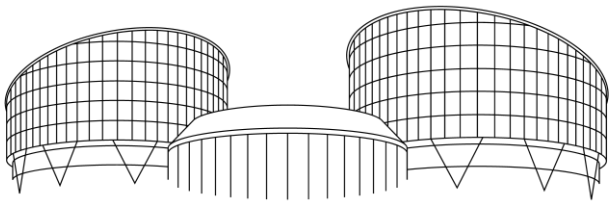

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOZAK v. POLAND

(Application no. 13102/02)

JUDGMENT

STRASBOURG

2 March 2010

FINAL

02/06/2010

Cet arrêt est devenu définitif en vertu de l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

In the case of Kozak v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Ledi Bianku, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 9 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 13102/02) 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 Piotr Kozak ("the applicant"), on 23 August 2001.

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

3. The applicant alleged, in particular, a breach of Article 14 taken in conjunction with Article 8 of the Convention, submitting that he had been discriminated against on the ground of his homosexual orientation in that he had been denied the right to succeed to a tenancy after the death of his partner.

4. On 4 December 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951 and lives in Szczecin.

A. Background

1. Undisputed facts

6. In 1989 the applicant moved in to a council flat at K. street, rented by T.B., the applicant's partner, with whom he had lived in a homosexual relationship. Earlier, in 1986 or 1987, they had lived together in a flat rented by T.B. at N. street. The applicant and T.B. shared the expenses for the flat. On 28 May 1989 the applicant was registered as a permanent resident of the flat in the residents' register kept by the Szczecin Municipality (*Gmina*).

7. On 1 April 1998 T.B. died.

8. On an unspecified later date the applicant applied to the Mayor of Szczecin (*Prezydent Miasta)*, asking him to conclude a lease agreement with him, replacing thereby the agreement with the late T.B. He was informed orally by one of the municipality's clerks that he should first pay arrears in rent since otherwise a fresh agreement would not be effected. The applicant paid the arrears, which amounted to 4,671.28 Polish zlotys (PLN) and also renovated the flat, paying PLN 5,662 for the work.

9. On 19 June 1998 the Szczecin Town Office's Department for Municipal Buildings and Dwellings (*Wydział Budynków i Lokali Komunalnych Urzędu Miejskiego*) sent a letter to the applicant, informing him that his application could not be granted because he did not meet the relevant criteria. One such criterion was to live in a council flat at least from 11 November 1992. The authorities held that the applicant had not lived in the flat but had moved in after 1 April 1998, the date of T.B.'s death. Moreover, meanwhile – on 3 April 1998 – the applicant's name had been struck out of the register of the flat's residents due to the fact that he had not lived there for more than five years (see also paragraphs 14-23 below). Accordingly, the authorities ordered the applicant to vacate the flat and surrender it to the municipality, on pain of being evicted from it at his expense and risk, the eviction being effected regardless of his presence.

10. Subsequently, the applicant tried to negotiate an agreement with the municipality but to no avail.

2. Facts in dispute

(a) The Government

11. The Government maintained that at some unspecified time the applicant and T.B. had come into conflict. T.B. asked the authorities to strike the applicant's name out of the residents' register and intended to start eviction proceedings against him. They stopped running the common household some one and a half years before T.B.'s death and, at the same time, the applicant stopped paying the rent for the flat. Three months before his death T.B. stayed in his brother's home but returned to the flat in mid-February 1998. The applicant did not live in the flat at the time of T.B.'s death.

The Government further stated that the applicant had not assumed responsibility for T.B.'s funeral.

In support of their submissions, the Government relied on the findings made by the administrative authorities and courts and in proceedings concerning permanent residence (see paragraphs 14-23 below) and eviction (see paragraphs 24-28 below). They produced copies of the relevant decisions.

(b) The applicant

12. The applicant acknowledged that he and T.B. had started to argue some one and a half years before the latter's death and that he had stopped paying the rent and moved out for some time. However, nine months before T.B.'s death they had reconciled and they had resumed their relationship.

13. The applicant submitted that until and upon T.B.'s death they both had lived in the flat. He had looked after T.B. during his illness up until his death. As regards T.B.'s funeral, the applicant stated that, officially, it had been T.B.'s former wife who had organised the funeral and had received a partial refund of expenses from the Social Security but he had helped her to organise it and had participated in the ceremony.

B. Administrative proceedings concerning permanent residence

14. On 5 August 1997 T.B made an application to the Szczecin Municipality, asking it to strike the applicant's name as a permanent resident of the flat at K. street out of the residents' register on the ground that the latter no longer lived at that address.

15. On 3 April 1998 the application was granted and a new entry was made in the register. The relevant administrative decision became final on an unspecified date.

16. On 26 June 1998 the applicant asked the authorities to re-open the case, submitting that he had not been notified of the institution of the

proceedings. He maintained that, in contrast to what had been established in those proceedings, he had continually lived in the flat since 18 May 1989.

17. The case was reopened and the authorities heard evidence from the applicant and several witnesses.

18. The applicant stated that in the years 1994-1998 he had on several occasions left for Germany to seek odd jobs for periods lasting usually some three months. In 1997 he had been absent only from March to May and, for one and a half months starting at the end of August or the beginning of September.

19. The authorities inspected visas and stamps in the applicant's passport and found that his stays in Germany and their length were confirmed.

20. They further heard evidence from two witnesses – K.P. and Z.M. – proposed by the applicant and also from residents of the building at K. street. While the applicant's neighbours did not clearly confirm that he had resided permanently in the flat, they said that they had often seen him around, that he had answered the door to the flat, helped one of them with moving furniture and that he had renovated the flat in April 1998. They also stated that T.B. had led a very lively social life and many men had visited him.

K.P and Z.M. who were colleagues of the late T.B. and the applicant confirmed that he had lived in the flat until T.B.'s death.

21. On 31 March 1999 the Mayor of Szczecin (*Prezydent Miasta*) quashed the decision of 3 April 1998 and refused to strike the applicant's name out of the residents' register.

In the decision, the Mayor referred to the fact that, in the years 1994-1995, the applicant had unsuccessfully attempted to succeed to a tenancy of a council flat at J. street, after the death of a certain E.B., the statutory tenant in 1994 (see also paragraph 26 below). It was noted that in those proceedings the applicant had stated that he had lived in the flat at J. street since March 1991, had had the keys, had kept his furniture and belongings there and, after his stay in Germany in 1994, had returned to the flat and renovated it.

22. It was further noted that the applicant, when asked to explain the inconsistency with the version recently presented, had said that his statements regarding the alleged residence at J. street had not been true and that he had done so solely for the sake of acquiring the right to lease the flat at J. street, whereas he had in fact lived permanently at K. street. He added that, in any event, he could not stay every day in the flat on account of T.B.'s and his colleagues' frequent drunkenness.

23. Assessing the facts as a whole, the Mayor considered that the testimonies given by the witnesses proposed by the applicant were not credible because they were his colleagues and, in addition, they did not reside in the building. The residents had not clearly confirmed that he had lived there from August 1997 to March 1998. However, given the fact that

T.B. had died on 1 April 1998, that the impugned decision had been issued on 3 April 1998 and that, as confirmed by the neighbours, the applicant had lived in the flat after T.B.'s death and had renovated it, it was evident that on the date of the issuance of the decision he had been a resident of the flat. Accordingly, the original decision had not been given on the basis of the circumstances obtaining on the date of issuance and, as such, had to be quashed.

C. Proceedings for eviction

24. On 16 April 1999 the Szczecin Municipality sued the applicant before the Szczecin District Court (*Sąd Rejonowy*), seeking his eviction from the flat rented by the late T.B.

On 27 May 1999 the court gave judgment in default, granting the claim.

On 18 June 1999 the applicant applied for the judgment to be set aside and the claim to be dismissed. The court proceeded to hear evidence.

25. On 24 May 2000 the court heard evidence from the applicant. The applicant stated that he had lived with T.B. in the flat and that he was registered as a permanent resident of the flat, sub-letting it from T.B. At the material time he still lived in the flat, paying twice the rent due because he was using the flat without any legal title. He had informed T.B.'s brother of the latter's death but had not organised the funeral since he had felt that the family should take care of it. The family had refused to take part in the funeral. Probably, T.B.'s former wife had organised it.

26. On 2 June 2000 the District Court upheld the judgment in default of 27 May 1999.

The court made the following findings of fact.

The applicant was registered as a permanent resident of the flat since 28 May 1989. He sub-let one room from T.B. On 3 April 1998 his name as a permanent resident of the flat was struck out of the register upon T.B.'s motion. It was later restored, following the re-opening of the case (see also paragraphs 14-23 above).

The applicant did not organise T.B.'s funeral. T.B. and the applicant had had arguments. The applicant moved to the flat at K. street after T.B.'s death.

By virtue of a judgment given by the Szczecin Regional Court on 18 February 1997 the applicant had been evicted from the flat at J. street. The applicant had made attempts to succeed to a tenancy of the council flat at J. street after the death of E.B., a statutory tenant. In the relevant proceedings, he had stated that he had lived at J. street since 1991. Following the enforcement of the eviction order, he left the flat in June 1998.

The court further held that even though the applicant was registered as a permanent resident of the flat, this fact could not be decisive since this

had legal consequences only for the residents' register and not for the application of section 8 of the 1994 Act setting out the statutory conditions for the succession to lease (see also paragraph 40 below).

In these circumstances, the court concluded that the applicant had no legal title to the flat in dispute and that the eviction order should be granted.

27. The applicant appealed, arguing that the first-instance court had made errors of fact, in particular that it had wrongly found that he had moved to the flat at K. street only after T.B.'s death. He also alleged several procedural shortcomings and arbitrary assessment of evidence.

28. On 14 September 2001 the Szczecin Regional Court (*Sąd Okręgowy*) heard and dismissed the appeal, upholding the grounds given for the first-instance judgment.

D. Proceedings for succession to tenancy

29. On 14 July 2000 the applicant sued the Szczecin Municipality before the Szczecin District Court, seeking a judgment declaring that he had succeeded to the tenancy after T.B.'s death.

30. At a hearing held on 30 October 2000 the applicant's lawyer stated that the claim was based on section 8(1) of the Lease of Dwellings and Housing Allowances Act of 2 July 1994 (*ustawa o najmie lokali mieszkalnych i dodatkach mieszkaniowych)* ("the 1994 Act") (see also paragraph 40 below) and that on this basis the applicant had a right to succeed to the tenancy as T.B.'s life-partner (*konkubent*), with whom he had cohabited for many years and had run a common household.

31. On 9 November 2000 the applicant asked the court to hear evidence from 3 witnesses, K.P., R.M. and S.B. in order to establish that he and T.B. had remained at all times in a particularly close relationship.

32. At a hearing held on 22 February 2001 the court rejected the motion and heard evidence from the applicant alone. It considered that the fact that the applicant had cohabited with his late partner had already been sufficiently proved on the basis of his own statements. Before the court, the applicant stated, among other things, that he had borne expenses involved in the running of their household, including the rent for the flat. He lived in a room and T.B. occupied the kitchen.

On the same day it gave judgment and dismissed the claim.

33. The District Court made the following findings of fact.

T.B. rented the flat in question from the municipality. He was a divorced single person. The applicant and T.B. had lived together from 1986 or 1987, initially in another flat and, subsequently in 1989, they moved to the flat in dispute. They had a homosexual relationship. The applicant bore the costs of running the household and paid the rent for the flat. They stopped running the common household some one and a half years before T.B.'s death and at the same time the applicant stopped payment of the rent to the municipality.

In 1996 the defendant municipality lodged an action for eviction against T.B., on the ground that rent arrears had not been paid.

After T.B.'s death the applicant paid the rent arrears and asked the defendant to conclude a lease agreement with him. He renovated the flat.

In 1994 the applicant made a similar application to the defendant municipality, asking it to conclude a lease agreement with him in respect of another flat, rented by a certain E.B., after the latter's death. He alleged that he had permanently lived in E.B.'s flat at J. street, whereas in T.B.'s flat he had only been registered as a permanent resident.

34. The findings of law read, in so far as relevant:

> "Under section 8(1) of the 1994 Act a person can take over a tenancy if he or she has fulfilled jointly the four following conditions: (1) was in a close relationship with the late tenant by blood relations, adoption or *de facto* marital cohabitation; (2) resided permanently with the tenant until his or her death; (3) had not relinquished this right to the landlord and (4) upon the death of the tenant had no title to another flat.
>
> The applicant stated that he had lived in *de facto* marital cohabitation with T.B. This should be assessed in the light of the situation as it obtained upon the latter's death.
>
> The major features of a *de facto* marital relationship (*konkubinat*) are its dissolvability and lack of legal consequences following its dissolution – as it is a purely *de facto* union. For a relationship to be considered a *de facto* marital relationship there must be emotional, physical and also economic bonds between the partners.
>
> Yet it emerges from the applicant's testimony that the economic bond between the partners broke some one year and a half before T.B.'s death, when they stopped running a common household. In consequence, their relationship no longer fulfilled the conditions for a *de facto* marital relationship.
>
> However, even assuming that all the above-mentioned requirements for a *de facto* marital relationship existed, the applicant's and T.B.'s cohabitation could not be regarded as such. Indeed, a *de facto* marital relationship is a not legalised substitute for a marriage. Pursuant to Polish law, Article 1 §1 of the Family and Custody Code, a marriage can be contracted only between a woman and a man. Consequently, [the law] recognises only *de facto* relationships of different-sex persons.

> That being said, the applicant does not belong to the group of entitled persons referred to in section 8(1) of the 1994 Act. All of the above-mentioned four requirements of section 8(1) must be fulfilled jointly; non-fulfilment of even one of them makes it redundant to examine compliance with the remaining ones. It should be added in passing that, given the applicant's attempts to succeed to the tenancy of [another] flat, his permanent residence in the flat [in question] upon the death of the statutory tenant is open to doubt.
>
> ..."

35. The applicant appealed to the Szczecin Regional Court (*Sąd Okręgowy*), seeking to have the impugned judgment quashed and the case remitted or, alternatively, to have the judgment altered and his claim granted in its entirety. He asked the Regional Court to hear supplementary evidence from him, in order to establish the actual duration of his relationship with T.B. Furthermore, relying on Article 390 § 1 of the Code of Civil Procedure (*Kodeks postępowania cywilnego*), he asked the court to refer to the Supreme Court (*Sąd Najwyższy*) the following legal question:

> "Does the term "a person who has lived with a tenant in *de facto* marital cohabitation" used in section 8(1) of the 1994 Act also concern a person who has lived in a homosexual cohabitation with a tenant, or only a person living in a heterosexual cohabitation?"

36. Alternatively, the applicant asked the court to refer, under section 3 of the law of 1 August 1997 on the Constitutional Court (*ustawa o Trybunale Konstytucyjnym*) ("the Constitutional Court Act"), to the Constitutional Court the following legal question:

> "Is the term "a person who has lived with a tenant in *de facto* marital cohabitation" referred to in section 8(1) of the 1994 Act – if interpreted as including only *de facto* marital cohabitation of a woman and a man – compatible with Articles 32 § 2 and 75 of the Constitution and Article 14 of the European Convention of Human Rights?"

37. As regards the principal grounds for the appeal, the applicant argued that the District Court had failed to establish the facts of the case properly, in particular because it had concluded that he and T.B. had stopped running their common household one and a half years before the latter's death solely on the basis of his incomplete testimony and had refused to admit evidence from the witnesses proposed by him in order to clarify the circumstances of the case. He also alleged a breach of the substantive civil law consisting in an erroneous interpretation of the term "a person who ha[d] lived with a tenant in *de facto* marital cohabitation" as relating solely to cohabitation of a man and a woman.

38. On 1 June 2001 the Szczecin Regional Court heard, and dismissed the appeal. It considered that the lower court had correctly held that the applicant had failed to meet the requirements laid down in section 8(1) of the 1994 Law. The reasoning, in so far as relevant, read as follows:

> "In the case under consideration the applicant derived his entitlement to succession of the tenancy from his stable homosexual relationship with the tenant.

For this reason, the determination of the scope of the term "a person who has lived with a tenant in *de facto* marital cohabitation" was of crucial importance for the determination of the claim.

In contrast to what has been argued in the appeal, the District Court correctly interpreted the above-mentioned term. This court shares the opinion stated in the reasoning of the impugned judgment that the legal regulation in section 8(1) of the 1994 Act concerns persons remaining in a *de facto* marital relationship, i.e. an actual relationship of different sex persons with stable physical, emotional and economic ties, imitating a marriage.

The appellant is not right in saying that the scope of the above-mentioned provision encompasses also homosexual relationships. According to an opinion commonly accepted in our legal writing and case-law ..., *de facto* marital cohabitation takes place only if a woman and a man cohabit together.

It must be stressed that a *de facto* marital relationship differs from a marriage only by lack of its legitimisation. For this reason, the subjects actually remaining in marital cohabitation can only be persons who, under Polish law, are eligible for marriage. Pursuant to Article 1 § 1 of the Family and Custody Code, the fundamental principle of the family in Poland is the difference in sex of a prospective nuptial couple (*nupturienci*), which means that contracting a marriage between persons of the same sex is inadmissible. Having regard to the fact that *de facto* cohabitation constitutes a substitute for a marriage, one must consider that its subjects can exclusively be a woman and a man.

While the appellant is right in saying that in the European legal writing the concept of *de facto* marital cohabitation also encompasses homosexual relationships ..., according to the general construction rules, legal concepts should be given the meaning that they have in our legal system. Polish law does not recognise relationships of same-sex persons. For this reason, where a legal provision (in this case section 8(1) of the 1994 Act) entails legal consequences on account of remaining in a *de facto* marital relationship, it does not concern partners having homosexual relations, even if they have stable emotional, physical and economic ties.

Contrary to what is being argued in the appeal, the above legal solution does not infringe the constitutional principle of equality before the law, which does not have an absolute character and exceptions to which may be justified by the need to protect other rights. Indeed, Article 18 of the Constitution ... clearly states that "marriage, being a union of a man and a woman, as well as the family ... shall be placed under the protection and care of the Republic of Poland".

The above-mentioned provision creates the constitutional principle of the protection for the family founded on a union of a woman and a man. Provisions of the international treaties ratified by Poland, i.e. Article 12 of the European Convention of Human Rights and Article 23 of the International Covenant of Civil and Political Rights ..., which ensure legal protection only in respect of heterosexual relations, correspond to the regulations in the Polish legal system.

In conclusion, the District Court rightly held that the applicant did not belong to the group of persons entitled to succeed to a tenancy referred to in section 8 of the 1994 Act. In the circumstances, it was unnecessary to take evidence in order to establish whether the applicant had indeed remained in cohabitation with the tenant and

whether other conditions for succession to the tenancy had been satisfied. For this reason, the arguments [concerning the refusal to take evidence from witnesses and the alleged errors of fact] are unfounded.

...

In view of the foregoing, the appeal should be dismissed.

..."

39. A cassation appeal to the Supreme Court was not available in this case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Succession to the right to lease a flat

40. Section 8(1) of the 1994 Act read:

"1. In the event of a tenant's death, his or her descendants, ascendants, adult siblings, adoptive parents or adopted children or a person who has lived with a tenant in *de facto* marital cohabitation, shall, on condition that they lived in the tenant's household until his or her death, succeed to the tenancy agreement and acquire the tenant's rights and obligations connected with [the lease of] the flat, unless they relinquish that right to the landlord. This provision shall not apply to persons who, when the [original] tenant died, had title to another residential dwelling.

2. In cases where there is no successor to the tenancy agreement, or where the successors have relinquished their right, the lease shall expire."

41. The 1994 Act was repealed on 10 July 2001. Since then, the rules governing succession to lease have been included in the Civil Code (*Kodeks cywilny*).

Pursuant to section 26(12) of the 2001 Act, a new Article 691 was introduced into the Civil Code.

Article 691, as applicable from 10 July 2001, reads, in so far as relevant, as follows:

"1. In the event of a tenant's death, his or her spouse (if he or she is not a co-tenant), his or her and his or her spouse's children, other persons in respect of whom the tenant had maintenance obligations and a person who has lived in *de facto* cohabitation with the tenant shall succeed to the tenancy agreement."

B. Family law

42. Article 1 § 1 of the Family and Custody Code (*Kodeks rodzinny i opiekuńczy*) states:

"A marriage shall be contracted when a man and a woman simultaneously present have declared before the Registrar of the Civil Status Office that they marry each other."

C. Bill on same-sex registered partnerships

43. In 2003 a group of 36 senators submitted a bill on same-sex registered partnerships to the Polish Senate (*Senat*). According to the bill, entering into a registered partnership was to create rights similar to those flowing from a marriage in respect of succession, health and social insurance and taxation. Following a long debate and having aroused considerable controversy over most of its provisions, the bill was eventually referred to *Sejm* at the end of 2004. It did not have any follow-up in *Sejm*, which had not started its reading before the dissolution of Parliament in connection with general elections held in 2005. Since then, there have been no further similar legislative initiatives in Parliament.

D. Constitutional provisions

44. Article 18 of the Constitution, which refers to marriage, states:

"Marriage being a union of a man and a woman, as well as the family, motherhood and parenthood shall be placed under the protection and care of the Republic of Poland."

45. Article 32 of the Constitution, which lays down the principles of equality before the law and non-discrimination, reads as follows:

"1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever."

46. Article 75 of the Constitution, which refers to the State's housing policy, states the following:

"1. Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of social housing construction and supporting activities aimed at acquisition of a home by each citizen.

2. Protection of the rights of tenants shall be established by statute."

47. Article 79 of the Constitution, which refers to a constitutional complaint reads, in so far as relevant, as follows:

"1. 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 Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public

administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution."

E. Constitutional Court's practice

1. Judgment of 1 July 2003 (no. P 31/02)

48. In that judgment the Constitutional Court dealt with a legal question submitted by the Środa Śląska District Court (*Sąd Rejonowy*) in connection with pending proceedings for succession to a tenancy. The question concerned the possible unconstitutionality of the 2001 Act in that, in consequence of the repeal of the 1994 Act and its section 8(1) (see paragraphs 40-41 above), it had introduced a new list of persons entitled to succession to the right to lease after the death of a tenant as laid down in Article 691 § 1 of the Civil Code (see paragraph 41 above). In contrast to the previous regulation, the list no longer included the tenant's grandchildren. The Constitutional Court ruled that the modification under the 2001 Act was compatible with Article 2 (rule of law) and Article 32 (principle of equality before the law and non-discrimination) of the Constitution.

2. Judgment of 9 September 2003 (no. SK 28/03)

49. The judgment was given following a constitutional complaint lodged by a certain J.B. and D.Cz., alleging that section 8(1) of the 1994 Act had been incompatible with a number of the constitutional provisions, including the principle of social market economy, protection of property rights, equality before the law, prohibition of discrimination, protection of succession rights and the protection of the rights of tenants. The applicants maintained, among other things, that the impugned section was in breach of the aforementioned provisions because it excluded from succession to a tenancy descendants of the late tenant's siblings as well as all other heirs who had title to another residential dwelling which, as a result, restricted their succession rights in a discriminatory manner.

50. The Constitutional Court held that section 8(1) of the 1994 Act, in so far as it operated in the manner contested by the applicants, was compatible with the constitutional provisions invoked by them in support of their complaint.

F. Supreme Court's case-law

51. The Supreme Court, in its judgment of 6 December 2007 (no. IV CSK 301/07), dealt with a cassation appeal concerning the division of common property acquired by a same-sex couple. The gist of the ruling

concerns the rules that apply to such property division, which, as the court held, were those provisions of the Civil Code that were relevant in the context of the particular relationship. They might differ depending on each specific situation, the nature of mutual relations and the organisation of personal and economic matters between the partners. While the court clearly rejected the idea that same-sex relationships could be considered "*de facto* marital relationships", it did not exclude that the rules applicable to *de facto* marital relationships might apply by analogy to a same-sex couple's claims for the division of common property.

In that context, the Supreme Court analysed in depth the legal concept of *de facto* marital relationship and made conclusions that, in so far as relevant, read as follows:

> "The [principle of the] protection of marriage set forth in Article 18 of the Constitution means that a legally formalised union of a woman and a man remains under the protection and care of the Republic of Poland. The protection of marriage is shown by, among other things, the fact that legal consequences ensuing from marriage shall not apply to other relationships and that any interpretation or application of the law that would lead to equating other forms of cohabitation with marriage is inadmissible. Having regard to the constitutional principle of protection of marriage and to the fact that the lack of legal regulations for extra-marital relationships cannot be considered a lacuna, it is inadmissible to apply provisions of matrimonial law (including matrimonial property and its division) – even by analogy – to other than marriage relationships based on existing personal and economic bonds. ...
>
> Polish law does not include any, either comprehensive or even fragmentary, regulations of extra-marital relationships of a personal and economic nature and, for that reason, they are regarded as legally indifferent factual relationships. ...
>
> Given the lack of legal regulations for extra-marital personal and economic relationships, certain rules for defining and treating such relationships – named *de facto* marital relationships – have been developed in the jurisprudence and legal writing. The criteria for a *de facto* marital relationship include, as a rule, no formal basis for cohabitation, no limitations on ending the relationship, the stability of the relationship, the existence of community in personal and economic life and different sex of the partners. The concept of *de facto* marital relationship as developed by the jurisprudence and legal writing considers the difference of sex between the partners as one of its material elements.
>
> The established tradition, including the semantic tradition, militates against including in the notion of *de facto* marital relationship unions of same-sex persons modelled on heterosexual unions."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

52. The applicant alleged a breach of his right to a fair hearing guaranteed by Article 6 § 1 of the Convention on account of the fact that in the proceedings for succession to a tenancy the District Court had refused to hear evidence from the witnesses proposed by him in order to determine that he had lived in a particularly close relationship with his late partner.

Article 6 § 1, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

53. The Court reiterates that, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

In the present case the witnesses proposed by the applicant were to be heard in order to establish a "particularly close relationship" between him and the late T.B., a circumstance which the District Court considered conclusively proved on the basis of evidence given by the applicant himself. This assessment of the evidential value of the applicant's testimony was fully endorsed by the appellate court (see paragraphs 32-33 and 38 above).

That being so, the Court concludes that the refusal to hear the witnesses did not affect the fairness of the process of obtaining and evaluation of evidence. Nor did it appear to have infringed the principle of equality of arms. Accordingly, the courts did not overstep the margin of appreciation left to them in such matters as admission and assessment of evidence.

54. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

55. The applicant further complained under Article 14 taken in conjunction with Article 8 of the Convention that the Polish courts, by denying him the right to succeed to a tenancy after the death of his partner, had discriminated against him on the ground of his homosexual orientation. Article 14 reads:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8 reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

56. The Government made four preliminary objections. They first argued that the complaint was incompatible *ratione personae* with the provisions of the Convention because the applicant could not claim to be a victim for the purposes of Article 34. Second, they maintained that he had not complied with the six-month rule laid down in Article 35 § 1. The third objection concerned his non-compliance with the rule of exhaustion of domestic remedies. Fourth, they submitted that, in any event, the complaint was incompatible *ratione materiae* with the provisions of the Convention since Article 14 did not apply in the case.

1. The Government's objection on compatibility ratione personae

(a) The Government

57. The Government submitted that the applicant could not be considered a "victim" for the purposes of Article 34 of the Convention because he had not suffered discrimination on the ground of his sexual orientation. In particular, he had not demonstrated that he had indeed been treated less favourably than other persons in an analogous situation. The domestic courts had based their decisions on the objective prerequisite, namely the fact that the applicant had not met the basic condition laid down in section 8(1) of the 1994 Act since he had not resided permanently with the statutory tenant until his death. The same condition – which, as such, could not be regarded as unreasonable or unjustified – would have been applied to all individuals, regardless of their sexual orientation.

In sum, the complaint should be rejected as being incompatible *ratione personae* with the Convention.

(b) The applicant

58. The applicant disagreed and maintained that he had been personally and directly affected by discrimination related to his relationship with a same-sex partner and his sexual orientation.

The Government, he added, seemed to refer to, and to base their arguments exclusively on, other proceedings, not those complained of. It was evident that in the proceedings for succession to a tenancy the courts had rejected his claim on the sole basis that he had had a homosexual relationship with the late T.B. This, in their view, had automatically excluded him from the circle of persons entitled to succession, regardless of whether or not he had met other statutory conditions.

(c) The Court's assessment

59. The Court observes that the issue of whether or not the applicant suffered discrimination on the ground of his homosexual orientation is inseparably linked with its assessment of whether the requirements of Article 14 have been respected in the particular circumstances of the case.

It accordingly joins the Government's plea of inadmissibility on the ground of incompatibility *ratione personae* to the merits of the complaint.

2. The Government's objection on compliance with the six-month rule

(a) The Government

60. The Government also maintained that the complaint should be rejected for non-compliance with the six-month rule laid down in Article 35 § 1 of the Convention. They drew the Court's attention to the fact that the final decision in the proceedings for succession to the disputed tenancy had been given by the Szczecin Regional Court on 1 June 2001, whereas the application had been lodged with the Court on 18 December 2001, that is to say, outside the relevant time-limit.

(b) The applicant

61. The applicant replied that his counsel had filed a formal complaint on his behalf with the Strasbourg Court already on 23 August 2001 and had been later instructed by the Registry to supplement it within six weeks. The Registry had also advised him that the failure to do so might affect the running of the six-month term laid down in Article 35 § 1 of the Convention. He had observed the deadline and, on 18 December 2001, had duly completed an application form that he had received from the Registry. It had been posted on the same day.

Accordingly, he had complied with the six-month rule. He asked the Court to dismiss the Government's objection as unfounded.

(c) The Court's assessment

62. Article 35 § 1 provides, in so far as relevant, as follows:

> " The Court may only deal with the matter ... within a period of six months from the date on which the final decision was taken."

(i) Applicable principles

63. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *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, §§ 156 et seq., ECHR 2009-...; and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

64. The final decision for this purpose is that taken in the process of exhaustion of effective domestic remedies which exist in respect of the applicant's complaints (ibid; see also *Devine v. the United Kingdom* (dec.) no. 35667/02, 1 February 2005; and *Chalkley v. the United Kingdom* (dec.), no. 63831/00, 26 September 2002, with further references).

In accordance with the established practice, the Court considers the date of the introduction of an application to be the date of the first letter indicating an intention to lodge an application and giving some indication of the nature of the application. However, where a substantial interval follows before an applicant submits further information about his proposed application or before he returns the application form, the Court may examine the particular circumstances of the case to determine what date should be regarded as the date of introduction with a view to calculating the running of the six month period imposed by Article 35 of the Convention (see *Chalkley*, cited above).

(ii) Application of the above principles in the present case

65. In the present case the first letter from the applicant was dated 23 August 2001. As shown by the postmark on the envelope contained in the case file, it was sent to the Court on the same day by registered mail. In that letter, with which copies of the judgments given in the impugned proceedings were enclosed, the applicant summarised the course of the trial and clearly expressed his intention to lodge an application with the Court in this connection. While he initially relied on Article 6 of the Convention only, he submitted, among other things, that in consequence of the domestic

courts' judgments "he had been openly discriminated against on the ground of his sexual preferences".

66. On 19 November 2001 the Registry sent a letter to the applicant, asking him to fill in a Court's application form and to inform the Court whether he had lodged a constitutional complaint. He was given a six-week time-limit for that purpose and advised that the delay might affect the introduction date of the application. On 18 December 2001 the applicant filed the application form, invoking Article 6 and Article 14 of the Convention and adding that he had not made a complaint to the Constitutional Court. He posted it on the same day, without any delay. It was received at the Registry on 3 January 2002.

67. That being so, the Court concludes that the applicant complied with the six-month term laid down in Article 35 § 1 and that the Government's objection should be dismissed.

3. The Government's objection on exhaustion of domestic remedies

(a) The Government

68. The Government next pleaded that the complaint should be rejected for non-exhaustion of domestic remedies since the applicant had failed to lodge a constitutional complaint under Article 79 § 1 of the Constitution, a remedy which had been available to him at the date of lodging his application with the Court.

In support of their contention, the Government submitted that the issue of the constitutionality of section 8(1) of the 1994 Act – which had been the legal basis for the domestic judgments rejecting the applicant's action for succession to the tenancy – had been examined by the Constitutional Court in two relevant cases that had concerned the categories of persons entitled to succession to a tenancy.

In the first of those judgments, delivered on 1 July 2003 (no. P 31/2002), the court found that the exclusion of a tenant's grandson from succession to a tenancy had not infringed the Constitution (see also paragraph 48 above).

In the second, given on 9 September 2003 (no. SK 28/03), the Constitutional Court had held that section 8(1), in so far as it had excluded a tenant's siblings from succession had not been contrary to the Constitution (see also paragraph 49 above).

69. In consequence, nothing had prevented the applicant from putting before the Constitutional Court a question concerning an interpretation of the notion of "a person who ha[d] lived with a tenant in *de facto* cohabitation" if he had indeed considered that the cause for the rejection of his claim had been the national court's wrong interpretation of section 8(1) of the 1994 Act, not the fact that he had not lived with E.B. until his death.

In view of the foregoing, the Government asked the Court to reject the complaint for non-exhaustion of domestic remedies.

(b) The applicant

70. The applicant disagreed and argued that the constitutional complaint would not have provided him with the relief required by Article 35 §1 of the Convention. First of all, under Polish law, a constitutional complaint was an exceptional remedy. Secondly, its scope of operation was limited to a declaration that a given legal provision was incompatible with the Constitution and, by lodging such a complaint, an individual could not obtain a ruling that his rights or freedoms had been infringed. In consequence, even a successful constitutional complaint could not result in the quashing of the impugned final judgment.

In any event, he made an unsuccessful attempt to put the issue of discrimination before the Constitutional Court, asking the appellate court to address a legal question concerning the interpretation of the term "*de facto* marital cohabitation".

The applicant invited the Court to reject the Governments' objection.

(c) The Court's assessment

71. Article 35 § 1, in so far as relevant, reads:

> " The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

(i) Applicable principles

72. The rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires 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 (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

The aim of the rule is to afford Contracting States an opportunity to put matters right through their own legal system before having to answer before an international body for their acts. However, although Article 35 § 1 requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, it does not require that recourse should be had to remedies that are inadequate or ineffective (see *Egmez v. Turkey* no. 30873/96, ECHR 2000-XII, §§ 65 et seq).

Last but not least, Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others*, cited above, § 69).

(ii) Application of the above principles in the present case

73. In the present case the Government, in support of their objection, referred to two judgments of the Constitutional Court concerning the constitutionality of section 8(1) of the 1994 in that it limited the circle of persons entitled to succession to a tenancy, excluding certain relatives of a late tenant and, across the board, persons who had title to another flat. The first ruling originated in a legal question submitted by a civil court, the second in a constitutional complaint. In both cases the provision was found to have been compatible with the Constitution (see paragraphs 48-49 above).

74. The Court cannot speculate whether or not the same conclusion would have been valid in the circumstances of the applicant's case, in which, however, the issue to determine was not a *per se* exclusion from the circle of statutory successors but an interpretation of a specific legal notion. That notion – "a person living with a tenant in *de facto* marital cohabitation" – was, and apparently still is, continually construed by the Polish courts as covering only heterosexual relationships. Such a continuing and established interpretation emerges not only from the reasons given by the civil courts dealing with the applicant's claim at the relevant time but also from firm and unambiguous statements of the Supreme Court in its judgment of 6 December 2007, given nearly six years after the events that gave rise to the present application. In that judgment, the Supreme Court leaves no doubt whatsoever that the term "*de facto* marital cohabitation" applies exclusively to different-sex couples (see paragraphs 51 above).

Considering the general legal and political context relating to same-sex relationships in Poland (see paragraphs 43 and 51 above) the Court is not persuaded that the applicant, by lodging a constitutional complaint formulated as suggested by the Government (see paragraph 69 above) would have indeed succeeded in obtaining an interpretation of the term in question that would have been in a fundamental conflict with the line firmly settled in the Polish jurisprudence and legal writing.

75. Be it as it may, there is another aspect of the case that the Government seem to have overlooked, namely the fact that the applicant, in his appeal against the first-instance judgment, sought to obtain an interpretation of the expression "*de facto* marital cohabitation" by means of a legal question to be put to the Supreme Court (see paragraph 35 above).

Alternatively, he asked the Regional Court to obtain a ruling of the Constitutional Court on the issue whether, if that term was to be understood as including solely heterosexual partners, it would be compatible with, *inter alia*, Article 32 § 2 of the Constitution, prohibiting discrimination (see paragraphs 36 and 70 above). However, both motions were rejected. The Regional Court, although it acknowledged that the interpretation of the term was "of crucial importance for the determination of the claim", did not see it fit to clarify its meaning and interpreted it on its own in the context of the relevant constitutional provisions (see paragraph 38 above).

Accordingly, in the circumstances of the present case it cannot be said that the applicant failed to put the substance of his Convention claim before the domestic authorities as required by Article 35 § 1 (see paragraph 71 above). The Government's objection should therefore be rejected.

4. The Government's objection on compatibility ratione materiae

(a) The Government

76. The Government further submitted that Article 14 of the Convention did not apply in the case. This provision, as confirmed by the Court on many occasions, did not have an independent existence and could only be invoked in relation to a breach of other rights. The applicant relied on Article 14 read together with Article 8. However, the subject-matter of his case, which concerned the right to succeed to a tenancy, did not come within the ambit of Article 8 § 1 which referred to four elements: "private life", "family life", "home" and "correspondence".

77. In that context, the Government heavily relied on the findings made by the national courts in the proceedings for eviction (see paragraphs 24-28 above). They stressed that it had been established that T.B. had rented the flat from the Szczecin Municipality and that the applicant had sublet one room in the flat. The witnesses had confirmed before the District Court that T.B. and the applicant had had a tense relationship and had often argued. The former had even applied for the applicant's name as a permanent resident of the flat to be struck out of the residents' register and had wanted to evict the applicant from the flat. They had stopped running a common household some one and a half years before T.B's death. The applicant had not organised his funeral.

78. On these facts, the Government concluded that the applicant and T.B had not been in any close relationship that could have been regarded as a form of "family life". They had not even kept the same household and the applicant had moved to the flat after T.B.'s death.

In fact, the applicant had made an attempt to succeed to the lease of another flat, at J. street, after the death of the statutory tenant E.B., claiming that he had been in *de facto* marital cohabitation with the latter.

This, in the Government's view, excluded the possibility of his being in the same kind of relationship with T.B.

79. The relationship between the applicant and T.B. had been of a merely contractual nature as it had been based on the sublease agreement that they had concluded and, in consequence, had had no elements of "private life" within the meaning of Article 8 of the Convention; thus, this provision could not be read as protecting relations between landlords and tenants.

Nor could the applicant claim under Article 8 the protection afforded by this provision to "home" as defined by the Court. Relying on the Commission's case-law, in particular the case of *Gillow v. the United Kingdom* (no. 9063/80; Commission's decision of 9 December 1982, D.R. 31, p. 76), the Government stressed that even if a person owned a house, this fact was not in itself sufficient to regard it as a "home" for the purposes of Article 8 if in reality he had never lived there. In the eviction proceedings the applicant had stated he had lived at J. street and had left that flat only in June 1998, when an eviction order against him had been enforced.

80. Concluding that the applicant's claim about discrimination did not fall within the catalogue of rights guaranteed by Article 8 and lacked the necessary link with any other substantive Convention provision, the Government invited the Court to find that Article inapplicable and to reject the complaint as being incompatible *ratione materiae* with the provisions of the Convention.

(b) The applicant

81. The applicant opposed that argument, maintaining that the circumstances of his case fell within the scope of Article 8 of the Convention. He stressed that the Government had again failed to argue the case on the basis of the facts giving rise to his application. Instead, they referred to the other proceedings, which had had no relation to his complaint about discrimination in the sphere of his private life. In the proceedings complained of the courts had not considered the circumstances examined in other cases but had focused on only one issue, i.e. the fact that he had remained in a homosexual relationship with T.B. In their opinion, this had been sufficient to exclude him from succession to a tenancy, regardless of whether or not he had met other statutory conditions. Compliance with those other conditions, as the courts had held, had not needed to be examined.

The applicant asked the Court to reject the Government's objection.

(c) The Court's assessment

(i) Applicable principles

82. Article 14 only complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see, among many other authorities, *Odièvre v. France* [GC], no. 42326/98, § 54, ECHR 2003-III; and *Karner v. Austria* [GC], no. 40016/98, § 32, ECHR 2003-IX).

(ii) Application of the above principles in the present case

83. The Court notes that the applicant's complaint relates to the interpretation and application in his case of the legal term "*de facto* marital cohabitation" by the Polish courts in a manner resulting in a difference of treatment between heterosexual and homosexual couples in respect of succession to a tenancy after the death of a partner (see paragraphs 29-38, 51 and 55 above).

Undoubtedly, sexual orientation, one of most intimate parts of an individual's private life, is protected by Article 8 of the Convention (see *Smith and Grady v. the United Kingdom* nos. 33985/96 and 33986/96, §§ 71 and 89, ECHR 1999-VI; *S.L. v. Austria* no. 45330/99, § 37, ECHR 2003-I; and *Salgueiro da Silva Mouta v. Portugal* no. 33290/96, §§ 23 and 28, ECHR 1999-IX).

84. Furthermore, leaving aside the question whether the applicant, as he maintained, lived in the flat upon T.B.'s death or, as the Government argued, at that time resided elsewhere (see paragraphs 11-13 above), it is uncontested that he was registered by the authorities as a permanent resident of that flat from at least May 1989 and lived there when the succession proceedings were pending (see paragraphs 6, 23 and 38). Accordingly, the facts of the case also relate to the right to respect for his "home" within the meaning of Article 8 (see *Karner*, cited above, § 33).

85. In view of the foregoing, the Court holds that Article 14 of the Convention applies in the present case and rejects the Government's objection on compatibility *ratione materiae*.

It consequently declares the complaint admissible.

B. Merits

1. The parties' submissions

(a) The applicant

86. The applicant submitted that his homosexual orientation had been the single ground on which he had been denied the right to succeed to the tenancy of the flat in which he had lived with the late T.B. He had been refused the status of a person who had remained in actual marital cohabitation only because they had formed a same-sex couple. In contrast to heterosexual common-law partners, who could at the material time enjoy the right to succeed to a tenancy, homosexual relationships had been excluded on the basis of the well-established and categorical interpretation of the notion "*de facto* marital cohabitation" as covering only a different-sex relationship. For that reason, the courts, having established the fact that he and T.B. had remained in a homosexual relationship, had not even given him a chance to prove his compliance with the remaining statutory conditions laid down in section 8(1) of the 1994 Act.

87. Referring to the Government's argument that in the eviction proceedings against him he had not mentioned the fact that he had cohabited with the late T.B. but had alleged that he had sublet a room from him (see paragraph 88 below), the applicant stated that such admission on his part could have exposed him to ostracism, mockery and prejudice and for that reason he had preferred not to have his sexual orientation discussed in public. He added that Polish society was not liberal in this area.

Furthermore, he stressed that his complaint concerned the manner in which the courts had dealt with his claim for succession to a tenancy, not the other proceedings that the Government chose to use and emphasise before the Court to defend their position. The examination of his case, he added, should be limited to the object of his complaint and not be extended to other issues.

The applicant concluded that he had been clearly discriminated against on the ground of his sexual orientation and asked the Court to find a violation of Article 14 taken in conjunction with Article 8 of the Convention.

(a) The Government

88. The Government began by recalling the findings made by the courts in the proceedings for eviction and the final result of the case. In those proceedings the applicant had based his defence on the fact that he had allegedly sublet a room in T.B.'s flat. He had not referred to his sexual orientation and homosexual cohabitation with T.B. On 2 June 2000 the District Court had upheld the judgment in default and the applicant had been

ordered to vacate the flat. Having learnt about the negative outcome of the proceedings, he had decided to change the line of his arguments and, consequently, in his particulars of claim of 14 July 2000, he had begun to assert that he had cohabited with T.B. and that they had run a common household for many years.

89. Turning to the proceedings complained of, the Government referred to the statutory conditions for succession to a lease laid down in section 8(1) of the 1994 Act and stressed that a close relationship with a tenant by blood relation, adoption or *de facto* marital cohabitation had been one of four requirements that had had to be fulfilled jointly. The provision had, among other things, in addition required a claimant to prove that he had resided permanently with a tenant until the latter's death.

It had been established in the domestic proceedings that the applicant had permanently lived in E.B.'s flat at J. street and that he had only been registered as a permanent resident in T.B.'s flat. Hence, the applicant who had not met the condition of permanent residence with T.B. and had not developed any close relationship with him, had not fulfilled the other criteria set out in section 8(1). As a result, his claim had been rejected. The same principles would have been applied to a heterosexual person seeking succession to a lease in such circumstances. Accordingly, the facts of the case did not disclose any element of discrimination against the applicant.

90. The Government next referred to the case of *Karner v. Austria* (cited in paragraph 82 above), expressing the view that that judgment was of no relevance for the applicant's complaint since it was based on entirely different circumstances from those in the present case.

First, in contrast to the applicant, Mr Karner had lived with his partner, had had a homosexual relationship with him and they had run a common household. Second, Mr Karner's life had been concentrated in his partner's flat; in consequence, he could justifiably seek protection of his “home” under Article 8 of the Convention. The applicant, on the other hand, had claimed that his life had been centred on E.B.'s, not T.B.'s flat. Thirdly, in the *Karner* case the applicant's succession claim had not been recognised even though he had met all the statutory conditions, whereas the applicant in the instant case had failed to comply with the relevant prerequisites because he had not lived with T.B. until the latter's death and their relationship had not had the features of *de facto* marital cohabitation.

In conclusion, the Government asked the Court to find that there had been no discrimination in the present case and, consequently, no violation of Article 14 taken in conjunction with Article 8 of the Convention.

2. The Court's assessment

(a) Principles deriving from the Court's case-law

91. In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, among many other authorities, *Odièvre*, cited above, § 55; *Salgueiro Da Silva Mouta*, cited above, § 29).

Not every difference in treatment will amount to a violation of this provision; thus, Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. For the purposes of Article 14, it must be established that there is no objective and reasonable justification for the impugned distinction, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" (see *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 75, *Reports of Judgments and Decisions* 1998-V; *E.B. v. France* [GC], no. 43546/02, § 91, ECHR 2008-...; and *Karner*, cited above, § 37).

92. Sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention (see *E.B.*, cited above, §§ 91 and 93; *S.L.*, cited above, § 37, ECHR 2003-I; *Smith and Grady*, cited above, §§ 89 and 94; and *Karner*, cited above, §§ 37 and 41).

(b) Application of the above principles in the present case

(i) Scope of the case before the Court

93. In their arguments and conclusions concerning the alleged violation of the Convention the parties referred to different proceedings. The Government essentially relied on the findings made by the courts in the proceedings for eviction, pointing out that in that case the applicant had given a different account of his relationship with T.B. and of the times at which they had allegedly lived together. They further mentioned

a number of inconsistencies in the applicant's testimonies, submitting that in each particular case his statements had varied considerably depending on the claim asserted (see paragraphs 76-80 and 88-90 above). The applicant, for his part, invited the Court to confine its examination of the case to the proceedings for succession to the tenancy at issue, which were the object of his complaint (see paragraphs 58, 81 and 87 above).

94. The Court agrees with the Government that certain statements concerning the nature and duration of the applicant's relationship with T.B. and his residence in T.B.'s flat that he made before the domestic courts and administrative authorities in the three separate proceedings described above (see paragraphs 14-38 above) are contradictory or inconsistent. However, it is not the Court's role to replace the national courts in their assessment of evidence in those cases and to determine which parts of the applicant's testimonies in each case should be considered credible and which are questionable or of no evidential value (see paragraph 53 above). The issue before the Court is not which of the trial courts in the two parallel proceedings for eviction and for succession to a tenancy made correct findings of fact and properly evaluated material before it but whether the ruling given on the facts as established in the proceedings complained of respected the standards under Article 14 of the Convention.

(ii) Compliance with Article 14

95. The ruling of the Szczecin District Court had its legal basis in section 8(1) of the 1994 Act, which is no longer in force (see paragraphs 40-41 above). Pursuant to this provision, a person seeking succession to a tenancy had, among other things, to fulfil the condition of living with the tenant in the same household in a close relationship – such as, for instance, *de facto* marital cohabitation (see paragraphs 29-38 and 40-41 above).

In the Government's submission, the case disclosed no element of discrimination since the applicant's claim was rejected not for reasons related to his sexual orientation but for his non-compliance with the above two statutory conditions. First, the applicant had not lived in T.B.'s household until the latter's death but in another flat, originally let by the late E.B. Second, his relationship with T.B. did not have the features of *de facto* marital cohabitation (see paragraphs 89-90 above).

However, having regard to the findings of fact and law made by the District Court and the Regional Court (see paragraphs 33-34 and 38 above), the Court does not accept the Government's contention.

96. To begin with, both courts, in particular the Regional Court, concentrated on only one aspect of the facts as adduced by the applicant in support of his claim, namely on the homosexual nature of his relationship with T.B. (see paragraphs 34 and 38 above).

It is true that the District Court expressed some doubts as to whether, given the breakdown of the economic ties between them, the relationship had all the features of *de facto* marital cohabitation understood as a union based on emotional, physical and economic bonds and whether the applicant had indeed lived in the flat (see paragraph 34 above). Nevertheless, it rejected the claim on the ground that under Polish law only a different-sex relationship qualified for *de facto* marital cohabitation, which excluded same-sex partners from succession to a tenancy (see paragraph 34 above).

The Regional Court fully endorsed this view, explaining at length and with reference to the constitutional principle of protection of marriage versus the principle of equality before the law that "Polish law does not recognise relationships of same-sex persons", "*de facto* cohabitation takes place only if a woman and a man cohabit together" and that "it does not concern partners having homosexual relations, even if they have stable emotional, physical ties". It further held that "[i]n the circumstances, it was unnecessary to take evidence in order to establish whether the applicant had indeed remained in cohabitation with the tenant and whether other conditions for succession to the tenancy had been satisfied" (see paragraph 38 above).

97. In the Court's opinion, the above conclusions clearly show that the Regional Court considered that the principal issue material for the ruling related to the applicant's sexual orientation. In contrast to what the Government argued, the relevant element was not the question of the applicant's residence in the flat or the emotional, economic or other quality of his relationship with T.B but the homosexual nature of that relationship, which *per se* excluded him from succession.

98. It remains for the Court to determine whether the Polish authorities can be said to have given "objective and reasonable justification" for the impugned distinction in law in respect of same- and different-sex partners, that is to say whether this measure pursued a "legitimate aim" and maintained "reasonable proportionality between the means employed and the aim sought to be realised" (see paragraph 91 above).

It emerges from the grounds given by the Regional Court that the essential objective of the difference in treatment was to ensure the protection of the family founded on a "union of a man and a woman", as stipulated in Article 18 of the Polish Constitution (see paragraphs 38 and 44 above). The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, cited above, § 40, with further references).

However, in pursuance of that aim a broad variety of measures might be implemented by the State (ibid). Also, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see *E.B.* cited above, § 92), the State, in its choice of means designed

to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.

99. Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition. Nevertheless, having regard to the State's narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation (see paragraph 92 above), a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense (see *Karner*, cited above, § 41). Nor have any convincing or compelling reasons been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time. Moreover, the fact that the provision which shortly afterwards replaced section 8(1) removed the difference between "marital" and other forms of cohabitation (see paragraphs 40-41 above) confirms that no such reasons were found to maintain the previous regulation.

In view of the foregoing, the Court finds that the Polish authorities, in rejecting the applicant's claim on grounds related to the homosexual nature of his relationship with T.B. failed to maintain a reasonable relationship of proportionality between the aim sought and the means employed. The impugned distinction was not, therefore, compatible with the standards under the Convention.

The Court accordingly rejects the Government's objection regarding the applicant's victim status and holds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 16,790.53 Polish zlotys (PLN) in respect of pecuniary damage. This sum included arrears in rent for the late T.B's flat due for 1996-1998 which he had paid and costs of the renovation of the flat incurred at various times between 1998 and 2007.

Under the head of non-pecuniary damage the applicant claimed 20,000 PLN for mental suffering arising from the discriminatory treatment to which he had been subjected.

102. The Government did not make any comments on the applicant's claims.

103. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards non-pecuniary damage, the Court considers that, in the particular circumstances of the case described above, it is sufficiently compensated by the finding of the violation of the Convention and makes no award under this head.

B. Costs and expenses

104. The applicant also claimed PLN 4,552 for the costs and expenses incurred before the domestic courts and in the proceedings before the Court. The applicant stated that he had no bills or invoices relating to the above expenses but maintained that they had been incurred and that the amount was moderate.

105. The Government did not make any submissions in this regard.

106. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the fact that the applicant failed to produce any documents showing that the sums claimed had been incurred, the Court rejects the claim for costs and expenses in its entirety.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection on victim status;

2. *Declares* the complaint concerning the alleged breach of Article 14 taken in conjunction with Article 8 admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention and *dismisses* the above-mentioned preliminary objection;

4. *Holds* that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

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

Done in English, and notified in writing on 2 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President