as to whether the confiscated pieces were to be regarded as arms within the meaning of the legislation governing the licensing of possession of arms.

11. On 18 October 2010 the Director of the Veterans' Office sent a letter to the Warszawa Wola District Court. He stated that the applicant's integrity and the fact that he was a law-abiding citizen were well-known. He had been decorated on a number of occasions for his involvement in the Polish Resistance during the Second World War. By accumulating a unique collection of historical weapons, uniforms and military equipment he had rendered outstanding services in the dissemination of knowledge about the history of Poland. He had financed this collection himself, at considerable personal sacrifice. The fact that criminal proceedings had been instituted against him had met with general disbelief. It had been universally considered among persons interested in military history that his collection could not possibly be regarded as posing any threat to public order. On the contrary, it had played a significant role in teaching younger generations about the history of Poland and about the fight for the country's independence. The applicant's services not only merited recognition but should also be taken into consideration by the court in the assessment of his guilt and any sentence to be imposed on him.

12. On 16 July 2010 the prosecution ordered that 24 pieces of the collection should be returned to the applicant, relying on an expert opinion prepared for the purposes of the investigation. The expert concluded that these items were only parts of weapons and therefore a licence to possess them was not necessary. On 20 July 2010 a bill of indictment against the applicant on charges of illegal possession of arms was filed with the Warszawa Wola District Court.

13. On 18 November 2010 the Warszawa Wola District Court discontinued the criminal proceedings against the applicant concerning charges of illegal possession of arms, contrary to Article 263 § 2 of the Criminal Code.

14. The court first listed 171 pieces of the applicant's collection, the oldest of them produced in 1889.

15. The court noted that the applicant had explained that he had been collecting old arms, mostly memorabilia of the Second World War as well as other older pieces, for almost fifty years. He had previously on numerous occasions made parts of his collection available on loan to various museums. He had been collaborating as an expert in old weaponry with the Warsaw Uprising Museum. The court noted that the applicant had explained that in order to prevent unauthorised third parties from having access to the collection he had kept it in his apartment which was secured with three locks and equipped with an alarm. He had also taken the necessary technical measures to make it impossible to use most of the weapons in his possession as arms. He declared his willingness to take such measures also in respect of the remaining pieces.

16. The court acknowledged that no criminal intent to use the arms to anyone's detriment could reasonably be ascribed to the applicant. However, he must have known that the possession of arms without a permit was unlawful. He had not availed himself of the possibility of legalising his collection by having recourse to the 2005 Arms Legalisation Act, devised specifically with a view to making it possible for Second World War veterans and other persons having fought for the independence of Poland to regularise arms acquired in the past and in connection with their involvement in the Polish Resistance.

17. The court acknowledged that there had been no evidence whatsoever that the applicant had ever used the arms with any criminal intent. It emphasised that the applicant was, at that time, 77 years old, a war veteran who had fought in the Warsaw Uprising and who was a retired professional officer of the Polish Army with no criminal record. He was a law-abiding citizen.

18. The court observed that the applicant's submissions as to the part of the collection which had been put out of action had been partly confirmed by the experts. The experts had found that it was impossible to use most of the pieces as weapons, but that some of them could be made to work again ("*ze znacznej większości egzemplarzy broni nie było możliwe oddanie strzału, niemniej jednak z części egzemplarzy broni możliwym było oddanie strzału, jak również możliwym było przywrócenie cech użytkowych broni*").

19. The court concluded that the offence was minor in nature and discontinued the criminal proceedings against the applicant, referring to Article 17 paragraph 1 (3) of the Criminal Code. At the same time, the

court decided to apply Article 100 of the Criminal Code in conjunction with its Article 39 and to confiscate 171 pieces of the collection.

20. The court, explaining why it decided to avail itself of its discretionary power to confiscate the entire collection, stated that dividing up the collection by returning to the applicant those pieces which had already been put out of action would seriously diminish its value. It noted that the collection should, because of its historical interest, be handed over to an institution capable of securing appropriate storage and display conditions for it.

21. The applicant and the prosecution appealed. The applicant essentially challenged the confiscation measure.

22. By a decision of 22 February 2011 the Warsaw Regional Court upheld the first-instance decision. It fully endorsed the reasoning of the lower court. It further noted that the confiscation of the collection should not lead to its destruction. The State authorities should be well aware of the historical value of the collection ("*organy państwa winny zdawać sobie sprawę z ... wartości historycznej zabezpieczonych przedmiotów*").

23. On 16 March 2011 the Warszawa Wola District Court invited the Warsaw Uprising Museum to indicate whether they would be interested in the applicant's collection. On 28 June 2011 the Director of the Museum replied, indicating that the Museum wished to take certain pieces selected by P.B., the Museum's expert. On 16 September 2011 the court authorised the transfer of these pieces to the Museum and on 17 October 2011 they were transferred.

24. On 16 September 2011 the same court requested the Office for the Protection of Monuments in Warsaw, the Regional Curator for Monuments (*Urząd Ochrony Zabytków w Warszawie, Mazowiecki Wojewódzki Konserwator Zabytków*), to indicate the name of a cultural institution which would accept the remainder of the collection. A number of cultural institutions expressed their interest, including the Warsaw Uprising Museum. The Warsaw Uprising Museum also expressed interest in the remainder of the collection covered by the forfeiture decision. The Regional Curator for Monuments gave a positive opinion in this regard. This part of the collection is currently being transferred to the Museum.

II. RELEVANT DOMESTIC LAW

25. Article 21 of the Constitution provides:

> "1. The Republic of Poland shall protect property and a right to inherit.
>
> 2. Expropriation is allowed only in the public interest and against payment of just compensation."

26. Article 31of the Constitution reads:

> "Freedom of the person shall be legally protected.
>
> Everyone shall respect the freedoms and rights of others. No one shall be compelled to do anything which is not required by law.
>
> Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

27. Article 79 § 1 of the Constitution provides as follows:

> "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

28. Under its settled case-law, the Constitutional Court has jurisdiction only to examine the compatibility of legal provisions with the Constitution and is not competent to examine the way in which courts interpreted applicable legal provisions in individual cases (e.g. SK 4/99, 19 October 1999; Ts 9/98, 6 April 1998; Ts 56/99, 21 June 1999).

29. Article 17 paragraph 1(3) of the Code of Criminal Procedure provides that criminal proceedings shall be discontinued if the seriousness of a criminal offence is negligible.

30. Article 100 of the Criminal Code provides that where the seriousness of a criminal offence is negligible, the court may order confiscation, within the meaning of Article 39 of that Code, of objects connected with the offence.

31. Article 263 paragraph 2 of the Criminal Code penalises possession of weapons or ammunition without a licence.

THE LAW

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

32. The applicant complained that the confiscation of his collection had breached his right to the peaceful enjoyment of his possessions within the meaning of 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

33. The Government submitted that the applicant had failed to exhaust relevant domestic remedies in respect of his complaint. He should have lodged a constitutional complaint with the Constitutional Court under Article 79 of the Constitution of Poland.

34. The applicant disagreed and argued that he had exhausted all relevant remedies. He submitted that he had no objections as regards the compatibility of Articles 39 and 100 of the Criminal Code as such with the Constitution, but solely the manner in which they had been interpreted and applied by the criminal courts to the circumstances of his case.

35. The Court considers that in the circumstances of the present case the alleged breach of the applicant's right cannot be said to have originated from the direct application of Articles 39 or 100 of the Criminal Code. Rather, the alleged violation resulted from the manner in which these provisions were interpreted and applied by the courts in the applicant's case. However, the established jurisprudence of the Constitutional Court indicated that constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision were excluded from its jurisdiction. The Court has already examined on many occasions the Government's objections based on the alleged failure to exhaust domestic remedies by way of constitutional complaints and rejected them (see, among many other authorities, *Długołęcki v. Poland*, no. 23806/03, § 25, 24 February 2009; and *R.R. v. Poland*, no. 27617/04, § 116, 26 May 2011). It sees no grounds on which to depart from this approach in the present case.

36. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 parties' submissions

38. The applicant submitted that the domestic courts had found that he had not committed a crime and had therefore discontinued the criminal proceedings. Nonetheless, they had decided to confiscate his collection in its entirety. This decision was not in compliance with the proportionality principle. The courts had failed to examine properly whether the confiscation was indeed necessary in the public interest. In any event, the vast majority of pieces constituting the collection could no longer be used as weapons and the courts were well aware of this.

39. The applicant further argued that it had not been open to him to have recourse to the provisions of the June 2005 Act referred to by the domestic court with a view to obtaining a licence for his collection. This Act had merely made it possible to obtain an amnesty in respect of arms personally acquired during the Second World War or afterwards by the resistance fighters in connection with or for the purposes of fighting for Poland's independence. The procedure foreseen under the provisions of that Act could not reasonably be used in respect of an arms collection consisting of 199 pieces.

40. The applicant further submitted that the collection represented a substantial pecuniary value. Furthermore, it had considerable sentimental value for him.

41. The applicant concluded that the forfeiture order made in respect of an entire collection of historical arms which could no longer be used as weapons constituted an excessive individual burden and was in breach of Article 1 of Protocol No. 1 to the Convention.

42. The Government argued that under the Constitution of the Republic of Poland and Article 1 of Protocol No. 1 to the Convention ownership was not *ius infinitum*. A State had the right to enact such laws as it deemed necessary to control the use of property in accordance with the general interest. The forfeiture of the arms held without a licence had amounted to an interference with the applicant's right to the peaceful enjoyment of his possessions. It had served the public interest as it had been ordered in order to safeguard public safety and to control the possession of arms by individuals. All States were entitled to control access to weapons as a fundamental power vested in them on the strength of their sovereignty. They were also under a positive obligation to ensure safety by way of licensing the possession of weapons. The States enjoyed a margin of appreciation in this regard. Under the Court's case-law the scope of this margin varied depending on the issue concerned in a case. The State's margin of appreciation in issues concerning arms control was particularly wide. A requirement to obtain a licence to possess weapons fell within the State's

margin of appreciation and could not be regarded as imposing an excessive individual burden on the applicant. The licensing system would be illusory if it was not attended by criminal sanctions or by the possibility to order forfeiture of illegally possessed arms.

43. The Government stressed that in the present case the courts had decided not to find the applicant guilty of a criminal offence of illegal possession of arms. They had decided to discontinue the proceedings against him, finding that the offence was minor in nature. However, the mere fact that the applicant had possessed weapons without a licence amounted to a criminal offence. The courts had had no choice but to order forfeiture, it being the only possible way to eliminate the unlawfulness created by the applicant's possession of weapons without a licence. Although most of the weapons constituting the collection could no longer be fired, the experts commissioned by the prosecuting authorities had found that it was technically possible to reverse that.

2. The Court's assessment

44. Article 1 of Protocol No. 1 to the Convention comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among many authorities, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V; *Barbara Wiśniewska v. Poland*, no. 9072/02, § 93, 29 November 2011).

45. It is not in dispute between the parties that the confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. It remains to be determined whether the measure was covered by the first or second paragraph of that Convention provision.

46. The Court has usually held in its case-law that a confiscation measure given in the context of criminal proceedings, although it involves deprivation of possessions, nevertheless constitutes a control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; *C.M. v. France* (dec.), no. 28078/95, 26 June 2001; and *Sun v. Russia*, no. 31004/02, § 25, 5 February 2009). However, in the present case the court discontinued the criminal proceedings, finding that the seriousness of the alleged offence was negligible. The court had regard to the applicant's

character and to the lack of criminal intent on his part (see paragraph 17 above). The circumstances of the case were therefore fundamentally different from cases where confiscation orders were made in the context of criminal proceedings concerning charges of serious or organised crime and where there was a strong suspicion or certainty confirmed by a judicial decision that the confiscated assets were the proceeds of an offence (see *Phillips v. the United Kingdom*, no. 41087/98, §§ 9-18, ECHR 2001-VII), which were deemed to have been unlawfully acquired (see *Riela* and *Arcuri*, both cited above, and *Raimondo v. Italy*, 22 February 1994, § 29, Series A no. 281-A) or were intended for use in illegal activities (see *Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June 2002). Furthermore, the confiscation order concerned the entire collection, with no distinction being made between objects which could still be qualified as weapons within the meaning of the arms control legislation and those which, as the court acknowledged, had been disabled (see paragraph 18 above). The Court is of the view that in these circumstances the confiscation order covering the entire collection should be regarded as a deprivation of property.

47. As the Court has held on many occasions, interference with property rights must be prescribed by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, the Court must determine whether a fair balance was struck between the demands of the general interest and the interest of the individuals concerned. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98; *Schirmer v. Poland*, no. 68880/01, § 35, 21 September 2004; *Wieczorek v. Poland*, no. 18176/05, § 59-60, 8 December 2009; compare and contrast Ian Edgar (Liverpool) Limited v. the United Kingdom (dec.), no. 37683/97, 25 January 2000).

48. In that connection, the Court notes that the confiscation of the applicant's property was ordered pursuant to Article 100 of the Criminal Code in conjunction with its Article 39. It therefore accepts that that interference was prescribed by law.

49. Furthermore, assuming that the interference complained of pursued a legitimate aim in the general interest, within the meaning of Article 1 of Protocol No. 1 to the Convention, the Court has to examine whether a proper balance had been struck between that aim and the applicant's rights.

50. In this connection, the Court reiterates that, where possessions are confiscated, the fair balance depends on many factors, including the owner's behaviour. It must therefore determine whether the Polish courts had regard to the applicant's degree of fault or care (see *AGOSI*, cited above, § 54; *Silickienė v. Lithuania*, no. 20496/02, § 66, 10 April 2012).

51. Turning to the circumstances of the present case, the Court notes the Government's argument that the authorities decided to discontinue the criminal proceedings against the applicant, having regard to the minor nature of the offence. However, it is not the decision to discontinue the proceedings, but the decision to order forfeiture of the applicant's collection which is the subject of the Court's scrutiny in the present case.

The Court notes that Article 100 of the Criminal Code did not oblige the courts to order the forfeiture of the collection. It only conferred on them a discretionary power to do so when discontinuing criminal proceedings. The courts decided to avail themselves of that power. In the absence of a legal obligation to order the forfeiture, it is relevant to consider, in the context of the examination of whether the fair balance has been struck in the present case, how the authorities exercised their discretion. In this connection, the Court will have regard to the grounds on which the domestic authorities relied when ordering the forfeiture.

52. The first-instance court noted that the applicant was a 77-year-old war veteran, had fought in the Warsaw Uprising, was a retired professional officer of the Polish Army and was a law-abiding citizen with no criminal record. Furthermore, it has not been shown or even argued before the Court that his possession of the collection of arms was regarded by the domestic authorities as posing any risk of inappropriate use on his part. Nor was it argued, let alone shown, that he had gathered the arms in any other capacity than an amateur collector (compare and contrast with *Silickienė v. Lithuania*, referred to above, where the applicant had directly participated in payments for smuggled goods and must have known that the confiscated property could only have been purchased with the proceeds of crime).

53. The Court further stresses that the domestic courts were aware of these circumstances (see paragraphs 15-16 above). However, they still decided to confiscate the collection. The applicant's personal circumstances did not therefore have any practical impact on the confiscation order. The Court is therefore of the view that the domestic courts failed to take into account the applicant's personal situation and characteristics (see, *Pincová and Pinc v. the Czech Republic*, no. 36548/97, § 61, ECHR 2002-VIII, *mutatis mutandis).*

54. Furthermore, the Court cannot but note that the applicant started his collection approximately fifty years ago. The domestic court acknowledged this fact in its decision. The authorities had never taken any interest in the collection before July 2008 when they searched the applicant's home and summer cottage. Moreover, it was not in dispute, either before the domestic courts or before the Court, that there had ever been any incident involving improper use of the collection by third parties which could indicate that the applicant had failed to take appropriate measures in order to prevent unauthorised persons from having access to the collection.

55. The Court further observes that the domestic court was aware that not all the pieces of the collection could still be used as weapons as the applicant had taken measures to disable them. The Court notes that the court failed to identify the pieces still in working order and those which had been disabled. Nonetheless, the court decided to order confiscation of the collection in its entirety. When doing so, the court had regard to the historical value that the collection represented. It was further of the view that the division of the collection by returning certain pieces to the applicant would seriously diminish its historical value. It therefore chose to confiscate the entire collection essentially in order to maintain its value.

56. In the Court's view, it can be reasonably accepted that the collection of old weapons, accumulated by an acknowledged specialist, has a significant pecuniary value. However, no thought had been given by the courts to whether the confiscation of the collection in its entirety imposed an excessive burden on the applicant, either as regards the pecuniary or sentimental value the collection had for him. Likewise, the court failed to consider any alternative measures which could have been taken in order to alleviate the burden imposed on the applicant, including by way of seeking registration of the collection.

57. The Court notes that subsequently the domestic court contacted a number of public institutions asking them whether they would be interested in acquiring the collection. As a result, part of the applicant's collection was transferred to the Warsaw Uprising Museum in October 2011. Furthermore, that museum expressed interest in obtaining the remainder of the collection. The Court notes that the judicial authorities took measures in order to make the applicant's collection available to the public. However, it cannot overlook the fact that the applicant was deprived of his property and lost a collection of considerable historical and presumably also financial value, while ultimately a public museum acquired it for free.

58. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant wished to have his collection returned to him. In the alternative, he claimed 300,000 Polish zlotys (PLN) for pecuniary damage. He submitted that he was unable to submit an estimate of the value of the confiscated collection as it was no longer in his possession. He further claimed PLN 50,000 in respect of non-pecuniary damage suffered as a result of the circumstances of the case.

61. The Government contested this claim.

62. The Court notes that the applicant first and foremost wishes to have the collection returned to him and that its value is disputed by the parties. In these circumstances the Court considers that the question of pecuniary damage is not yet ready for decision. It should therefore be reserved to enable the parties to reach an agreement (Rule 75 §§ 1 and 4 of the Rules of Court). In this connection, the Court is of the view that in the circumstances of the case the most appropriate form of redress of the violation found would be the restitution to the applicant of those elements of the collection which could be lawfully restored to him.

63. Moreover, the Court accepts that the applicant undoubtedly suffered distress and anxiety (see *Luczak v. Poland*, no. 77782/01, § 64, 27 November 2007). It therefore awards him EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

64. The applicant did not submit a claim in respect of costs and expenses.

C. Default interest

65. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that, as regards pecuniary damage resulting from the violation found, the question of just satisfaction is not ready for decision and accordingly
   (a) *reserves* this question;
   (b) *invites* the Government and the applicant to submit, within three months from the date of notification of this judgment, their written observations on this question 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 it if need be;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano is annexed to this judgment.

D.T.B.
F.A.

CONCURRING OPINION OF JUDGE DE GAETANO

1. Although I agree that in this case there has been a violation of Article 1 of Protocol No. 1, I cannot fully subscribe to some of the reasoning and arguments leading up to this conclusion.

2. The violation in this case depends to an appreciable extent on the peculiar nature of three provisions of Polish law – Articles 17 paragraph 1(3), 39 and 100 of the Criminal Code (§§ 29 and 30, above) – which, when applied in combination to the facts of the case, create a manifest imbalance between the public interest and the rights of the applicant. To be sure, in principle there appears to be nothing objectionable if a provision of law provides for the confiscation, or indeed, for the removal or the destruction, of an object the existence or possession of which is in breach of some provision of law *even if* the person concerned is acquitted of the criminal charge of illegal possession of *that object*. This was the general approach taken by the Court in *Saliba v. Malta* (no. 4251/02, 8 November 2005). This point is only very vaguely reflected in the last sentence of § 62 of the present judgment. In the instant case, however, we have neither an acquittal nor a conviction, but a discontinuation of the proceedings coupled with a *judicial acknowledgment* that the offence was of a "negligible" nature in terms of seriousness – *de minimis non curat praetor*. In the present case this suffices for a finding of disproportionality, and this is where the Court's reasoning should, in my view, have stopped. In many jurisdictions trifling offences are dealt with, upon conviction, by a simple reprimand or admonition; on the contrary in this case the applicant had the benefit of *not being found guilty* annihilated for all practical purposes by the confiscation of a priceless collection. The domestic court's views on the character of the applicant and on "the lack of criminal intent on his part" (§§ 46 and 17) are irrelevant (apart from the fact that it is not clear whether by criminal intent that court was referring to a specific intent or to motive; as the respondent Government rightly observed, the applicant, as a retired army commissioned officer and an expert on weapons, could not but have known that at least some of the weapons required licensing). The reasons contained in §§ 52 to 57 are irrelevant to a finding of a breach of the Convention on the facts of the instant case.

3. On the positive side, however, the decision in the instant case clearly departs from the case-law of the Court which, as a rule, has considered – wrongly in my view – confiscation pursuant to proceedings of a criminal nature as a measure of control of use of property rather than of deprivation (§ 46, and the cases there referred to; see, more recently, *Milosavljev v. Serbia*, no. 15112/07, 12 June 2012, § 53). I have always been perplexed by the elliptical reasoning in the last two sentences of § 51 of *AGOSI v. the United Kingdom* (no. 9118/80, 24 October 1986) and by the lack of

proper distinction between the attachment stage and the disposal stage (as provided for in the relevant domestic law) in *Riela et autres c. l'Italie* (dec.) no. 52439/99, 4 September 2001.