



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

SECOND SECTION

CASE OF VÉKONY v. HUNGARY

(Application no. 65681/13)

JUDGMENT

STRASBOURG

13 January 2015

FINAL

01/06/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vékony v. Hungary,

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

Guido Raimondi, *President*,

Işıl Karakaş,

András Sajó,

Nebojša Vučinić,

Egidijus Kūris,

Robert Spano,

Jon Fridrik Kjølbro, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 25 November 2014,

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

PROCEDURE

1. The case originated in an application (no. 65681/13) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr László Vékony (“the applicant”), on 14 October 2013.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged under Article 1 of Protocol No. 1 read alone and in conjunction with Article 14 of the Convention that the loss of his tobacco retail licence amounted to an unjustified deprivation of possessions in discriminatory circumstances.

4. On 15 November 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and lives in Sopron.

A. Particular circumstances of the case

6. From 1994 the applicant's family operated a grocery with the personal involvement of the applicant. They sold, initially under the excise licence of the applicant's mother, merchandise subject to excise tax, that is, alcohol and tobacco products. On average, the turnover of tobacco retail represented about one-third of the family's business.

The applicant himself obtained a shop-keeping licence in 1999 (see also paragraph 15 below). In 2001 he qualified as a trader and shop manager. In 2005, he was registered in his own right as a trader of excise goods.

7. On 11 September 2012 Parliament enacted Act no. CXXXIV of 2012 on the Repression of Smoking of the Youth and on Tobacco Retail. The Act was published on 24 September 2012. The Act was subsequently amended on several occasions, and the final version was enacted on 6 June 2013. It entered into force on 1 July 2013.

8. According to the Act, tobacco retail – previously exercised at about 42,000 retail points nationwide – was to become a State monopoly (exercised through a State-owned company, *ND Nemzeti Dohánykereskedelmi Nonprofit Zrt*, “ND Zrt”), and tobacco retailers would become licensed through a concession tender, advertised on 15 December 2012, for up to five retail points per tenderer. In applying for the new concessions, tenderers were required to produce business plans reflecting, *inter alia*, the new governmental policy to limit to the utmost the access of minors to tobacco products, notably by prohibiting the entry of those less than 18 years of age into shops selling tobacco. Under the new licences, tobacco retail could take place only in shops with separate entrances, with dark shades in the shop windows preventing seeing through, and with only a limited selection of other goods on sale.

The final time-limit for applying was 22 February 2013. Entities previously engaged in tobacco retail had no privileges in the tender. The decision about the tenders was to be taken by ND Zrt.

In the tender, altogether some 6,800 licences were granted nationwide¹.

9. The applicant applied for a concession on 4 February 2013, for the would-be licence to be used in the family enterprise. The application was signed by the applicant, and witnessed by his wife and their son. The applicant then amended the application according to the upcoming new rules, on 20 February 2013. According to the Government, the application was very succinct and in no way developed; in particular, it contained no appropriate business plan, which was part of the criteria for the tenders. The applicant submitted that no information was ever made available about the assessment of the tender.

¹ www.nemzetidohany.hu

10. On 23 April 2013 the applicant was informed that he had not obtained a tobacco retail concession. The decision contained no reasons or any indication of the applicant's score on the 120-point tender adjudication score-sheet, and it was not subject to any legal remedy.

The enterprise run by the applicant's family was obliged to terminate the sale of tobacco products by the statutory deadline, that is, 14 July 2013. Tobacco wholesalers were under a legal obligation to re-buy any outstanding stocks from terminated retailers.

The remaining sales activities of the applicant's family enterprise were no longer profitable, entailing the winding-up of the business.

11. Under the law, no compensation is available for former holders of tobacco retail licences who, by not having been awarded a concession, lost part of their livelihood. The applicant submitted that this was the case of his family; and that he had, after losing the retail licence, considerable difficulties in supporting his family including a minor son.

12. The applicant further submitted that others in comparable situations – and in the case of those who had never been doing tobacco retail beforehand, in non-comparable situations – had been granted concessions, which difference in treatment could not be explained by any circumstance other than political adherence. In his view, this was corroborated by the fact that some successful tenderers had obtained more than one concession for multiple selling points.

13. On 14 January 2014 the Constitutional Court declared admissible a number of complaints relating to the same matter.

In decision no. 3194/2014 (VII.14.) it dismissed these motions on the merits (see below in paragraph 16), noting in particular that the legislature had aimed to eliminate underage smoking and therefore restricted the accessibility of tobacco retail, measures reflecting Hungary's obligations under the WHO Framework Convention on Tobacco Control as well as the findings of the Global Youth Tobacco Survey.

B. Relevant domestic law

14. Act no. CXXXIV of 2012 on the Repression of Smoking of the Youth and on Tobacco Retail provides as follows:

Section 2

“(1) Tobacco retail in Hungary is an activity falling under State monopoly, the exercise of which may be licensed through fix-term concession contracts concluded according to the provisions of this Act, as well as of Act no. XVI of 1991 on Concessions.”

Section 11

“(1) If this Act does not provide otherwise, tobacco retail may only be pursued in tobacco shops.”

15. According to Act no. CIII of 1997 on Excise Tax and the Special Rules of Trading in Merchandise Subject to Excise Tax (“the Excise Tax Act”), as in force until 1 May 2004, trading in excise goods was possible in two manners: (a) subject to an excise licence, in which case the holder of such a licence could sell the products to non-end-consumers; (b) the sale of excise goods to end-consumers was also possible without a specific excise licence, if the owner of the business had an appropriate shop-keeping licence, covering also the sale of the excise goods in question. The relevant provisions of the Act provided as follows:

Section 72 (1)

“(1) Non-excise-licensed free trade of excise goods ... is only allowed in possession of a shop-keeping licence, specified by the law on the operation of shops ... if

a) the shop-keeping licence is issued for a scope of retail, catering or accommodation activities in the framework of which the law allows the sale of excise goods, and

b) the non-excise-licensed dealer pursues his or her commercial activity ... in a shop.”

16. In its relevant part, Act no. CLI of 2011 on the Constitutional Court (“the Constitutional Court Act”) provides as follows:

Section 26

“(1) In accordance with Article 24 § 2 (c) of the Fundamental Law, any person or organisation affected by a concrete case may submit a constitutional complaint to the Constitutional Court if due to the application of a legal regulation contrary to the Fundamental Law in the judicial proceedings:

a) their rights enshrined in the Fundamental Law were [allegedly] violated, and

b) the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available.

(2) By way of derogation from paragraph (1), Constitutional Court proceedings may also be initiated – by exception – relying on Article 24 § 2 (c) of the Fundamental Law, if:

a) due to the entry into force or the application of a legal provision contrary to the Fundamental Law, the complainant’s rights were [allegedly] violated directly, without a judicial decision, and

b) there is no legal remedy capable of redressing the violation of rights, or the complainant has already exhausted the remedy.”

Section 29

“The Constitutional Court admits constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision [in question] or the case raises constitutional law issues of fundamental importance.”

Section 56

“(1) The Constitutional Court decides on the admission of a constitutional complaint sitting as a panel ...

(2) The panel examines in its discretionary power the content-related requirements of the admissibility of a constitutional complaint”

The Constitutional Court analysed the motions mentioned in paragraph 13 above from two aspects: whether the impugned legislation infringed the complainants’ right to protection of their property and whether it breached their right to pursue an entrepreneurial activity.

As regards the property right, the Constitutional Court held in essence that the complainants’ business activities in tobacco retail – however long-standing it may have been – did not constitute *per se* acquired possessions or constitutionally protected legitimate expectations. Prior to 1 July 2013, they had not possessed specific licences for tobacco retail, this kind of licence having been instituted only by the impugned legislation as of that date. Therefore, the legislation did not deprive them of pre-existing, acquired possessions, nor did it annul their shop-keeping licences in general. Moreover, their licences to sell merchandise subject to excise tax (a licence different from the one instituted by the impugned legislation, issued by the Tax Authority as a pre-condition for engaging in tobacco retail) were non-transferable and revocable permits, which did not constitute possessions. The Constitutional Court emphasised that the legislation did not prevent the complainants from applying for tobacco retail concession under the new system and, if successfully licensed, from continuing their activities.

As regards the complaint concerning the right to pursue an entrepreneurial activity, the Constitutional Court agreed that the complainants’ activity fell within the scope of constitutional protection. Nevertheless, it underlined that this right did not give an unrestricted or inalienable entitlement to pursue an activity of one’s choice. In the Constitutional Court’s view, the impugned legislation did not prejudice the essence of the right to pursue an entrepreneurial activity, namely it did not permanently deprive the complainants of the possibility to continue their tobacco retail business, let alone to pursue entrepreneurial activities in general. It only subjected that activity to conditions, which they were not unable to meet. The Constitutional Court found that limitation to be in the public interest and to be sufficiently proportionate to the underlying public health considerations, all the more so since the goods merchandised by the complainants represented well-known health risks and the treatment of smoking-related diseases put a considerable burden on the State – which, in the Constitutional Court’s view, enjoyed a wide margin of appreciation in the regulation of the matter in question.

17. The standing case-law of the Supreme Court/*Kúria* concerning the lawmaker's tort liability was recapitulated by the Budapest Court of Appeal in leading case no. EBD2014.P.1 as follows:

“[T]he Supreme Court held in leading case no. EBH1999.14 that rules of tort liability cannot be applied to legislation, that is, to the activity aimed at adopting general and abstract legal rules of behaviour. In leading case no. BH1993.312 it also considered that the damage potentially resulting from the entry into force of a law laying down a general rule of normative force does not create a relationship of civil law liability between the lawmaker and the alleged victim of the legislation. ... Furthermore, leading case no. BH1994.31 also reflects the jurisprudence according to which the lawmaker cannot be held liable for the adoption of normative rules, unless there are additional findings of fact (*többlettényállás*).”

In the leading case, such additional findings of fact were constituted by the underlying decision of the Constitutional Court holding that the law-making process in question had been dysfunctional in that the resultant legal provision was nothing less than an individual decision to the detriment of the complainant, couched in terms of a legislative act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

18. The applicant complained that the removal, in respect of tobacco, of the previous licence of the family business, in allegedly discriminatory circumstances and without compensation, amounted to a breach of Article 1 of Protocol No. 1, read alone or in conjunction with Article 14 of the Convention, especially because he was not granted a similar licence under the new rules.

The Government contested the applicant's arguments.

The Court considers that the complaint falls to be examined under Article 1 of Protocol No. 1 alone, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

19. The Government argued at the outset that the applicant's mother being the previous licence-holder, the application was incompatible *ratione personae* from the applicant's perspective. The applicant contested this view, arguing that the loss of the retail concerned the entire family enterprise and that he had personally been holder of an excise licence.

20. The Court points out that, in order to rely on Article 34 of the Convention, two conditions must be met: an applicant must fall into one of the categories of petitioners mentioned in Article 34, and he or she must be able to make out a case that he or she is the victim of a violation of the Convention. According to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. In addition, in order for an applicant to be able to claim to be a victim of a violation of the Convention, there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation (see, among other authorities, *Tauira and Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports (DR) 83-B, p. 112; *Association des amis de Saint-Raphaël et de Fréjus and Others v. France*, no. 38192/97, Commission decision of 1 July 1998, DR 94-B, p. 124; *Comité des médecins à diplômes étrangers v. France and Others v. France* (dec.), nos. 39527/98 and 39531/98, 30 March 1999; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III).

21. In the present case, the Court observes that although formally speaking the previous holder of the excise licence was the applicant's mother, that licence was benefiting their family enterprise, an assertion of the applicant not refuted by the Government. Moreover, the applicant himself was holder of a shop-keeping licence concerning the same grocery and was registered as a trader of excise goods, this licence entitling him to sell tobacco products (see paragraph 15 above). In these circumstances, the Court considers that the non-acquisition of a new licence, if only pursued by the applicant rather than other family members, produced a sufficiently direct link between him and the harm perceived to be sustained on account of the alleged violation. It is therefore satisfied that the application cannot be rejected as incompatible *ratione personae*.

22. The Government further asserted that the applicant should have filed a constitutional complaint which, if successful, would have opened the way for an action in damages against the responsible authorities, as established in leading case no. EBD2014.P.1., published in 2014. Similar complaints had been declared admissible by the Constitutional Court. They emphasised that this was in no way a discretionary remedy, the Constitutional Court being under a legal obligation to examine the merits of such complaints in

so far as they fulfilled the statutory conditions. This remedy had not proved ineffective by the time the application was introduced, was available to the applicant at that moment, and offered a reasonable prospect of success; consequently, it should have been used. It was true that the procedure before the Constitutional Court alone could not have produced pecuniary redress for the applicant; however, the aggregation of this procedure with a subsequent civil-law litigation would have qualified as an effective remedy (see *Kudła v. Poland* [GC], no. 30210/96, §§ 152, 157, ECHR 2000-XI; *Omasta v. Slovakia* (dec.), no. 40221/98, 10 December 2002; and *Dorota Szott-Medynska v. Poland* (dec.), no. 53351/99, 9 October 2003).

The applicant contested this view, asserting that section 56(2) of the Constitutional Court Act, read in conjunction with sections 26(2) and 29, expressly provides for a “discretionary” examination of a complaint’s admissibility, including the question whether the subject matter of a constitutional complaint directed against a legal provision raises constitutional law issues of “fundamental importance”. Accordingly, this legal avenue, which may only be availed of “by exception”, was no effective remedy in his opinion. He further noted that the leading case on the State’s tort liability, referred to by the Government, concerned a situation where a parliamentary act of individual effect (namely, a dismissal) constituted an abuse of legislative power. While accepting the State’s liability in that particular situation, the courts confirmed that ordinary legislative acts would remain covered by the State’s immunity.

23. The Court recalls that the only remedies which Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these conditions are satisfied (see, among other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others v. Turkey*, 16 September 1996, § 71, *Reports of Judgments and Decisions* 1996-IV). Lastly, an applicant who has availed himself of a remedy capable of redressing the situation giving rise to the alleged violation, directly and not merely indirectly, is not bound to have recourse to other remedies which would have been available to him but the effectiveness of which is questionable (see *Manoussakis and Others v. Greece*, 26 September 1996, § 33, *Reports* 1996-IV, and *Anakomba Yula v. Belgium*, no. 45413/07, § 22, 10 March 2009).

24. In the present case, the Court notes at the outset that it was not in dispute between the parties that the constitutional complaint procedure alone could not have produced pecuniary redress for the applicant. In any

event, the cases referred to by the Government were eventually dismissed by the Constitutional Court on the merits (see paragraph 13 above). It is true that these decisions post-dated the introduction of the application and that, at that time, the outcome of the constitutional procedures was unknown as yet.

However, for the Court, the applicant cannot be expected to have pursued a constitutional complaint with the sole purpose of enabling a subsequent action in damages against the lawmaker. This is so because the case-law on such liability, as evidenced by the leading case published in 2014 but referring to a standing jurisprudence, is quite restrictive in terms of possible scenarios where the lawmaker can be held liable for prejudice resulting from legislation, namely, particular findings of fact, such as *ad hominem* or otherwise dysfunctional legislation, are required – an element which does not appear to pertain to the applicant's situation and whose presence has not been argued by the Government.

The Court is therefore not persuaded that a potential action in damages against the legislator underpinned by a constitutional complaint, if and when successful, was an effective remedy whose existence was sufficiently certain both in theory and in practice. Without taking a position on the effectiveness of the constitutional complaint procedure in general, the Court is therefore satisfied that the constitutional complaint is not a remedy of a kind whose non-pursuit can be held against the applicant in this case.

It follows that the application cannot be rejected for non-exhaustion of domestic remedies.

25. The Government further argued that the licence in question was a new institution under the law, enacted by the 2012 legislation. The applicant had never possessed this right, because the previous concession he had had was different in nature. Therefore, the application was, in the Government's view, directed at the acquisition of an asset, a right not guaranteed by the Convention or its Protocols. Moreover, the Convention or its Protocols could not be construed to guarantee any right to the continued exercise of a gainful activity based on representing health hazard to others, like tobacco sales. The application was thus incompatible *ratione materiae* with the provisions of the Convention.

The applicant argued that his former licence was just as much a possession as the one he was striving to acquire and that its loss consequently brought Article 1 of Protocol No. 1 into play.

The Court considers that the question concerning the nature of the licences at issue is closely linked to the merits of the application and must be joined to it for joint consideration.

26. 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. Arguments of the parties

a. The applicant

27. The applicant argued that the former licence including the retail of tobacco, that is, the economic interests connected with the underlying business, had represented a “possession” for the purposes of Article 1 of Protocol No. 1. Its withdrawal by operation of law was therefore an interference with his rights under that provision. His family had been the beneficiary of that licence since 1994 and tobacco sales had yielded a large part of the income of their grocery.

Moreover, in his view, the lawfulness of this interference was doubtful given the hasty adoption of the law in question, its amendments while the tender adjudication procedure was already ongoing, and the absence of a transparent procedure or a legal remedy.

As to the aim pursued by the measure in question, the applicant did not call into question that the purported aim, that is, to combat underage smoking, and in wider terms, to protect the health of the population was a legitimate aim in this context. However, he argued that in reality, the measure rather aimed to monopolise tobacco retail and re-distribute the market shares, which could not be accepted as a legitimate aim, even in the face of the State’s wide margin of appreciation in this field. He further questioned the adequacy of the means chosen, pointing to the fact that the increased difficulty to buy tobacco products, if intended to be dissuasive, in fact benefits the black market.

Lastly, no fair balance had been struck between his interests and that of the community in that by losing his main source of livelihood enjoyed for almost twenty years, and this without any compensation, he had had to bear an excessive individual burden.

b. The Government

28. The Government submitted at the outset that the applicant’s application for a new concession had been very succinct and not at all elaborated; in particular, it contained no relevant business plan. As a result, he had a very low score in the adjudication process. In any case, he could not complain about not acquiring a new concession, since this would imply the – non-existent – right to acquire a property. The Government further doubted that the applicant had had a legitimate expectation to obtain a new concession. In their view, he could legitimately expect nothing more than an appropriate transitory period to adjust to the new situation, which was available.

In the Government’s submissions, the legislative measures complained of were no more than a control of the use of property in that the applicant had

not been deprived of his business; and only the scope of activities available to him had been restricted. The previous licence had enabled the applicant to sell tobacco products in his general grocery; however, under the new law, such stores could no longer sell tobacco; consequently, the applicant's previous licence had simply become obsolete and its loss could not be seen as a deprivation of property. He had not suffered any actual damage, apart from losing the entitlement for the future.

The measure in question had aimed, by reducing the number of sales points of tobacco retail, to combat underage smoking and improve society's health status. Other Member States of the Council of Europe had introduced similar measures. The State monopoly that had been created in the field of tobacco retail belongs within the State's wide margin of appreciation in this field.

Lastly, the Government argued that the applicant had not had to suffer an excessive individual burden, because only the scope of his business had been reduced. Such control of use of property did not entail an automatic obligation on the State's side to provide compensation (cf. *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 79, ECHR 2007-III).

2. The Court's assessment

a. Interference

29. The Court observes at the outset that the subject matter of the present case is the statutory cancellation of the applicant's former licence to sell tobacco, instead of which he was not awarded another one in the tender procedure. For the Court, it is hardly conceivable not to regard this licence, once guaranteeing an important share of the applicant's turnover (see paragraph 6 above), as a "possession" for the purposes of Article 1 of Protocol No. 1 (see *Centro Europa 7 S.R.L. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 177-178, ECHR 2012). It further recalls that the withdrawal of a licence to carry on business activities amounts to an interference with the right to peaceful enjoyment of possessions as enshrined in Article 1 of Protocol No. 1 (see *Capital Bank AD v. Bulgaria*, no. 49429/99, § 130, ECHR 2005-XII (extracts); *Rosenzweig and Bonded Warehouses Ltd v. Poland*, no. 51728/99, § 49, 28 July 2005; and *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007). Given the obvious economic interests connecting tobacco retail with the applicant's business in general, the Court is satisfied that the statutory removal of the applicant's long-standing tobacco licence amounted to an interference with his rights under Article 1 of Protocol No. 1 (see in particular *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159), and this notwithstanding the harmful consequences of smoking as facilitated by tobacco retail.

In the light of this finding, the Government's preliminary objection suggesting incompatibility *ratione materiae* must be dismissed.

30. The Court finds that the cancellation and non-renewal of the applicant's tobacco licence constituted a measure of control of the use of property, which falls to be considered under the second paragraph of Article 1 of Protocol No. 1 (cf. *Tre Traktörer*, cited above, § 55; *Megadat.com SRL v. Moldova*, no. 21151/04, § 65, ECHR 2008; see also *Malik v. the United Kingdom*, no. 23780/08, §§ 88-89, 13 March 2012).

b. Compliance with the requirements of the second paragraph

i. Lawfulness and purpose of the interference

31. The Court notes the parties' partly diverging positions about the lawfulness and the purpose of the interference. For its part, it does not call into question the Government's position according to which the measure serves the purpose of combatting underage smoking, an aim being in accordance with the general interest. However, it considers that it is not necessary to embark on a closer scrutiny of the lawfulness of the measure, since even assuming that the interference is "lawful", the circumstances of the case disclose a violation of the applicant's rights under Article 1 of Protocol No. 1 for the reasons set out below, in the paragraphs addressing the issue of proportionality (see paragraphs 32 to 36 below).

ii. Proportionality of the interference

32. As was pointed out in the *James and Others v. the United Kingdom* judgment (21 February 1986, § 37, Series A no. 98), the second paragraph of Article 1 of the Protocol has to be construed in the light of the general principle set out in the first sentence of this Article. This sentence has been interpreted by the Court as including the requirement that a measure of interference should 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, *inter alia*, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52). The search for this balance is reflected in the structure of Article 1 as a whole (*ibid.*) and hence also in the second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *James and Others*, cited above, p. 34). A proper balance between the general interest and the individual's rights will not be found if the person concerned has had to bear an individual and excessive burden (see *Rosenzweig*, cited above, § 48).

33. The Government submitted that for the purposes of applying Article 1 of Protocol No. 1 the competent authorities enjoy a wide margin of appreciation. Their assessment as to the need for legislation, its aims and its effects should be accepted by the Convention institutions unless it was

manifestly unreasonable and imposed an “excessive burden” on the person concerned (see *James and Others*, cited above, §§ 46 and 50).

In the present case, the applicant submitted – and this was not refuted by the Government – that the loss of the licence reduced his business by one-third of its turnover, leading eventually to winding-up. Given the serious economic consequences flowing from the criticised measure, the Court agrees with the applicant that this was a severe measure in the circumstances.

34. The Court further observes that only ten months elapsed between the enactment of the impugned law on 11 September 2012 and the deadline for terminating the applicant’s tobacco retail (14 July 2013). Moreover, from the moment the applicant was informed that he had not been granted a licence (23 April 2013), less than three months elapsed until he had to stop selling tobacco (see paragraphs 7 and 10 above). In the context of a business benefiting from a tobacco retail licence for nearly twenty years previously, these transitory periods can hardly be regarded as sufficient. The Court has previously found that proceedings related to the renewal or invalidation of licences that are arbitrary, discriminatory, or disproportionately harsh violate the second paragraph of Article 1 of the Protocol. Furthermore, authorities must follow a “genuine and consistent policy” regarding licensing (see *Megadat.com SRL*, cited above, § 79). The lack of safeguards against arbitrariness and the lack of a reasonable opportunity of putting the case of the persons affected to the responsible authorities for the purpose of effectively challenging the measures interfering with their possession (see *Microintellect OOD v. Bulgaria*, no. 34129/03, § 38 to 50, 4 March 2014) as well as the question of lawfulness of the applicant’s own conduct (see *Tre Traktörer*, cited above, § 61) are issues to be taken into consideration.

In terms of the non-granting of a new licence to the applicant, the Court would add that it cannot assess the procedure leading up to this development, since the parties did not submit any relevant material on this question. In any case, it is noteworthy that the procedure appears to have been devoid of elementary transparency and of any possibility of legal remedies. At this juncture, the Court recalls that it is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision; nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision (see *Capital Bank AD*, cited above, § 134).

35. The “burden” placed on the applicant as a result of the statutory expiry of his licence, though heavy, must be weighed against the general

interest of the community, that is, public health considerations in the instant case. In this context, the States enjoy a wide margin of appreciation.

Although it is true that the interference with the applicant's possessions was a control of use rather than a deprivation of possessions, such that the case-law on compensation for deprivations is not directly applicable (see *J.A. Pye (Oxford) Ltd.*, loc. cit.), a disproportionate and arbitrary control measure does not satisfy the requirements of protection of possession under Article 1 of Protocol No. 1. It is noteworthy that the applicant's licence was extinguished without compensation (see, *a contrario*, *Pinnacle Meat Processors Company and 8 Others v. the United Kingdom* (dec.), no. 33298/96, 21 October 1998; and *Ian Edgar (Liverpool) Ltd v. the United Kingdom* (dec.), no. 37683/97, ECHR 2000-I) or the possibility of judicial redress. The very short period provided to licence holders to make adequate arrangements to respond to the impending change to their source of livelihood was not alleviated by any positive measures on behalf of the State, for example, the adoption of a scheme of reasonable compensation. Moreover, it has not been suggested that the applicant, although his family enterprise was active in the lawful selling of products harmful for the health, was in any breach of the law (compare and contrast, *Tre Traktörer*, loc. cit.). The measure was introduced by way of constant changes of the law and with remarkable hastiness, the loss of the old licence was automatic, and the non-acquisition of a new one was not subject to any public scrutiny or legal remedy.

36. The Court finds that the measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on arbitrariness, given that (i) the existence of the previous licence was disregarded; (ii) the possibility of a former licence-holder to continue tobacco retail under the changed conditions accommodating the policy of protection of minors was not considered in the new scheme (see paragraph 8 above); (iii) the concession system enabled the granting of five concessions to one tenderer which objectively diminished the chances of an incumbent licence holder, in particular of those individuals, such as the applicant's family, whose livelihood had depended for many years on the possibility of tobacco sale, now lost (see, *mutatis mutandis*, *Di Marco v. Italy*, no. 32521/05, § 65, 26 April 2011; and *Lallement v. France*, no. 46044/99, §§ 20-24, 11 April 2002) and, finally, (iv) the lack of transparent rules in the awarding of the concessions, which took place (v) without giving any privilege to a previous licence-holder, such as limiting the scope of the first round of tendering to such persons.

iii. Conclusion

37. Therefore the Court finds that the applicant had to suffer an excessive individual burden due to the control measure. The foregoing

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage. The former figure is the applicant's global estimate for lost business.

40. The Government contested these claims in general terms.

41. Without speculating on the profits which the applicant would have achieved if the violation of the Convention had not occurred, the Court observes that he suffered a real loss of business. It therefore considers it appropriate to award a lump sum in compensation for the loss of future earnings. In addition, the Court considers that the violation it has found of Article 1 of Protocol No. 1 in the instant case must have caused the applicant prolonged uncertainty in the conduct of his business and feelings of helplessness and frustration, entailing some non-pecuniary damage.

Thus, the Court considers it reasonable, making its assessment on the basis of equity, to award the applicant an aggregate sum of EUR 15,000, covering all heads of damage (see, *mutatis mutandis*, *Centro Europa 7*, cited above, §§ 219 to 222).

B. Costs and expenses

42. The applicant also claimed EUR 10,600 for the costs and expenses incurred before Court. This figure corresponds to the legal fees billable by his lawyer, that is, 19.4 hours of paralegal work, charged at an hourly rate of EUR 50, as well as 64.2 hours of legal work, charged at an hourly rate of EUR 150.

43. The Government contested this claim.

44. 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 are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* the Government's objection to the merits and *dismisses* it;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage combined;
 - (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

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

G.R.A.
S.H.N.

JOINT CONCURRING OPINION OF JUDGES SPANO AND KJØLBRO

1. We voted in favour of finding a violation of Article 1 of Protocol No. 1 to the Convention, but we write separately as our reasoning differs to some extent from the judgment.

2. We agree that the withdrawal of the applicant's licence to sell tobacco products, as a consequence of the Act on the Repression of Smoking of the Youth and on Tobacco Retail, amounted to an interference with his right to the peaceful enjoyment of his possessions, involving control of the use of property within the meaning of paragraph 2 of Article 1 of Protocol No. 1.

3. The enactment of the law restricting and controlling the selling of tobacco products clearly pursued a legitimate aim in protecting the health of the population, in particular as regards minors. Indeed, States have a wide margin of appreciation in adopting and implementing policies to protect the health of the population and in controlling the use of property, including laying down the general conditions for pursuing a commercial activity, such as retail of tobacco products (see, *inter alia*, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III; and *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 55, ECHR 2007-III).

4. Furthermore, under the case-law of the Court there is no general obligation to pay compensation for interferences amounting to control of the use of property, even in cases concerning the withdrawal of a licence. However, the payment of compensation may be of relevance in assessing the proportionality of the interference in question (see, *inter alia*, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI; *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 94, 29 March 2010; and *Uzan and Others v. Turkey* (dec.), no. 18240/03, § 102, 29 March 2011).

5. However, Contracting States have an obligation to ensure that interferences amounting to control of the use of property, including the revocation of a licence to run a business, strike a fair balance between individual rights and the general interest. A proper balance of these interests is not attained if the person concerned has had to bear an individual and excessive burden.

6. As regards the present case, the applicant had been selling tobacco products lawfully for more than sixteen years under a licence granted by the authorities, and a significant part of the turnover came from selling tobacco products.

7. From the time of the publication of the Act on the Repression of Smoking of the Youth and on Tobacco Retail, the applicant must have been aware that the future sale of tobacco products had become precarious, being conditional on obtaining a tobacco retail concession under the new law.

However, only six months after the publication of the Act, the applicant was informed that he had not been granted a tobacco retail concession, and only three months later he had to stop selling tobacco products, as a consequence of which his business had to close.

8. Owing to the particularly short transition period, the applicant was granted very little time to adjust to the new situation. The consequences were all the more dire as the legislation in question did not provide for any compensation for licence holders who did not obtain a tobacco retail concession under the new legislation. Furthermore, the applicant was not given any reasons for not having been granted a new licence. Nor did he have access to a legal remedy to challenge the refusal to grant him a new licence.

9. Therefore, having regard to the specific circumstances of the case and irrespective of the State's wide margin of appreciation, we concur in finding that the applicant had to bear an individual and excessive burden, in violation of Article 1 of Protocol No. 1.

10. In our view, however, there is not a sufficient basis for finding that the process of granting concessions was "verging on arbitrariness" (see paragraph 36 of the judgment). Furthermore, the Court's task is not to tell the State what it could or should have done in implementing its policy in this area (*ibid.*), but rather to assess whether the way the applicant's licence was revoked in the specific circumstances of the case amounted to an unjustified interference with his property rights under Article 1 of Protocol No. 1.

11. Finally, as regards compensation for pecuniary damage, we emphasise that the sum granted to the applicant is intended to compensate for the loss of profit from selling tobacco products during a transition period that may be regarded as reasonable, allowing the applicant sufficient time to adjust to the new situation arising as a consequence of the new legislation.