



FIRST SECTION

**CASE OF LYSAK v. POLAND**

*(Application no. 1631/16)*

JUDGMENT

*(Merits)*

Art 1 P1 • Control of the use of property • Individual and excessive burden imposed on applicant as a result of protracted impoundment of his merchandise for the purpose of criminal proceedings into allegations of trading counterfeit clothes • Domestic courts' failure to evaluate relevant circumstances and sufficiently consider less intrusive measures • Fair balance between competing interests upset

STRASBOURG

7 October 2021

*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 Łysak v. Poland,**

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

Ksenija Turković, *President*,  
Péter Paczolay,  
Krzysztof Wojtyczek,  
Alena Poláčková,  
Gilberto Felici,  
Erik Wennerström,  
Raffaele Sabato, *judges*,  
and Renata Degener, *Section Registrar*,

Having regard to:

the application 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 Wojciech Łysak (“the applicant”), on 21 December 2015;

the decision of 27 March 2018 to give notice to the Polish Government (“the Government”) of the complaint concerning Article 1 of Protocol No. 1, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 21 September 2021,

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

## INTRODUCTION

1. The case concerns the protracted impoundment of merchandise for the purpose of criminal proceedings concerning allegations of trading counterfeit clothes without the applicant being charged.

## THE FACTS

2. The applicant was born in 1984 and lives in Katowice. He was represented by Mr K. Grochalski, a lawyer practising in Czeladź. The Government were represented by their Agent, Ms J. Chrzanowska and, subsequently, by Mr J. Sobczak, of the Ministry of Foreign Affairs.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

### I. INVESTIGATION CONCERNING THE APPLICANT’S MERCHANDISE

4. The applicant ran a wholesale clothing business selling branded clothes.

5. On 21 February 2013 the police searched his business premises and seized 582 items of his merchandise (brands B. and G.) in relation to a criminal investigation *in rem* (that is, without a designated suspect) into allegations of trading in counterfeit clothes, a criminal offence under section 305 of the Industrial Property Act (*Prawo własności przemysłowej*).

6. On 28 February 2013 the Sosnowiec District Prosecutor (*Prokurator Rejonowy*) authorised the above-mentioned search.

7. On 11 March 2013 a witness testified that the clothes seized were counterfeit. On various dates, the authorities were informed by representatives of the B., G. and T.H. brands that the companies' internal checks had proved that the clothes being sold by the applicant were counterfeit.

8. On 24 April 2013 additional merchandise (brands B., G. and T.H.) was seized under an order of 22 April 2013 issued by the District Prosecutor.

9. Altogether, 582 items of the applicant's merchandise by brands B., G., and T.H. were seized by the police (case no. 3 Ds 217/13, subsequently, 3 Ds 605/14).

10. On 13 May 2013 the police issued a decision classifying the enumerated items of merchandise, which had been impounded in February and April, as evidence in the criminal investigation on suspicion of the items being counterfeit.

11. On 28 May 2013 the applicant lodged an interlocutory appeal against this decision, arguing that the suspicion was ill-founded. On the same date, the applicant also lodged a formal complaint against the District Prosecutor. The complaint was dismissed by the Sosnowiec Regional Prosecutor (*Prokurator Okręgowy*) as ill-founded on 12 June 2013. A copy of that decision was not submitted to the Court.

12. On 3 June and 18 July 2013, the authorities ordered a report from an expert to establish whether the merchandise seized from the applicant bore genuine or counterfeit trademarks. The report was produced on an unspecified date. A copy of it has not been submitted to the Court. The applicant claims that the report was inconclusive. In the Government's submission, the expert concluded that the trademarks of all three brands which had been printed on the seized clothes were identical to the genuine trademarks. The expert had nevertheless suspected that the clothes might be counterfeit and, that being the case, he had recommended that they be examined further by the brands' representatives or by a specialised expert.

13. On 28 August 2013 the Sosnowiec District Court (*Sąd Rejonowy*) dismissed the applicant's interlocutory appeal as groundless. The court relied on the opinion of the expert who had concluded that the trademarks on the clothes in question might be fake. The court also observed that the investigation had been carried out with some delay.

14. In the meantime, on various dates in July 2013, representatives of the three brands had examined the photographs of the clothes seized and concluded that the respective items were fake.

15. Subsequently, the investigative authorities revealed that the suppliers the applicant had sourced his trademarks from were not authorised distributors of the T.H. or B. brands.

16. On 30 December 2013 the District Prosecutor discontinued the investigation (3 Ds 217/13) concerning the clothes of all three brands. It was concluded that although the clothes in question were unequivocally counterfeit, it was impossible to establish beyond reasonable doubt that the applicant had acted with criminal intent. In other words, the applicant was considered to have acted in ignorance (“*w błędzie*”) and not intentionally. The elements of the criminal offence of the distribution of counterfeit merchandise were therefore not fulfilled. It was noted that the applicant could nevertheless be liable under the civil law.

17. On 23 May 2014 the Sosnowiec District Court quashed that decision and remitted the case for further investigation.

18. On 2 July 2014 the District Prosecutor authorised another search of the applicant’s business premises and the seizure of his business records.

19. On 3 and 7 July 2014 these items were classified as evidence.

20. On 9 July 2014 the applicant lodged an interlocutory appeal against the prosecutor’s decision and asked that the items be returned.

21. On 10 September 2014 the Sosnowiec District Court dismissed this appeal, holding that the records were necessary for the investigation.

22. On 25 November 2014 the investigation was stayed as the authorities were awaiting evidence they had sought abroad.

23. On 1 December 2014 and 18 May 2015, the applicant asked the prosecutor to return to him the material evidence that had been the subject of the decision of 13 May 2013, arguing that the merchandise was no longer needed for the investigation.

24. On 16 December 2014 and 8 June 2015, respectively, the District Prosecutor informed the applicant by letters that his requests could not be granted because the investigation had been stayed, awaiting the results of activities being carried out in the framework of international cooperation.

25. On an unspecified date, a new expert report was produced. It concluded that the clothes in question were counterfeit.

26. On an unspecified date in 2016, the case concerning the clothes of the T.H. brand was severed. On 26 February 2018 the Sosnowiec District Court acquitted the applicant of the offence of distributing counterfeit T.H. clothes. On 7 September 2018 the Katowice Court of Appeal (*Sąd Apelacyjny*) upheld that judgment. The reasoning of these judgments has not been provided.

27. In June 2017 the Italian authorities informed the Polish prosecutor that they could not find the person sought for the purposes of the ongoing criminal investigation.

28. In October 2017 a French national was heard in the case.

29. The investigation in respect of B. and G. clothes appears to be still ongoing. The applicant, who has not been charged, appears to continue to have witness status.

## II. THE APPLICANT'S CIVIL CASE

30. On 15 October 2013 the applicant sued the Sosnowiec District Court, seeking 24,000 Polish zlotys (approximately 6,000 euros) in compensation on account of the protracted seizure of his property.

31. On 17 April 2014 the Sosnowiec District Court dismissed this action.

32. On 18 March 2015 the Katowice Regional Court dismissed the applicant's subsequent appeal.

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

### I. USE OF FORGED TRADEMARKS AND DISTRIBUTION OF COUNTERFEIT MERCHANDISE

33. Marking merchandise destined for trade with forged trademarks and trading counterfeit merchandise are prohibited under section 305 of the Industrial Property Act. A person who intentionally engages in such trade is criminally liable to a fine or up to two years' imprisonment, or, in the event of large-scale trade, from six months to five years' imprisonment.

### II. OWNERSHIP AND SEIZURE OF PROPERTY

34. Article 64 of the Constitution reads:

“1. Everyone shall have the right to ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.”

35. Pursuant to Article 217 § 1 of the Code of Criminal Procedure (*Kodeks Postępowania Karnego*; “CCP”), objects to be used as evidence in a criminal case or for the purposes of securing the payment of fines may be seized by the police or by the prosecuting authorities.

36. Injunctions on the property of suspects or the accused (but not of witnesses) are regulated in Articles 291 to 295 of the CCP.

37. In particular, under Article 294 the security measure becomes invalid if a criminal court does not order any fine, forfeiture, compensation or redress, and if a related civil action has not been lodged within three months from the date when the criminal court's decision has become final. In the event that such a civil case has been instituted, the injunction remains in force unless the civil court decides otherwise.

38. Moreover, Article 299 § 1 of the CCP provides that, in the preliminary proceedings, a victim and a suspect are parties to the proceedings. Under Article 302 of the CCP, persons who are not parties are entitled to lodge interlocutory appeals against decisions (*postanowienia*), orders (*zarządzenia*) and other activities of the prosecutor which breach their rights.

39. The return of seized property is regulated under Article 230 § 2 of the CCP in the following terms:

“2. The seized objects shall be returned as soon as they are found to no longer be needed for the criminal proceedings. ...”

40. Lastly, if a person is convicted of the offence of marking merchandise destined for trade with counterfeit trademarks or trading counterfeit merchandise, forfeiture of the merchandise may be ordered by the court pursuant to section 306 of the Industrial Property Act.

### III. STATE LIABILITY FOR DAMAGE

41. Article 77 § 1 of the Constitution reads:

“Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority which is contrary to the law.”

42. Article 417 § 1 of the Civil Code (*Kodeks Cywilny*) lays down a general rule on State liability for damage caused by a public authority. The relevant part of this provision reads as follows:

“The State Treasury ... shall be liable for any damage caused by an unlawful act or omission [committed] in connection with the exercise of public authority.”

43. Article 417<sup>1</sup> § 3 of the Civil Code reads as follows:

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

44. “Damage” as referred to in these provisions means pecuniary damage, which is defined in Article 361 § 2 of the Civil Code as “losses and lost profits, which an aggrieved party could have made if he had not sustained damage”.

45. In the practice of the domestic courts, a claim under Article 417<sup>1</sup> of the Civil Code does not arise unless the unlawfulness of the action or

omission resulting in damage has been declared in separate proceedings (*prejudykat*) (see judgment no. IC 342/16 of 2 February 2017 of the Słupsk Regional Court).

#### IV. IMPLIED WARRANTY FOR DEFECTS UNDER THE CIVIL LAW

46. Purchase of counterfeit merchandise, which the buyer expected to be genuine, gives rise to the seller's liability under the regime of implied warranty for defects and, potentially, contractual liability (Articles 556 et seq. of the Civil Code).

47. In particular, a seller is liable to the buyer if the object sold has a legal or physical defect (Article 556 of the Civil Code). A physical defect is defined as failure of the object sold to comply with the contract. An object sold is non-compliant with the contract if, for example, it does not have the properties described by the seller to the buyer (Article 556<sup>1</sup> § 2 of the Civil Code). The term "defect" is interpreted broadly and includes the lack or existence of properties, contrary to the seller's assurances, regardless of whether this has an impact on the usefulness or the value of the purchased item (see the judgment of 31 May 2017 of the Supreme Court in case no. V CSK 506/16).

48. Article 560 of the Civil Code entitles the buyer either to demand a price reduction or to withdraw from the purchase agreement (*odstąpienie*), in the event of purchasing a defective object.

49. The exercise of the buyer's rights defined in Article 560 of the Civil Code is subject to limitations if the purchase agreement was concluded between entrepreneurs (in contrast to situations where the item was purchased by a consumer). Under Article 563 of the Civil Code, in such cases the buyer's right to demand a price reduction or to withdraw from the purchase agreement expires if he has failed to examine the object in time and in the manner usually accepted when purchasing similar items. Moreover, the buyer must notify the seller of the defects discovered without undue delay. In the event of the defect being discovered at a later stage, the seller must be notified without undue delay after its discovery.

#### V. CIVIL LIABILITY FOR TRADEMARK INFRINGEMENT

50. Under section 296 (1) of the 2000 Industrial Property Act, a trademark owner is entitled to bring an action against a person who has committed trademark infringement. The plaintiff can seek the cessation of the infringement, the return of unlawfully obtained benefits and, in cases of intentional violations, compensation.

51. Where such an action is granted, the court may order the destruction of the counterfeit merchandise, pursuant to an application being lodged by the trademark owner (section 286 of the Industrial Property Act).



52. The Industrial Property Act does not require that the person committing trademark infringement be convicted of the offence of trading counterfeit merchandise before a civil action can be lodged. Where a final criminal judgment has been delivered, it binds all domestic courts in civil proceedings (Article 11 of the Code of Civil Procedure).

53. The statute of limitations for actions arising out of trademark infringements (namely, actions based on section 296 of the Industrial Property Act) is three years from the day on which the owner became aware of the infringement and of the identity of the person responsible. In any event, such claims become time-barred after five years from the day on which the infringement took place (section 299 of the Industrial Property Act).

## THE LAW

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

54. The applicant complained under Article 1 of Protocol No. 1 to the Convention of the unjustified and unnecessarily protracted control of the use of his property. The provision in question 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

55. The Government raised a preliminary objection, arguing that the application was inadmissible for non-exhaustion of domestic remedies.

56. Firstly, in their view, the application was premature because the criminal investigation concerning the applicant was still ongoing.

57. The Government submitted that, even if the criminal investigation were ultimately to be discontinued, the seizure measure could be maintained for the purpose of any potential criminal case under the other limb of section 305 of the Industrial Property Act, namely, for the offence of marking merchandise destined for trade with forged trademarks. Another possibility was for the authorities to order forfeiture. If the case was discontinued in the pre-trial stage, the prosecutor would have to decide on the items seized, and the applicant would have the right to appeal against any such decision.

58. The Government also pointed to another possible outcome, namely, the brands concerned could sue the applicant under the civil law under section 296(1) of the Industrial Property Act. The security measure would therefore possibly remain in force. Ultimately, the applicant would be able to challenge any court decision delivered in the course of such proceedings.

59. Secondly, the Government argued that the applicant, instead of lodging a formal complaint against the District Prosecutor, should rather have withdrawn from the contract with his suppliers under the law on civil liability for implied warranty for defects, or, alternatively, he should have sued them under the general provisions on civil liability for damage (Article 417 of the Civil Code).

60. The applicant did not make any comments in respect of the above-mentioned preliminary objection by the Government.

61. The Court reiterates that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 70, ECHR 2010, with further references).

62. Turning to the present case, the Court observes that the applicant complained that on 21 February and 24 April 2013 the authorities had seized 582 items of his merchandise and classified them as evidence in a criminal investigation into allegations of trading counterfeit clothes (see paragraphs 5, 8 and 10 above). The measure was authorised by the prosecutor under Article 217 § 1 of the CCP (see paragraphs 6, 8 and 35 above). The ensuing proceedings, which initially concerned three brands, were ultimately split into two separate sets (see paragraph 26 above). In respect of trading counterfeit clothes of the B. and G. brands, the applicant has had witness status (see paragraph 28 above). In respect of trading counterfeit clothes of the T.H. brand, the applicant was ultimately charged and then acquitted (see paragraph 26 above). Be it as it may, in light of information in the Court's possession, none of the items seized have been returned to the applicant.

63. Moreover, the Court notes that the applicant appealed against the decision on the classification of the merchandise seized as evidence. He also lodged a formal complaint concerning the actions of the prosecutor in respect of the search and seizure. These remedies were to no avail. The authorities found that the search and seizure were lawful and not marked by any procedural shortcomings. The decision to classify the items seized as evidence was considered justified in the light of the expert's conclusions (see paragraphs 10-11 and 13 above).

64. At a later stage, the applicant twice asked the prosecutor to return the seized merchandise (see paragraph 23 above). On 16 December 2014 and 8 June 2015, respectively, the District Prosecutor refused to grant these requests (see paragraph 23 above).

65. As regards the Government's preliminary objection that the complaint is premature, the Court observes that the applicant's grievance under Article 1 of Protocol No. 1 is precisely about the fact that no decision has been taken as to the fate of his merchandise, which in 2013 was seized and classified as evidence in a case which has not, to this day, been fully concluded. The Court therefore finds that the different scenarios presented by the Government of how the case in question might develop (see paragraphs 57 and 58 above) are irrelevant for the admissibility issue. Likewise, the applicant seeking redress from his suppliers under the regime of implied warranty for defects would not constitute an adequate remedy because his complaint before the Court is directed against the State authorities.

66. Accordingly, the Court dismisses the Government's preliminary objection.

67. 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*

68. The applicant complained that impounding his merchandise for the purpose of the criminal proceedings against him had been unjustified and that the measure had lasted an unnecessarily long time, in breach of Article 1 of Protocol No. 1. The seizure had had far-reaching negative consequences for him as he had had to cease his main commercial activity of selling branded clothes.

69. The Government acknowledged that there had been an interference with the applicant's property rights but they considered that it had been in accordance with the law and that it had pursued the legitimate aim of securing evidence necessary for the purpose of the ongoing criminal proceedings.

70. To that end they submitted, referring to the expert reports, the information from the representatives of the three brands concerned and the prosecutor's decision of 30 December 2013, that there had been a strong suspicion that the items seized were counterfeit. It followed that even though, in the absence of the necessary criminal intent, the applicant might ultimately not be held criminally accountable, the seizure in question could be considered justified in view of the possibility of the applicant being sued

under the Industrial Property Act by the brands affected by his trademark infringement.

71. The Government also stressed that the applicant was a professional entrepreneur and, as such, he should have been aware of the economic risks entailed in trading counterfeit merchandise. To that end, the applicant should have acted more diligently when choosing his suppliers.

72. The Government also argued that the losses the applicant had incurred due to the seizure were proportionate to the value of his transactions. They provided the following details about the applicant's business. The applicant's trade margin was around 200% of the purchase price of the goods from the supplier. He had been reselling those goods at around half the market value of the genuine products. For example, the applicant had bought shirts with the B. trademark for 110 Polish zlotys (PLN - approximately 27 euros (EUR)) each. He would have sold each shirt on for PLN 329 (EUR 82). The market value of a genuine shirt was PLN 775 (EUR 193).

73. The Government thus concluded that the impugned measure had not disproportionately affected the applicant's rights and had not imposed an excessive individual burden on him. According to public records, the applicant's business was still operating. Moreover, under the existing legal framework, the applicant could have sought compensation from his suppliers.

74. Lastly, the Government pointed out that the decisions issued in respect of the applicant's property had not been arbitrary or marked by a manifest error of judgment.

## 2. *The Court's assessment*

### (a) **General principles**

75. Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among many other authorities, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 52, ECHR 2007-III; *Anheuser-Busch Inc. v. Portugal* [GC],

no. 73049/01, § 62, ECHR 2007-I; *AGOSI v. the United Kingdom*, 24 October 1986, § 48, Series A no. 108; and *Hábenczius v. Hungary*, no. 44473/06, § 27, 21 October 2014).

76. A seizure of property for legal proceedings normally relates to the control of the use of property, which falls within the ambit of the second paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Raimondo v. Italy*, 22 February 1994, § 27, Series A no. 281-A; *Patrikova v. Bulgaria*, no. 71835/01, § 81, 4 March 2010; *JGK Statyba Ltd and Guselnikovas v. Lithuania*, no. 3330/12, § 117, 5 November 2013; *Hábenczius*, cited above, § 28; *Džinić v. Croatia*, no. 38359/13, § 62, 17 May 2016; *Lachikhina v. Russia*, no. 38783/07, § 58, 10 October 2017; and *Adamczyk v. Poland* (dec.), no. 28551/04, 7 November 2006; contrast *Waldemar Nowakowski v. Poland*, no. 55167/11, § 46, 24 July 2012).

77. In order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is, it must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see, among many other authorities, *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000-I, and *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd*, cited above, § 75). The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69-74, Series A no. 52, and *Hábenczius*, cited above, § 29).

78. The application of provisional measures in the context of judicial proceedings, aimed at anticipating a possible confiscation of property, has already been held to be in the “general interest” of the community (see, for example, *Borzonov v. Russia*, no. 18274/04, § 58, 22 January 2009, and the cases cited therein; *East West Alliance Limited v. Ukraine*, no. 19336/04, § 187, 23 January 2014; and *Džinić*, cited above, § 65).

**(b) Application of the above principles to the present case**

79. It is not in dispute between the parties that the measure in question amounted to an interference with the applicant’s right to the peaceful enjoyment of his possessions. The seizure of the 582 items of the applicant’s merchandise amounted to a temporary, albeit protracted, restriction on the use of his property, and did not entail a transfer of ownership. The Court therefore follows the general principle above and qualifies the interference in question as control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1.

80. The items in question were seized under Article 217 § 1 of the CCP and classified as evidence in the criminal investigation into allegations of trading counterfeit clothes. The Court thus finds that the interference was prescribed by law and in the general interest of the community.

81. Even if it has taken place “subject to the conditions provided for by law” – implying the absence of arbitrariness – and in the public interest, as stated above (see paragraph 77 above), an interference with the right to the peaceful enjoyment of possessions must always strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 49, ECHR 1999-V, and *JGK Statyba Ltd and Guselnikovas*, cited above, § 127).

82. The Court notes at the outset that seizure of property is, by its nature, a harsh and restrictive measure for the property’s owner. It is capable of affecting the rights of an owner to such an extent that his or her main business activity or even living conditions may be at stake (see *JGK Statyba Ltd and Guselnikovas*, cited above, § 129, with further references).

83. In the present case, the alleged violation of the applicant’s property rights stems, on the one hand, from the initial imposition of the measure and, on the other hand, from the fact that it has remained in force for over six years, while the main criminal investigation is still ongoing.

84. The Court accepts the justification given for the initial decisions to seize the applicant’s merchandise and to classify it as evidence in the criminal proceedings concerning trading counterfeit clothes. The suspicion that the clothes in question were counterfeit had indeed been very strong in the light of the statements made by the representatives of the brands concerned and in the expert report (see paragraphs 7 and 12 above).

85. As to the duration of the measure, the Court accepts that the proper administration of justice takes time (see, *mutatis mutandis*, *JGK Statyba Ltd and Guselnikovas*, cited above, §§ 131-32). However, where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time (*ibid.*, § 133).

86. In the present case, the criminal investigation fairly quickly led the prosecutor to conclude that the merchandise of the three brands concerned, which had been offered for sale by the applicant, was indeed counterfeit (see paragraph 17 above). Since 2014 the sole thrust of the investigation (in so far as it concerns brands B. and G.) has thus been to establish the second necessary element of the offence in question, that is, the applicant’s criminal intent. To that end, the authorities seized the applicant’s business records (see paragraphs 18 and 19 above). They also set up international cooperation to find the applicant’s alleged collaborators operating in the countries where the clothes were made. The investigation was for some time, or possibly still is, officially stayed, awaiting the results of that international cooperation (see paragraphs 24 and 27 and 28 above).

87. The Court also notes that in respect of the third brand concerned, T.H., the case was severed and the applicant was acquitted (see paragraph 26 above).

88. It would therefore seem that the clothes in question could not, for some time now, be legitimately perceived as necessary evidence, which was the formal justification for the seizure. Moreover, the Court observes that, in light of the material at its disposal, no other related criminal investigation has been opened by the authorities and no civil proceedings have been instituted against the applicant by the brands concerned for the alleged trademark infringement. It also appears that any such action would at this point be statute-barred (see paragraph 53 above).

89. Furthermore, the Court observes that in the absence of a forfeiture order, the clothes in question continue to be the applicant's property. If the seizure was lifted, the applicant could make an informed decision on how to use or dispose of the clothes in question.

90. Lastly, the Court considers that the applicant's situation was not sufficiently mitigated by the existence of a remedy within the civil-law framework of implied warranty for defects, as invoked by the Government. In the absence of any examples of relevant domestic practice, the Court is not convinced that the above framework would have allowed the applicant to seek and obtain compensation from his suppliers (contrast *Sulejmani v. the former Yugoslav Republic of Macedonia*, no. 74681/11, § 41, 28 April 2016).

91. The foregoing considerations are sufficient to enable the Court to conclude that the domestic courts did not evaluate all the relevant circumstances of the applicant's case and did not give sufficient consideration to the possibility of taking less intrusive measures with respect to the applicant's property. As a result, the retention of the applicant's property for over six years constituted an individual and excessive burden on the applicant, upsetting the "fair balance" which should be struck between the protection of the right to the peaceful enjoyment of possessions and the requirements of the general interest (see, *mutatis mutandis*, *Džinić*, and *Lachikhina*, both cited above).

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

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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.”

94. The applicant claimed PLN 1,405,000 (EUR 350,000), in respect of pecuniary damage, comprising approximately EUR 96,250 for actual damage, calculated as the market value of the seized items, and EUR 255,000 for lost profits.

95. The Government argued that granting any award would be unjust because the applicant had acted in breach of the Industrial Property Act. Moreover, the applicant’s claims, both in respect of the market value of the clothes and business losses, were highly speculative and not supported by any documents containing detailed valuations.

96. In the circumstances of the present case, the Court considers that, as far as the award of damages is concerned, the question of the application of Article 41 is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having regard to any agreement which might be reached between the Government and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

### 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 the question of the application of Article 41 of the Convention is not ready for decision and accordingly,
  - (a) *reserves* the said question;
  - (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, their written observations on the amount of damages to be awarded to the applicant and, in particular, to notify the Court of any agreement that they may reach;



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4. *Reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 7 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature\_p\_2}

Renata Degener  
Registrar

Ksenija Turković  
President